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THE ENGLISH REPORTS

COMMON PLEAS

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THE

ENGLISH REPORTS

VOLUME CXL

COMMON PLEAS
XVIII

CONTAINING

COMMON BENCH REPORTS (NEW SERIES), VOLS. 1 TO 4

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COMMON BENCH REPORTS. New Series. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, and in the EXCHEQUER CHAMBER, from Michaelmas Term, 1856, to Hilary Vacation, 1857. By JOHN SCOTT, Esq., of the Inner Temple, Barrister-at-Law. Vol. I. London, 1857.

[1] Cases Argued and Decided in the Court of Common Pleas, in Michaelmas Term, in the Twentieth Year of the Reign of Victoria.

The judges who usually sat in banco in this term, were,—Cresswell, J., Crowder, J., and Williams, J.

Memoranda.

On Saturday, the 1st of November, 1856, The Right Honorable Sir John Jervis, Knight, Lord Chief Justice of Her Majesty's Court of Common Pleas, died at his residence in Eaton Square.

In consequence of this event, no business was transacted in Court on the first day of Term.

On the same day, the Hon. Mr. Baron Platt, one of the Barons of Her Majesty's Court of Exchequer, resigned his seat, and was succeeded by William Henry Watson, Esq., one of Her Majesty's counsel learned in the law, who on the 6th of November appeared at the Bar of the Court of Common Pleas and counted in a writ of dower unde nihil habet, and took the oaths and his seat in the [2] Court of Exchequer on the 8th of November, and shortly afterwards received the honor of knighthood.

He gave rings with the motto "Militavi."

On the 19th of November, the Hon. Sir Alexander James Edmund Cockburn, Knight, Her Majesty's Attorney-General, was appointed Lord Chief Justice of the Court of Common Pleas, in the room of the late Sir John Jervis, Knight, deceased.

He appeared at the Bar of that Court on the 21st of November, and counted in a writ of dower unde nihil habet, and on the following day took the oaths and his seat.

He gave rings with the motto, "Fiat justitia."

Sir Richard Bethell, Knight, Her Majesty's Solicitor-General, was on the 22nd of November appointed to the office of Her Majesty's Attorney-General, vacated by the elevation of Sir Alexander James Edmund Cockburn to the Bench of the Court of Common Pleas.

The Right Hon. James Alexander Stuart Wortley, of the Inner Temple, one of Her Majesty's counsel learned in the law, and Recorder of London, was on the same day appointed to the office of Her Majesty's Solicitor-General, vacated by the promotion of Sir Richard Bethell to the office of Attorney-General.

GS 29.17

[3] Registration Appeals.

(Under 6 & 7 Vict. c. 18.)

City and Borough of Hereford.

Alexander Chastel de Boinville, *Appellant*, William Arnold, *Respondent*.
Nov. 10, 1856.

[S. C. 26 L. J. C. P. 65; 3 Jur. N. S. 642; 5 W. R. 21.]

Serjeants-at-mace appointed by a corporation, under the provisions of its charter, with a salary paid by the treasurer, out of the fund of the corporation, are not "constables appointed for the borough under the 5 & 6 W. 4, c. 76," so as to be prohibited from voting in the election of members of parliament by the 19 & 20 Vict. c. 69, s. 9, although their original appointment takes place subsequently to the passing of the first-mentioned statute.

At a court held on the 3rd of October, 1856, to revise the lists of voters in the election of members of parliament for the city and borough of Hereford, Alexander Chastel de Boinville duly objected to the name of William Arnold being retained in the list of freemen entitled to vote in the election of members for the said city and borough. The facts established by the evidence in the case were these:—

The said William Arnold was on the last day of July, 1856, one of the serjeants-at-mace appointed by the corporation of Hereford. He was first appointed to his office in the month of December, 1851, and has received his salary by payment of the treasurer of the corporation of Hereford. It was and is part of his duty to serve summonses for juries and summonses issued by the magistrates of the said city and borough, and to execute warrants, apprehend prisoners, and assist in keeping the peace. These warrants were addressed to the "constables and other peace-officers of the city;" and he had, as such serjeant-at-mace, taken the oath hereinafter set forth.

The revising-barrister found, that the corporation of Hereford had, previously to the passing of the Municipal [4] Corporation Reform Act (5 & 6 W. 4, c. 76), pursuant to the charter of the said city and borough, appointed serjeants-at mace; that the serjeants so appointed had always taken the same oath as the present serjeants, their duties being similar; that they acted as police-constables and conservators of the peace, executing warrants, serving summonses, and apprehending prisoners; and that they all discharged certain duties in the mayor's court (which court has since been abolished, by 9 & 10 Vict. c. 95), and had to attend the mayor on processions and on other state occasions; that, on the passing of the Municipal Corporation Reform Act, the corporation reduced the number of serjeants-at-mace for the city to three, and, when vacancies occurred by the death or resignation of the then serjeants-at mace, the corporation appointed others (to the number of three) to succeed them, and the persons thus appointed discharged the same offices as the old officers; that the serjeants-at-mace have been appointed annually, ever since the passing of the Municipal Corporation Reform Act, at the general meeting of the corporation in the month of November in each year; and that the appointment has never been made since the passing of the Municipal Corporation Reform Act on the day named in the charter, but always on the 9th of November.

The serjeants-at-mace are sworn as follows:—

"1. You and every of you shall well and truly observe the office of serjeantship-at-mace within the city of Hereford, suburbs, and liberties of the said city, as long as you shall continue and occupy the said office and be in the same:

"2. Item. You shall make true attachments of all manner of actions, and make true returns of the same actions at the next court following, without any concealment:

"3. Item. All warrants and precepts to you directed [5] and commanded by the mayor, as well by writing as by word of mouth, you shall truly execute according to your powers, and true return make of the same:

"4. Item. All sums of money as amerciaments, fines, and forfeitures, and all other things which you shall be charged with by reason of your office, or that shall come into your hands, you shall truly levy and gather, and true return and accounts

make of the same to Mr. Mayor; and you shall come and yield your accounts at such time as you shall be called upon:

"5. Item. The council of the mayor you shall truly keep, and obey his commandments in every lawful thing touching your offices, as well by night as by day, to the best of your powers; and you shall see the King's Majesty's peace observed and kept duly and truly at all times within the said city and liberties thereof, to the best and utmost of your powers, as long as you shall continue and be in the said offices:

"6. Item. You shall do no extortion or oppression to the King's people, nor receive any moneys which belongeth to the mayor, but shew him thereof, and true deliverance make of the same to him forthwith upon the receipt thereof:

"7. Item. You shall not suffer any person arrested by you to go at large, directly or indirectly, until he hath given sufficient bail: and, if he cannot procure bail within twenty-four hours after he is arrested, you shall deliver him into the custody of the gaoler, there to remain until he give bail, or be legally discharged:

"8. Item. You shall well and truly behave yourselves in making of juries, as well between our sovereign lord the King's highness and the party, as between party and party, having no respect to one party more than to the other, but to be indifferent in returning the same juries, without any partiality; and all things appertaining to your office to be done, you shall execute and do to the utmost [6] of your power during the said time, all favour and malice and affection set apart. So help you God."

The present serjeants-at-mace are, the voter, William Arnold, Francis Woodhouse Hollings, and Charles Morgan (hereinafter referred to), who have all been appointed since the passing of the Municipal Corporation Reform Act, and who were sworn in in November, 1854, but have not since been sworn.

The serjeants-at mace have received the fees on execution of warrants allowed by law to constables.

Since the passing of the Municipal Corporation Reform Act, a police-force has been appointed by the watch-committee, under the authority of the 76th section of the act. The force consists of about sixteen men, headed by a superintendant. They perform all the ordinary duties of police-constables; but the serjeants-at-mace have also continued to perform their duties as before.

The charter before referred to,—which was granted by King William the Third,—contains the following provisions respecting the appointment and duties of serjeants-at-mace and other officers:—

"And also we will, and by these presents, for us, our heirs and successors, do grant to the aforesaid mayor, aldermen, and citizens of the city aforesaid, and their successors, That the aforesaid mayor, aldermen, and chief citizens, being the common council of the city aforesaid for the time being, or the major part of them, may elect, nominate, and appoint from time to time in all future times, yearly, on the said Monday after the aforesaid feast of St. Michael the Archangel, two men of the common council of the city aforesaid who shall be chamberlains of the same city:

"And also so many and such constables and other inferior officers and ministers within the city aforesaid, as the citizens and governors of the aforesaid city before the date of these presents have had and were accustomed [7] to have within the same city and liberties thereof, if to the same mayor, aldermen, and common council it shall seem to be necessary and expedient; and that such ministers or officers so to their offices being severally elected, appointed, and named, shall in due manner be sworn to execute their offices rightly, well, and faithfully in all things touching that office, before the mayor and aldermen of the city aforesaid for the time being, or the major part of them, of whom the aforesaid mayor we will to be one; and that they, so elected and appointed, may severally have and exercise their offices at the pleasure of the same mayor and aldermen, and chief citizens of the city aforesaid, or the major part of them, for the time being:

"And also we will, and by these presents, for us, our heirs and successors, do ordain and grant to the aforesaid mayor, aldermen, and citizens of the city aforesaid, and their successors, that they for ever hereafter may have, and that there may and shall be in the city of Hereford, five other officers, to wit, one officer who shall be and shall be called bearer of our sword before the mayor of the city aforesaid, and four other officers who shall be and shall be called serjeants at-mace, for the execution of processes, mandates, and other businesses to the offices of serjeants at mace in the city aforesaid and the liberties of the same belonging, from time to time to be executed

and performed; which sword-bearer and serjeants-at-mace shall be appointed, named, and chosen by the aforesaid mayor, aldermen, and common council of the city aforesaid, or by the major part of them, yearly, on Monday next after the feast of St. Michael the Archangel; and that they and every of them shall be attending from time to time upon the mayor of the city aforesaid for the time being; and that the aforesaid sword-bearer and four serjeants-at-mace so to be chosen and named shall be sworn in due manner well and faithfully [8] to execute their offices aforesaid, before the mayor, aldermen, and common council of the city aforesaid, or the major part of them, for the time being, of whom the mayor for the time being we will to be one; and that, after such oath so taken, they may, shall, and ought to execute that office for one whole year then next ensuing, so that they shall well behave themselves in the offices aforesaid:

"And we will, and by these presents, for us, our heirs and successors, do grant to the same mayor, aldermen, and citizens of the city aforesaid, and their successors, that they and their successors for ever hereafter may have and hold, and shall and may have and hold, in the Guildhall of the same city, one court of record, every Monday and Thursday in every week, yearly, to be held before the mayor of the city aforesaid for the time being, and, in the absence of the said mayor, before one alderman of the city aforesaid for the time being, to be deputed by the same mayor for the time being; and that, in the same court, they may hold, by plaint to be levied in the same court, all and all manner of pleas, actions, suits, and demands of whatsoever trespasses with force and arms or otherwise, in contempt of us, our heirs and successors, done or to be done, and of whatsoever other trespasses, faults, and offences within the city aforesaid, the suburbs and liberties, limits, and precincts of the same, done, moved, arising, had, or committed, and hereafter to be done, moved, or committed, of all and all manner of pleas upon the case, and of all and all manner of debts, accompts, covenants, receipts, detaining of charters, writings, and muniments, and chattels, taking and detaining of cattle and chattels, and other contracts from whatsoever causes or things, within the city aforesaid, suburbs, limits, and precincts thereof, arising or happening, and of all other actions whatsoever personal and mixed: and that, as often as [9] any person or persons shall be willing to implead any other person or persons whatsoever possessing or holding lands, tenements, rents, or hereditaments within the aforesaid city and suburbs, limits and precincts, of the same lands, tenements, rents, and hereditaments, that, so often as he or they so being willing to implead shall sue out our writ of right patent, to be issued forth of our court of Chancery of England, to be directed to the aforesaid mayor of the city aforesaid,—upon which writ in the court aforesaid, before the mayor of the city of Hereford aforesaid for the time being, and, in the absence of the said mayor, before one of the aldermen of the said city for the time being, deputed by the said mayor for the time being, he or they so as aforesaid being willing to implead shall make their protestation to prosecute their complaint upon the writ aforesaid made, in the nature of a writ of assize of novel disseisin, mort d'ancestre, attaint, or in the nature of any other action or writ whatsoever at common law, as the matter and case demands and requires, and as the manner there is; and that such pleas, complaints, and actions, as well real as personal and mixed, shall be there heard and determined before the mayor of the said city aforesaid for the time being, or, in the absence of the said mayor, before one of the aldermen of the city aforesaid for the time being, by the said mayor for the time being to be deputed, in the Guildhall of the same city, by such and the like proceedings and manner, according to the law and custom of our kingdom of England by which and as shall be agreeable to our law, and in as ample and the like manner and form and as in any other court of record in any other city, borough, or town incorporate within this realm of England is used and accustomed, or may or ought so to be done: And we will, and for us, our heirs and successors, do ordain, that the serjeants-at-mace for the city aforesaid for the time being, or any of them, all juries, [10] panels, inquisitions, attachments, precepts, mandates and warrants, judgments, processes, and other things whatsoever necessary to be done touching or concerning the causes aforesaid, or any other causes whatsoever, of the city aforesaid, within the said city and the liberties of the same, shall do and execute as to them shall be commanded, according as the law requires, or according to the custom of the city aforesaid, and as in the like cases is used or ought to be done in any other court of record in any other city, borough, or town incorporate within the kingdom of

England: and that the serjeants-at-mace of the city aforesaid for the time being, and every of them, may have power of arresting, taking, attaching, and distraining, by bodies or goods and chattels, or by both of them, whatsoever persons within the city aforesaid, the suburbs, franchises, and liberties thereof, against whom any complaints of any personal pleas in the court aforesaid shall be brought, to answer to the plaintiff in the same complaints: And that the mayor of the city aforesaid, and his successors, shall and may have, to the use of the same mayor, aldermen, and citizens of the city aforesaid for the time being, all and all manner of fines, amerciaments, and other profits of and in the court aforesaid, or by reason or pretence of the same court, arising, coming, or happening."

The revising-barrister found that, since the passing of the 5 & 6 W. 4, c. 76, the corporation had appointed a treasurer and other officers.

Persons called "mayor's porters" were appointed by the old corporation under the first part of the foregoing extracts; and such porters took the following oath: -

"First. That you shall well, honestly, and truly behave yourself, and shall observe, occupy, exercise, and keep the office of the portership of the gate within the city of Hereford, by night and by day:

"Item. You shall make true attachment, and true [11] return and presentments of the same forthwith at the next court following, and nothing conceal from the mayor of the court:

"Item. That you shall do no extortion to the King's Majesty's people, nor take of them bribes, but take the due fee that belongeth to your office, according to the law and custom of this city, and the laws of this realm:

"Item. You shall well and truly keep the keys of the said gate, save unto the use of the King's Majesty, for the said city, and lock it every night by ten of the clock, and so keep the same gate shut until daylight, except it be upon reasonable causes, at the request of honest persons having business and affairs, to pass and repass, &c.: and also shall keep the keys of the said gate safe to the King's Majesty's Highness's use, and be always ready at the mayor's commandment, and not to deliver the keys to any other. So help you God.'

In consequence of the removal of the city gates, the foregoing oath has long since ceased to be administered to the mayor's porters, who, in lieu thereof, took the constable's oath, of which the following is a copy:—

"You shall well and truly occupy and exercise the office of constableship of the peace in this city of Hereford, and the liberties thereof: You shall see His Majesty's peace kept duly and truly at all times to the utmost of your power, so long as you shall continue in the said office: You shall be obedient unto the commandments of the mayor and justices of the peace of the same city at all times, both by night and by day, as well for the preservation of His Majesty's peace as in all other lawful things: All warrants, writs, and precepts to you directed, you shall execute and do: You shall see the statute of Winchester and all other statutes put in execution concerning vagabonds, beggars, and unlawful games: Also you shall see the King's Majesty's watch kept within this [12] city, when required, according to the laws and statutes in that case provided: And all other things that belong to your said office you shall well and truly execute and do, to the best of your power, as long as you shall continue in the same. So help you God."

Upon the passing of the Municipal Corporation Reform Act, the mayor's porters then in office, in pursuance of the powers thereby given, received compensation; and one similar officer only was appointed.

On behalf of the objector it was contended that the voter, William Arnold, and the other serjeants-at-mace, were constables appointed under the Municipal Corporation Reform Act, and were disqualified from voting, by the statute 19 & 20 Vict. c. 69, s. 9, and were consequently not entitled to remain upon the register of voters of the said city and borough.

The revising barrister decided that the serjeants-at-mace were appointed by the corporation of Hereford under the said charter, and not under the Municipal Corporation Reform Act; and that the voter, William Arnold, was not disqualified from voting: and he allowed the vote.

If the court should be of opinion that this decision was incorrect, the name of William Arnold was to be removed from the list of freemen entitled to vote in and for the said city.

Francis Woodhouse Hollings and Charles Morgan, mentioned in a schedule annexed to the case, were duly objected to by the same objector, and on the same grounds; and the facts relating to them were the same as already set out, excepting that Francis Woodhouse Hollings was qualified to vote as a householder as well as a freeman; and the same decision was come to in each case.

Notice of appeal was given, and the appeals consolidated.

[13] W. H. Cooke, for the appellant. The decision of the revising-barrister is clearly erroneous. The appointment of Arnold to the office of serjeant-at-mace, which took place in 1851, was made by virtue of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, and not under the charter set out in the case. By the 1st section of that statute, it is enacted that "so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters-patent now in force relating to the several boroughs named in the schedules A. and B. to this act annexed (and, amongst others, the city and borough in question), or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act, shall be and the same are hereby repealed." Except, therefore, so far as they are preserved by that act, all the powers of the old corporation are at an end. Previous sections having provided for the election of a body to be called the town-council of the borough, the 58th section proceeds to define their duties with regard to the appointment of corporate officers: it enacts, "that the council of every borough, on the 9th day of November in the then present year, shall appoint a fit person, not being a member of the council, to be the town clerk of such borough, &c.; and the council of every borough shall in every year appoint another fit person, not being a member of the council, to be the treasurer of the borough, and also such other officers as have been usually appointed in such borough, or as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of this act, and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be re-appointed; and shall take such security for the due execution of his office by any [14] such town-clerk, treasurer, or other officer, as the said council shall think proper; and shall order to be paid to the mayor, and to the town clerk and treasurer, and to every such other officer to be employed as aforesaid, such salary or allowance as the said council shall think reasonable; and, in case of a vacancy in any such office as aforesaid by death, resignation, or removal, the council of such borough may appoint another fit person in the place of the person so making such vacancy; provided that the town-clerk and treasurer shall not be the same person." That clause provides that the whole future patronage of the borough shall be vested in the town-council. The 65th section provides "that the council elected under this act in any borough shall have power to remove from his office every bailiff, treasurer, or chamberlain, and every other ministerial or executive officer of such borough and body corporate who shall be in office at the time of the first election of councillors under this act; and every such bailiff, treasurer, or chamberlain, and every other ministerial or executive officer in such borough, shall continue to act in the same capacity as heretofore, and to execute all the duties heretofore belonging to his office, and be entitled to have the same salaries, fees, and emoluments as he would have had if this act had not passed, until he shall be removed from his office and no longer, unless he shall be re-appointed according to the provisions of this act." The provision for the appointment of constables is contained in s. 76, which enacts "that the council to be elected for any borough shall, immediately after their first election, and so from time to time thereafter as they shall deem expedient, appoint, for such time as they may think proper, a sufficient number of their own body, who, together with the mayor of the borough for the time being, shall be and be called the watch-committee for such borough, &c.: and such watch-committee shall, within [15] three weeks after their first formation, and so from time to time thereafter as occasion shall require, appoint a sufficient number of fit men, who shall be sworn in, before some justice of the peace having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace; and the men so sworn shall, not only within such borough, but also within the county in which such borough or part thereof shall be situated, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all

such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has or hereafter may have within his constablewick by virtue of the common law of this realm or of any statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within such borough, or within any county in which they shall be called on to act as constables, for conducting themselves in the execution of their office." The watch-committee, therefore, who are delegated by the town-council, appoint all constables. The case finds that the serjeants-at-mace are constables,—that they act "as police constables and conservators of the peace, executing warrants, serving summonses, and apprehending prisoners." Since the passing of the Municipal Corporation Reform Act, they derive their authority solely from their re-appointment by the town-council. The 7th section of the 19 & 20 Vict. c. 69, enacts that "the constables acting under the 2 & 3 Vict. c. 93 (*a*), the 3 & 4 Vict. c. 88 (*b*), the 5 & 6 W. 4, c. 76, and this **[16]** act, or any of the said acts, shall, in addition to their ordinary duties, perform all such duties connected with the police in their respective counties or boroughs as the justices in general or quarter sessions assembled, or the watch-committees of such respective counties or boroughs, from time to time direct and require." The respondent, therefore, clearly falls within the prohibition contained in the 9th section of the 19 & 20 Vict. c. 69, that "no head or other constable already appointed, or hereafter to be appointed for any borough, under the said act of 5 & 6 W. 4, c. 76, except special constables, shall, during the time he continues to be such constable, or within six calendar months after he has ceased to be such constable, be capable of giving his vote for the election of any person to any municipal office in such borough, or for the election of a member to serve in parliament for such borough or any county in or to which such borough is situate (either wholly or in part) or adjoins, or for any borough within any such county," &c. The serjeant-at-mace is clearly a constable, and one who can only derive his authority by appointment under the Municipal Corporation Reform Act, and consequently is prohibited from voting.

H. James, for the respondent. The decision of the revising barrister is right. The respondent and the two other persons named are not "constables" at all; and, if they are constables, they are not "constables appointed for the borough under the 5 & 6 W. 4, c. 76, and therefore not within the 19 & 20 Vict. c. 76, s. 9. The revising-barrister has not found by the case that these persons are constables; and there is nothing in the charter, or in the oath, in which their duties are defined, to shew that they are appointed for the purpose of acting as constables. It is true, it was part of their duty to assist in keeping the peace; but that is no more than the **[17]** duty which the law imposes upon every magistrate, as well as upon a watchman or beadle: see *Lawrence* v. *Hodges*, 3 Taunt. 14. The original creation of serjeants-at-mace was with a view to their attendance upon the mayor's court, as well as upon the person of the mayor upon state occasions, and not with a view to the performance by them of the ordinary duties of peace-officers or police constables. Should the court, however, think that these serjeants-at-mace are constables, they are not constables appointed under the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76. The argument on the other side assumes that the statute intended to abolish all charters then existing. The 1st section, however, expressly reserves them, except in so far as they may be inconsistent with or contrary to the provisions of that act. It was not intended to operate any new creation of corporations; but merely to alter the terms on which the old corporations were to continue to exist. Upon its being suggested by counsel in *Arnold* v. *Ridge*, 13 C. B. 745, 750, that "the new corporations are not the same as existed before the 5 & 6 W. 4, c. 76," Maule, J., observed: "They have very often been so considered. I do not think you can successfully contend the contrary." The case is, in truth, disposed of by the 76th section, which enables the watch-committee to appoint all constables who are appointed under the act; and the case finds that the serjeants-at-mace are appointed, not by the watch committee, as they would be if appointed under the act, but by the mayor and corporation, by whom the

(*a*) "For the establishment of county and district constables by the authority of justices of the peace."

(*b*) An act to amend the last-mentioned act.

oath is administered to them,—no change having taken place in the mode of their appointment since the passing of the 5 & 6 W. 4, c. 76. The 77th section gives the watch-committee power to dismiss constables: could they take upon themselves to dismiss persons who are appointed to the office of serjeants-at-mace by the mayor? Again, the 11 & 12 Vict. c. 14, provides for the [18] superannuation of constables: could these persons be superannuated by the watch-committee? It is submitted that the officers in question are not constables within the 9th section of the 19 & 20 Vict. c. 69, and therefore not deprived of the right of voting.

Cooke, in reply. In order to bring him within the operation of the 19 & 20 Vict. c. 69, s. 9, it is not necessary that the party should be a "police" constable. The case finds that these persons are paid by the treasurer of the borough: and all constables who participate in the borough-fund under the 5 & 6 W. 4, c. 76, are deprived of the right of voting. They were constables before the passing of the act; and are so still.

Cresswell, J. I am of opinion that the respondent in this case is entitled to be continued on the register. It appears to me that a serjeant-at-mace cannot be considered as an officer appointed under the 5 & 6 W. 4, c. 76. Upon looking at the 58th section of that act,—which relates to the appointment of officers,—I think it may have been introduced for this purpose:—The legislature having in previous sections provided for the election of a new governing body, to be called the town-council, declare by the 58th section that all such officers as have usually been appointed in the borough, or as may be thought necessary for enabling them to carry into execution the various powers and duties vested in them by the act, shall thereafter be appointed by such new governing body. It was necessary to give that power in terms to the newly-created body, inasmuch as it might otherwise have been contended that the old municipal body continued to exist for that purpose, the charter remaining unrepealed. Therefore, when the act of parliament vests the power of appointment in the new governing body, and does not take away the charter, the [19] inevitable conclusion, in my judgment, is that those persons are still appointed virtually under the charter, and not under the act of parliament. The next clause of the act relied on is the 76th, which enables the town council to select certain members of their own body, who, together with the mayor, shall be called the watch-committee, and enacts that such watch-committee shall appoint constables for preserving the peace in the borough. Now, it may very well be doubted whether this person is a constable at all, though his appointment may entail upon him the performance of duties like those performed by constables. The power given to the watch-committee is a special power to appoint constables "who shall be sworn in before some justice of the peace having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace." The serjeants-at-mace are neither appointed nor sworn in under that section. The recent act of 19 & 20 Vict. c. 69, in s. 1 recites the 2 & 3 Vict. c. 93, and the 3 & 4 Vict. c. 88,—acts for the establishment and regulation of county and district constables; and then recites that, by the 5 & 6 W. 4, c. 76, "provision is made for the appointment of constables in all boroughs in England and Wales which are subject to that act," and that, "for the more effectual prevention and detection of crime, suppression of vagrancy, and maintenance of good order, it is expedient that further provision should be made for securing an efficient police-force throughout England and Wales." Now, the only provision in the 5 & 6 W. 4, c. 76, for the appointment of constables, is that contained in the 76th section: and, when we find provisions in the earlier sections of the 19 & 20 Vict. c. 69, for the appointment and regulation of constables for the more effectual prevention and detection of crime, suppression of vagrancy, and [20] maintenance of good order, followed by an enactment in s. 9, that "no head or other constable already appointed or hereafter to be appointed for any borough, under the 5 & 6 W. 4, c. 76, except special constables, shall, during the time he continues to be such constable, or within six calendar months after he has ceased to be such constable, be capable of giving his vote for the election of any person to any municipal office in such borough, or for the election of a member to serve in parliament for such borough," &c., I cannot for a moment doubt that the legislature was intending to refer to the officers appointed under the 76th section of the 5 & 6 W. 4, c. 76, and consequently that the serjeants-at-mace, who are appointed in the manner mentioned in the case, do not fall within the 9th section of the 19 & 20 Vict. c. 69.

I therefore think the respondent's name was rightly retained upon the register, and that the appeal must be dismissed.

CROWDER, J. I also am of opinion that the respondent was entitled to have his name retained upon the register, because I think he does not fall within the 9th section of the 19 & 20 Vict. c. 69, which deprives constables appointed under the 76th section of the Municipal Corporation Reform Act of the right of voting in the election of members for the borough. Those persons only are to be deprived of the franchise who come distinctly and clearly within the first-mentioned provision. It is immaterial to inquire whether, if the duties to be performed by the serjeants-at-mace are the same as those of ordinary constables, and that fact had been brought to the attention of the legislature, they might not have been included in the prohibition contained in the 9th section of the recent act; for, I think it is impossible to say that they are appointed under the 5 & 6 W. 4, c. 76, s. 76. I agree with my Brother Cresswell in [21] thinking that there is nothing in the 58th section to warrant us in concluding that the serjeants-at-mace are appointed under that section. I was anxious during the argument to learn if there was any other section of the Municipal Corporation Reform Act referring to the appointment of constables. None could be pointed out but the 76th, which clearly relates only to officers appointed by the watch-committee. When the 9th section of the 19 & 20 Vict. c. 69, is looked at, it evidently refers to such constables as are appointed under the 76th section of the 5 & 6 W. 4, c. 76. The serjeant-at-mace not being a constable appointed under that section, the prohibition does not refer to him, and consequently his right of voting remains.

WILLES, J. General words in an act of parliament are always to be construed according to the subject-matter with which the legislature is dealing. It is clear from the recitals in the 1st section of the 19 & 20 Vict. c. 69, that the 9th section meant to deal with the descriptions of constables thereinbefore alluded to; and therefore, when it enacts that no constable appointed under the 5 & 6 W. 4, c. 76, shall be entitled to vote, it must be understood to mean no such constable as before referred to, viz. constables appointed pursuant to the provisions of the 76th section of the Municipal Corporation Reform Act. An instance of this sort occurs in the 7th section of the 3 & 4 W. 4, c. 98, which enacts "that no bill of exchange or promissory note made payable at or within three months of the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, &c., be void;" and then proceeds "nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury." The court of Queen's Bench in a case of [22] *Fullance* v. *Siddel*, 6 Ad. & E. 932, 2 N. & P. 78, seemed to think that the words "any bill of exchange," were to be construed as "any such bill of exchange" (*a*).

James asked for costs.

CRESSWELL, J., after consulting the master, said he understood the practice to be, to allow the respondent his costs of the appeal, when the decision of the revising barrister is affirmed (*b*).

WILLES, J. Especially where, as here, the party's claim to the franchise is established by our decision.

Cooke, for the appellant, submitted that it could hardly be considered a case for costs, seeing that the question was one that was fairly arguable.

CRESSWELL, J. I must confess I thought it a very plain case on reading it.

Appeal dismissed, with costs.

[23] BOROUGH OF BURY ST. EDMUNDS.

JAMES WILLIAM CLARK, *Appellant*, THE OVERSEERS OF THE PARISH OF ST. MARY, BURY ST. EDMUNDS, *Respondents*. Nov. 10, 1856.

[S. C. 26 L. J. C. P. 12; 3 Jur. N. S. 645; 5 W. R. 21. Principle applied, *Fox* v. *Dalby*, 1874, L. R. 10 C. P. 294; *Smith* v. *Seghill*, 1875, L. R. 10 Q. B. 131.]

A. claimed to be registered as the occupier of a house of the requisite yearly value to

(*a*) And see *King* v. *Braddon*, 10 Ad. & E. 675, 2 P. & D. 516.

(*b*) See 17 C. B. 315, n. (*a*); and post, pp. 23, 33, 62.

confer a vote. The revising-barrister found that A. was the keeper of the Guildhall at B.; that the house in question was the residence assigned by the corporation to the hall-keeper, and in which he was required to reside; and that it was necessary for the due performance of his duties as hall-keeper that he should reside there:—Held, that this was an occupation as servant to the corporation, and not an occupation as tenant within the 2 W. 4, c. 45, s. 27.—Where the decision upon an appeal is adverse to the claim of franchise, semble that the court will grant or withhold costs according as they see that there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, costs will be given as a matter of course.

At a court held for the revision of the lists of voters for the borough of Bury St. Edmunds, James William Clark claimed to be inserted in the said list for the parish of St. Mary, in the said borough, as follows:—

Name, &c., of voter.	Place of abode.	Qualification.	Street, lane, &c., where property situate, &c.
Clark, James William.	80 Whiting Street.	House.	80 Whiting Street.

Within the said borough are certain charity trust estates formerly called the Guildhall Feoffment, belonging to certain trustees or feoffees, and now regulated by a scheme made by the court of Chancery in 1842. Amongst the said estates are the Guildhall and the house in Whiting Street occupied by the said James William Clark. The Guildhall is used for general public purposes connected with the borough, and is not rated to the relief of the poor. The said Guildhall is situate in Guildhall Street, which street runs parallel to Whiting Street, in which is the house occupied by the said James William Clark (of the yearly value of 10*l.* and upwards). At the back of the house in Whiting Street is a garden, having a door communicating with a yard at the back of the Guildhall. The said door in the said wall is fastened by a lock and a bolt on the side towards the said garden, and is the only means of communication between the **[24]** Guildhall premises and the house and garden. The said James William Clark has the keys, and the entire and exclusive control of the said house: the feoffees reserving a small room as an office under the same roof, but having no internal communication with the said house, and entered by a door opening into a yard at the side of the said house, also occupied by the said James William Clark. The entrance door of the Guildhall, opening into Guildhall Street, is secured by a lock, which can be used from the inside and from the outside, and by an iron moveable bar inside, occasionally used.

The hall-keeper is elected annually, in January, by the said feoffees. The said James William Clark was elected hall-keeper in January, 1846, and has since been elected annually up to and inclusive of the present year.

According to the entry contained in the minute-book of the resolutions come to by the said feoffees at their annual meeting held in January of each year, pursuant to the scheme, and dated the 15th of January, 1846, the said James William Clark was elected hall-keeper, to have possession at Lady-Day then next, and to receive salary from the date of election.

From January, 1847, to January, 1853, inclusive, the said James William Clark was re-elected under the following minute annually entered in the said book:—"Mr. James William Clark was elected hall-keeper for the year ensuing." On the 12th of January, 1854, the minute is as follows:—"Mr. James William Clark is elected hall-keeper for the year ensuing: and that the said James William Clark be continued as tenant of the house in which he lives, he paying the rates, taxes, and outgoings." On January the 11th, 1855, a minute similarly worded with the preceding one appears in the same book. On January the 10th, 1856, the entry is,—"Mr. James William Clark is elected hall-keeper for the ensuing year."

[25] From the appointment of the said James William Clark, in January, 1846, until the 6th of April in the same year, the said James William Clark resided in and occupied another house, paying rent, rates, and taxes for the same, the widow of the late hall-keeper being permitted during that period to remain in the house in question.

The said James William Clark pays no money rent for the said house; his occupation being considered as part-payment for his services.

It is necessary for the due discharge of his duties as hall-keeper that he should reside in the house in question, which was built, upwards of forty years ago, for the residence of the hall-keeper.

The said James William Clark, since his appointment in January, 1846, and up to the present time, has paid all rates and taxes, and done all internal repairs, excepting on one occasion, when the feoffees and himself jointly re-floored one of the rooms in the said house.

A minute of the 9th of February, 1846, in the aforesaid minute-book, is as follows:—"The hall-keeper, James William Clark applied to the trustees for directions whether he was to pay for the fruit-trees at the hall keeper's house; and, it appearing to the trustees that such trees could not be removed by Mrs. Ward, they were not to be paid for by Clark; and Clark was informed that he would not be paid for anything which he should leave."

Being of opinion that the occupation of the said house by the said James William Clark was necessary to the due performance of his duties as hall keeper, and that he was required to occupy the said house, the revising barrister disallowed the claim of the said James William Clark

Welsby, for the appellant. The question is whether the claimant, James William Clark, occupied the house [26] described in the case, as tenant, within the 2 W. 4, c. 45, s. 27. It is to be observed that the revising-barrister has not found as a fact that Clark was required to occupy it, as part of the terms of his employment as hall-keeper, but merely states that as his opinion, or as an inference from the facts which he has found. All the law that is to be found on this subject is contained in the judgment pronounced by this court in *Hughes, App., The Overseers of Chatham, Resp.*, 7 Scott, N. R. 581, 5 M. & G. 54, 1 Lutw. Reg. Cas. 51, and *Dobson, App., Jones, Resp.*, 8 Scott, N. R. 80, 5 M. & G. 112, 1 Lutw. Reg. Cas. 105. In the former of these cases, A., the master rope-maker in a royal dock-yard, had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes: the house was stated in the case to belong to the lords of the Admiralty: if A. had not had it, he would have had an allowance for a house in addition to his salary: and it was held that A. occupied the house as tenant within s. 27. In the other case, of *Dobson, App., Jones, Resp.*, A., the surgeon of Greenwich Hospital, as such, occupied a house at the infirmary in the hospital, which was appropriated to the surgeon: repairs were done by the commissioners of the hospital: the surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money: and, by the regulations of the commissioners of the hospital, no officer of the hospital is allowed to make any exchange of apartments. It was held that A. did not occupy the house as tenant within s. 27, inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as a surgeon. The present case has some of the incidents which appear in both these cases, and some additional ones. The principle which must govern this case is very clearly laid [27] down by Tindal, C. J., in the case first cited. "There is," he says, "no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and, if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them: it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy, in the performance of his contract to serve his master. The settlement cases cited in argument established, and proceeded on, this distinction. We think it applicable to the present question; and, as there is nothing in the facts stated to shew that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising-barrister has arrived is wrong.

The case, indeed, states that the claimant was master rope-maker, and as such had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them. The fact also of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for, such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen [28] that something in the service which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants. But, in the present case, upon the grounds above stated, we think the juster inference is, that there is an occupation as tenant." Applying those principles to the present case, it appears that Clark has the entire and exclusive possession and control of the house. By the entries in the minute-book of the feoffees, which form part of the case, it appears that Clark came in with certain rights as a succeeding tenant, after the death of his predecessor in the office of hall-keeper; that he pays all rates, taxes, and outgoings; and that he has always been recognised and dealt with by the feoffees as their tenant, —the occupation of the house being considered as part payment for his services. It is true, the revising-barrister finds as a fact that "it is necessary for the due discharge of his duties as hall-keeper that Clark should reside in the house in question:" but it is not found that another house equally near to the Guildhall would not be as convenient and efficient for that purpose. The decision in *Dobson, App., Jones, Resp.*, proceeded upon the ground that there the appellant was required to occupy the house in respect of which he claimed to be on the register. After adverting to the principle upon which the former judgment proceeded, Tindal, C. J., says,—"In deciding the present appeal, we have only to consider within which of the two classes the present case ranges itself. It is found by the case that the appellant is the surgeon of Greenwich Hospital; that the house which he occupies is in the infirmary; and that he occupies it as such surgeon. Now, the nature of the office of surgeon of the hospital is such that a residence in some [29] known and certain dwelling may reasonably be required for the due performance of his office. But it is further found that he was placed in it when he was first appointed (nineteen years ago), and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And, lastly, it is found by the revising barrister, that, by the regulations established by the lords commissioners of the Admiralty, the officers of the hospital having apartments, are to inhabit those assigned to them, and that no exchanges, or other appropriations, are to be made, without permission. The revising-barrister, upon this state of evidence before him, appears to have come to the conclusion that the appellant does not occupy this house simply by permission of the government, and as part of the remuneration for his services as surgeon, but that he is required to occupy this house, with a view to the more efficient performance of the duties of his office; and, consequently, that there was no occupation by him in the legal relation of tenant to a landlord. And, upon the state of facts so brought before the revising-barrister, and set out upon the case, we cannot say he has come to a wrong conclusion in point of law."

Byles, Serjt., for the respondents. The revising-barrister in this case has come to a right conclusion. In order to confer a right of voting, as tenant, under the 2 W. 4, c. 45, s. 27, it is not enough that the party shall merely occupy a house of the requisite value,—so as to become liable to be rated, or so as to "come to settle" within the 13 & 14 Car. 2, c. 12, -but he must occupy as tenant: he must be an independent occupier. It is conceded that the true construction of the clause in question is to be gathered from the judgments of this court in the two cases referred to. The real question is this,—Is the party required to occupy the house as sub-servient to his appointment? If so, he does not occupy [30] as tenant, whether he pays rates or not. If, on the other hand, he has the liberty of residing there or elsewhere at his option, and is only permitted to occupy the house, though it be more convenient to the due performance of his duty or service, and though he pays no money rent for it, he occupies as tenant, and is entitled to be registered as such. The facts stated in this case clearly shew that Mr. Clark stands in the former predicament. The Guildhall and the house in question stand upon the same piece of ground. There is a door of

separation, which is fastened on the side of the dwelling house; the only mode of securely fastening the front door of the Guildhall being within. The house was built for the residence of the hall-keeper; and it is necessary for the due discharge of the hall keeper's duties that he should reside therein. The revising barrister has distinctly found, —and his opinion on the fact is communicated to the court, —that it was necessary and that the claimant was required to occupy the house. [Cresswell, J. He states that as his opinion, but he does not in terms find it as a fact.] It is at all events distinctly found as a fact that it was necessary for the discharge of the hall-keeper's duties that he should reside in the house provided by the corporation for that purpose. In other words, the duties of his office could not be efficiently performed unless he resided there. [Williams, J. A jury might presume that he was required to reside there, the nature of his duties making it necessary that he should do so.] If it appears that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services, —as Tindal, C. J., says in *Hughes, App., The Overseers of Chatham, Resp.*, with his usual perspicuity, clearness, and simplicity,—that is enough to support the finding of the revising-barrister in this case, [31] that the occupation by Clark was an occupation as servant, and not as tenant. In *Dobson, App., Jones, Resp.*, the surgeon was held not to acquire a right of voting, because his residence in the house allotted to him was not voluntary, but obligatory on him. The facts clearly bring this case within the principle which was held in those two cases to disentitle the party to the franchise.

Welsby, in reply. The facts found by the revising barrister are not, it is submitted, sufficient to deprive this claimant of the character of tenant. That must depend upon the bargain between him and his employers, does the contract under which he was appointed require him to occupy this house, as the regulations established by the lords commissioners of the Admiralty did in *Dobson, App., Jones, Resp.*? The fact that his residence there is convenient is not sufficient to outweigh all the other circumstances stated in the case. And it must not be forgotten that the burthen of shewing that the franchise is taken away rests upon the respondents.

Cresswell, J. I do not find in the two cases of *Hughes, App., The Overseers of Chatham, Resp.*, and *Dobson, App., Jones Resp.*, any distinct principle laid down for the determination of these cases; but they lay down some rules by which we may to a certain extent be guided. I apprehend the true question to be whether the claimant occupied the premises as tenant or as servant. It may be that the party occupies as tenant, and that he is required to occupy; but it may also be that he occupies as servant, and that he is required to occupy because he is a servant. It seems to me that the revising barrister has in effect found here that the claimant was required to occupy and did occupy as servant; and that there is abundant rea [32] son for holding that he did occupy in the character of servant, and not in that of tenant. The case finds that "it is necessary for the discharge of his duties as hall-keeper that he should reside in the house in question, which was built for the residence of the hall-keeper." And it appears to be a place where convenience requires that he should reside, in order that he might have by the internal communication with the Guildhall premises the means of securely fastening them at night. I therefore think we are justified in holding that the claimant occupied these premises as servant, and not as tenant within the 27th section of the Reform Act, 2 W. 4, c. 45.

Crowder, J. I also am of opinion that the revising-barrister came to a right conclusion in this case. The question he had to decide was, whether this person occupied the premises described in the character of tenant, or merely as a servant. All the facts set out in the case seem to me to shew that his occupation was in the character of servant. The house was built for the residence of the hall keeper, and it was a place where it was not only convenient but necessary that he as the servant of the corporation should reside. From the very nature of his appointment, as stated in the case, it must have been so; and I think the revising-barrister has sufficiently found it, for, he states it to be his opinion that the occupation of the said house by the claimant was necessary to the due performance of his duty as hall-keeper, and that he was required to occupy it. I feel irresistibly led to the conclusion that Clark's occupation of the premises was an occupation as servant, and not as tenant, and therefore that the revising-barrister very properly rejected his claim.

Willes, J. I am of the same opinion. I think the proper conclusion from the

facts stated is, that it was [33] part of the terms of the hall-keeper's employment that he should reside in the house in question, and that his occupation was not in the character of tenant.

Byles, Serjt., asked for costs.

Cresswell, J. I understand the general rule to be, to give the respondent costs where the appeal is dismissed, unless it be a case of reasonable doubt.

Willes, J. The rule suggested last year was, that, where the court decides adversely to the claim to the franchise, they will consider whether there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, the costs will be allowed.

Cresswell, J. We think this is not a case for costs.

Appeal dismissed, without costs (*a*).

[34] County of Durham—Northern Division.

John Stephenson Robson, *Appellant*, Lawrence Lawson Brown, *Respondent*.
Nov. 14, 1856.

[S. C. 26 L. J. C. P. 81; 3 Jur. N. S. 674.]

Appeals cannot be consolidated under the 6 & 7 Vict. c. 18, s. 44, unless they depend upon the same precise point of law.—Where, therefore, a consolidated appeal contained a different statement of facts as applicable to the several voters, requiring several decisions in point of law, the court declined to entertain it.

At a court held for the revision of the lists of voters for the northern division of the county of Durham, on the 16th of September, 1856, at Lancaster, John Stephenson Robson, on the register of voters for the said division, duly objected to the name of Lawrence Lawson Brown being retained on the register of voters for the parish of Hunstonworth in the said division.

The name of the said Lawrence Lawson Brown appeared on the said register, as follows:—

Name, &c. of Voter	Place of abode.	Qualification.	Local description of the property, &c.
Brown, Lawrence Lawson.	Witton-le-Wear.	Annuity out of freehold lands.	Lord Crewe's trustees.

N.B.—In the heading of the fourth column, for the local description of the property, is inserted the following direction, viz. "or, if the qualification consist of a rent-charge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property."

The said John Stephenson Robson also objected to the several names of John Calcot, Mark Pattinson, and James Thompson, whose qualifications were respectively described on the said register, in the third column, as "freehold rent charge," and in the fourth column as "Lord Crewe's trustees;" also to the name of George Dugard, whose qualification was described on the said register, in the third column, as "freehold rent charge," and in the fourth column as "Hunstonworth, Lord [35] Crewe's trustees, owners;" also to the name of William Cassidi, whose qualification was described on the said register, in the third column, as "annual charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" also to the name of William Darnell, whose qualification was described on the said register, in the third column, as "rent-charge issuing out of freehold lands," and in the fourth column as "Lord Crew's trustees;" also to the name of William Kay, whose qualification on the said register was described, in the third column, as "annual charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" also to the name of Richard Marshall, whose qualification on the said register was described, in the third column, as "annual charge on freehold lands," and in the fourth column as "in the parish of Hunston-

(*a*) See 17 C. B. 315 (*a*); ante, p. 22; post, p. 62.

worth;" also to the name of Robert Taylor, whose qualification on the said register was described, in the third column, as "annual rent-charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" and also to the name of Henry Baker Tristram, whose qualification on the said Register was described, in the third column, as "freehold rent-charge," and in the fourth column as, "out of lands in the parish of Hunstonworth, Lord Crewe's trustees, owners."

The facts of the case, as proved, were as follows:—

Lord Crewe, being seised in fee of certain lands, tenements, and hereditaments in the said parish of Hunstonworth, in the said county of Durham, and also of other lands, tenements, and hereditaments in the county of Northumberland, by his will, dated the 24th of June, 1720, and properly executed (and attested) to pass real estates, devised all the said lands, tenements, and hereditaments, to five trustees named in the said will, their heirs and assigns, for ever, upon the following trust, viz. upon trust that they, the said trustees, and the survivors and survivor of them, and the heirs and assigns of the [36] survivor of them, should, out of the rents, issues, and profits of the said lands, tenements, and hereditaments, in the said counties of Durham and Northumberland, for ever thereafter pay or cause to be paid the yearly sum of 20l. to each and every of twelve exhibitioners of Lincoln College, in the University of Oxford, which he had then already named and appointed, or which he should there after nominate and appoint, and to each and every of twelve exhibitioners to be elected and chosen after his decease, as thereinafter mentioned, who should be under-graduate commoners in Lincoln College aforesaid, and who were or should be natives of the diocese of Durham, and, for want of such, natives of Northallertonshire, Howdenshire, in the county of York, or of Leicestershire, and particularly of the parish of Newbold Verdon, or of the diocese of Oxford, whereof he was formerly bishop, or of the county of Northampton, in which county he was born (with certain directions and limitations for electing fresh exhibitioners in case of vacancies, and as to the time and conditions of the holdings of the said exhibitions, not material in the judgment of the revising-barrister to the present cases): Upon the further trust that the said trustees, their heirs and assigns, should, out of the rents, issues, and profits of the said lands, tenements, and hereditaments in the said counties of Durham and Northumberland devised to them as aforesaid, for ever thereafter pay the annual sums thereinafter mentioned, that is to say, unto the minister of the parish church of Bamboro', in the county of Northumberland, and his successors, the yearly sum of 40l. per annum; and to the minister of St. Andrew's church in Auckland, in the county of Durham, and his successors, the yearly sum of 30l.; and the yearly sum of 10l. a piece for the augmentation of twelve poor rectories, vicarages, small livings, or curacies in the diocese of Durham, such as he should by any writing or writings, codicil or codicils, under his hand and seal, to [37] be attested by three or more credible witnesses, from time to time direct and appoint, and, in default thereof, to and for the augmentation of twelve such poor rectories, vicarages, small livings, or curacies within the diocese of Durham aforesaid, as the said trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should direct and appoint; and unto the ministers, lecturers, or curates of the parishes of All Saints and Saint Michael's, in Oxford, of Twyford, in the county of Bucks, and of Comb, in the county of Oxford, which belonged to Lincoln College aforesaid, and to the several successors for the time being, the several yearly sums of 10l. a piece for catechising youth within the same respective parishes; and unto the poor scholars of Trap and Marshall in Lincoln College aforesaid (being eight in number), such annual sums as would make up and increase their respective scholarships to the yearly sum of 10l. a piece (including what they then already respectively received on account of their several scholarships), to the intent that their respective scholarships might be all alike in their respective yearly values; and to the bible-clerk of Lincoln College aforesaid, such annual sum as would make up and increase his salary to the yearly sum of 10l. (including what he then already received on account of his clerkship); and also the yearly sum of 20l. to the rector of the said college, and the yearly sum of 10l. a piece to each of the said fellows of the said college, which benefactions he gave to the said rector and fellows of Lincoln College aforesaid, and to the college aforesaid, being the place where he had had his education, and of which college he was first fellow and afterwards rector; and to each of the almsmen and almswomen in each of the hospitals of Durham and Bishop Auckland, of the foundation of Bishop Cosens, and to each of the six almswomen in the hospital of Brackley.

in the county of Northampton, of the foundation of his grandfather, Sir [38] Thomas Crewe, and to each of the two almswomen in the hospital at Hinton, in the said county of Northampton, of the foundation of Elisha Hele, Esq., the several yearly sums of 40s. a piece; and to such schoolmaster of Newbold Verdon aforesaid for the time being, the yearly sum of 20l.; and to the trustees for the time being of the hundred of Spackenhoe, in the county of Leicester, for the relief of the widows, orphans, and children of poor clergymen deceased, and to their successors, the yearly sum of 10l., to be by the said trustees and their successors distributed for the relief of widows, orphans, and children of poor clergymen deceased within the said hundred, in such proportions as the said trustees and their successors should think fit; and unto the minister and churchwardens of the parish of Daventry, in the county of Northampton, and to their successors, the yearly sum of 6l., to be by them paid and applied for and towards the support and maintenance of a charity-school to teach poor children of the said parish of Daventry to read English and write:—All which said annual payments he willed and desired should be for ever thereafter paid in manner following, that is to say,—unto the said almsmen and almswomen, by quarterly equal payments, on the Feast of St. Michael the Archangel, St. Thomas the Apostle, the Annunciation of the Blessed Virgin Mary, and St. John the Baptist, the first payment to begin and be made at such of the said feasts which should first or next happen after his decease; and all other the annual payments, by half-yearly equal payments, at the feast of St. Michael the Archangel and Annunciation of the Blessed Virgin Mary, the first payment thereof to begin and be made at such of the same two last mentioned feasts which should first and next happen after his decease. And the testator by his said will did will, order, and direct that all the said annual payments by him directed to be paid to the said rector, fellows, exhibitioners, poor scholars of [39] Lincoln College aforesaid, and to the said ministers, lecturers, or curates of All Saints, St. Michael's, Twyford, and Comb, aforesaid, and to the bible clerk, should be from time to time received by the bursar of the said college for the time being, as other rents of the said college were by him received, to be by him paid for the uses aforesaid, and for no other use or uses whatsoever, whom the testator thereby required to give security to pay the money coming to his hands by virtue of that his will to the uses aforesaid, to the satisfaction of the rector and fellows of the college aforesaid: and his will was, and he did thereby direct, that all the said annual payments for ever thereafter should be made without any deduction or abatement whatsoever for taxes, charges, or assessments for or by reason of any act or acts of parliament then already made or thereafter to be made, or by reason or means of any other payments, matter, or thing whatsoever, and to begin to be made in manner as he had thereinbefore directed.

Then follow directions as to the application of the surplus rents "after the said annual payments should be paid, and not before," which the revising barrister did not think material to be set forth.

The will contained a clause for the election and the appointment of new trustees from time to time on the death of any one or more of the trustees appointed by the will, so as the trustees should never exceed five in number, and providing that the rector of Lincoln College for the time being should be one of the trustees: and the will contained a further clause directing that the trustees for the time being should be satisfied and paid for their charges and expenses which they or any of them should be put unto, lay out, or expend in or about the execution of all, every, or any of the trusts aforesaid, or by reason of any matter or thing whatsoever any ways relating to or concerning that his will, or the trusts therein contained.

[40] The present trustees are, James Thompson, D.D., rector of Lincoln College, Charles Sharpe, D.D., Archdeacon of Durham, William Nicholas Darnell, D.D., rector of Stanhope, the Rev. Henry George Liddell, rector of Easington, and the Rev. John Dixon, clerk, of Belford.

Hunstonworth is a parish, and the parish and township are co-extensive. Lincoln College is a corporation aggregate, styled "The Warden or Rector and Scholars of the Blessed Mary and All Saints, Lincoln, commonly called Lincoln College:" and the rector and fellows are respectively members of the corporate body.

The said James Thompson is rector, and the said John Calcot, Mark Pattinson, and William Kay are severally fellows of Lincoln College.

The said Lawrence Lawson Brown is perpetual curate of Witton-le-Wear, in the county and diocese of Durham, which is one of the small livings or

curacies which have been augmented with 10l. a year pursuant to the said will of Lord Crewe.

The said William Cassidi is vicar of Grindon in the county and diocese of Durham, which is another of the small livings which has been augmented with 10l. a year pursuant to the said will.

The said William Darnell is perpetual curate of Bamborough, in the said will mentioned.

The said George Dugard is perpetual curate of Barnard Castle, in the county and diocese of Durham, which is another of the small livings which has been augmented with 10l. a year, pursuant to the said will.

The said Richard Marshall is perpetual curate of Wettonstall, in the county and diocese of Durham, which is another of the small livings or curacies which has been augmented with 10l. a year, pursuant to the said will.

The said Robert Taylor is perpetual curate of Hartlepool, in the county and diocese of Durham, which is [41] another of the small livings or curacies which has been augmented with 10l. a year, pursuant to the said will.

The said Henry Baker Tristram is vicar of Castle Eden, in the county and diocese of Durham, which is another of the small livings which has been augmented with 10l. a year, pursuant to the said will.

The aggregate amount of the said several annual sums so by the said will primarily made payable out of the rents, issues, and profits of the said devised lands, tenements, and hereditaments in Durham and Northumberland, is 740l. 6s. 8d.; and they are, and always have been, paid out of a joint fund derived from the rents, issues, and profits of the whole of the said devised lands, tenements, and hereditaments in Durham and Northumberland, without distinction.

All the annual payments directed by the said will to be paid to the rector, fellows, exhibitioners, poor scholars of Lincoln College aforesaid, and to the ministers, lecturers, or curates of All Saints, St. Michael's, Twyford, and Comb aforesaid, and to the bible-clerk, are and have always been paid by the said trustees to, and received by, the bursar of Lincoln College for the time being, to be by him paid to and for the uses aforesaid, pursuant to the direction of the said will; and the amount so received by the bursar is not carried to the corporate funds of the college, but is by him distributed amongst and paid to the individuals entitled to receive the same, as directed by the said will. The rest of the said annual sums are paid by the trustees directly to the several parties entitled to receive the same pursuant to the directions of the said will.

The gross annual rental of the said devised estates in Hunstonworth amounts to 800l. a year and upwards. The ordinary management of those estates, including the collection of rents, costs the trustees from 25l. to 30l. a year; and the repairs incident to the same estates have [42] on an average, for the last twenty years, cost the trustees from 40l. to 50l. a year.

The amount of the net annual rental of the Hunstonworth estates is less than the said aggregate amount of the said annual sums charged on those estates and the said estates in Northumberland by the said will aforesaid.

Of the said devised estates in Northumberland, parts are situate in the northern division of the county, and the rest in the southern division thereof. The amount of the gross rental of those parts which are situate in the northern division of Northumberland, is 6500l. a year, and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property amount to 1500l. a year. The gross rental of those parts which are situate in the southern division of Northumberland amounts to 1500l. a year and upwards, and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property amounts to 400l. a year.

It was objected, on the part of the said John Stephenson Robson, that, in all the said cases, the description of the qualifications as described on the register was defective, inasmuch as the local situation of the lands out of which the rent charges issued was not correctly stated.

The revising barrister thereupon, in the several cases of Lawrence Lawson Brown, John Calcot, William Cassidi, William Darnell, William Kay, Mark Pattinson, Robert Taylor, and James Thompson, added, in the fourth column, "Hunstonworth," as being the local situation of those lands; and, in the case of Richard Marshall, he added, in

the fourth column, "Lord Crewe's trustees," as the owners of the property out of which the annual charge issued,—conceiving and determining (?) that he had power so to do under the 40th section of the 6 & 7 Vict. c. 18, for the better identification of the qualifications; the matters so omitted and insufficiently described having **[43]** been previously supplied to his satisfaction: and, with that amendment, he held the description of the qualifications as described on the register sufficient, against the objection (still persisted in on the part of the said John Stephenson Robson), that, notwithstanding his said amendments, the description of the qualifications, as described in the register, was defective.

It was also objected, on the part of the said John Stephenson Robson, that none of the said several parties objected to had any sufficient estate in Hunstonworth to entitle them to have their names on the register of votes for the said parish of Hunstonworth; and that their qualifications, as described on the register, were not supported, inasmuch as the annuities were payable out of the lands in the county of Northumberland as well as out of the lands in Hunstonworth, in the county of Durham.

The following objection was also made on the part of the said John Stephenson Robson, in the following language, viz. "that, if the said annuities ought to be rateably and proportionably distributed over each division in each county, in proportion to the whole property in each division, and if such rateable and proportionable apportionment of the said annuities were made, then and in that case the said Lawrence Lawson Brown, John Calcot, William Cassidi, William Darnell, George Dugard, William Kay, Richard Marshall, Mark Pattinson, Robert Taylor, James Thompson, and Henry Baker Tristram would have less than 10l. a year out of the said rents arising in the parish of Hunstonworth, and consequently that their qualifications would be insufficient.

It was also further objected, on the part of the said John Stephenson Robson, that the interest of the annuitants was merely equitable; and that they could not elect to take their annuities out of the rents of the lands in Hunstonworth.

[44] And, lastly, that the said John Calcot, William Kay, Mark Pattinson, and James Thompson, being members of the corporation aggregate of Lincoln College aforesaid, had not individually such an estate or interest in their said annuities as to be a qualification to be on the said register of voters.

The revising-barrister overruled these several objections of the said John Stephenson Robson, and retained on the said list the names of the several persons so by him objected to.

Robson having given notice of appeal in each of the above cases, the revising-barrister stated this case for the opinion of this court,—adding, that, "it appearing to him that each of the said appeals depended on the same points of law, he declared that all the said appeals ought to be consolidated," and named Brown respondent.

Hindmarch, for the appellant. Notwithstanding the amendments, the qualifications of the several voters are still inaccurately described. The act expressly requires the form given in the schedule A. No. 3, to be adhered to. Where the qualification consists of a rent-charge, the names of the owners of the property out of which such rent-charge is issuing, or some of them, and the situation of the property, must be inserted in the fourth column. It is essential that the person who objects to the vote should have full means of inquiring into the sufficiency of the qualification.

Then, it is submitted that the voters had not a "freehold interest," within the statutes 8 H. 6, c. 7, and 10 H. 6, c. 2, so as to entitle them to be upon the register. The will of Lord Crewe merely contains a direction to the trustees to pay the several sums mentioned, out of the profits of the lands devised to the trustees. There is no power of entry or distress to compel payment, but a bare naked trust. It is in truth an interest in **[45]** money, and not in land: see *Bligh* v. *Brent*, 2 Y. & C. 268; *Bradley* v. *Holdsworth*, 3 M. & W. 422. Then, as to the amount,—if this is a rent-charge, it must issue out of the whole and every part of the lands upon which it is charged. Now, the case finds that the annual value of the lands in Hunstonworth is 800l. only; whereas, the yearly value of the lands in the northern division of Northumberland is 6500l., and that of the lands in the southern division 1500l. The value of the lands in Durham, in proportion to that of those in Northumberland, therefore, is only as one in ten. Consequently, the claimants cannot in any sense be said to have an interest of 40s. a year arising out of lands in Durham,—assuming

them to be within the exception in the 2 W. 4, c. 45, s. 18 (*a*). Co. Litt. 147 b. With respect to the master of Lincoln College, the rent-charge (assuming it to be **[46]** properly a rent-charge) does not come to him "by devise," —which means, a devise to the person himself, whereas, this is a devise to the corporation; nor does he take "by promotion to any benefice or to any office," within the meaning of the act. In *The Cambridge case*, 1 Journ. 798, May 28, 1624, cited, Rogers on Elections, 7th edit. 149, the House resolved "that members of colleges, halls, or corporations, not having freehold, saving in right of their colleges, halls, or corporations, ought not to have votes in elections of knights or burgesses." [Cresswell, J. There, the land belonged to the body corporate: the division of the profits was mere matter of internal arrangement.] Here, the money is directed to be paid to the bursar of the college. [Cresswell, J. That may be simply the appointment of an agent for the purpose of distributing and dividing the fund.] The subsequent words "and to the college aforesaid," clearly make it amount to a gift to the rector and fellows in their corporate character. This objection applies to all except the ministers of Bamborough, and St. Andrews, Auckland, to whom respectively are given the several annual sums of 40*l.* and 30*l.* [Cresswell, J. You may, perhaps, say that the claimants have no right to apportion, and so they have no charge on lands in Durham. Can the party say "I will have so much out of the lands in Durham, and so much out of the lands in Northumberland?"] The right to apportion clearly does not exist. [Crowder, J. If the parties may apportion, they may claim the right of voting in both counties.] He was proceeding with his argument, when he was stopped by

Cresswell, J., who said. My attention has been called to a case of *Prior, App., Waring, Resp.*, 5 C. B. 56, 2 Lutw. Reg. Cas. 45, which seems to shew that we have no jurisdiction to hear this appeal, inasmuch as the va-**[47]**-lidity of the several claims or objections does not depend, and has not been decided by the revising barrister, "upon the same point or points of law." The objection having been taken, and the 44th section of the 6 & 7 Vict. c. 18, referred to, it was suggested by the counsel for the appellant that the court might remit the case to the revising-barrister, under s. 65, in order that it might be stated more correctly. But Maule, J., said,—"I do not think this can be said to be an insufficiently stated case within that section. There may be very good reason why a man having a bad case may be anxious to consolidate it with a better one." Upon its being urged that both parties were consenting to the consolidation before the revising-barrister, the same learned judge observed,—"Two parties may consent to state a case for the opinion of the court of Chancery; but that would not give the court jurisdiction." And, in giving judgment, the whole court agree, that, in entertaining a case so stated, they would be usurping a jurisdiction which the legislature had not thought fit to confer upon them. It seems to me to be impossible to distinguish that case from the present. The rights of the voters here depend upon totally separate and distinct states of facts.

Hindmarch. All the cases here depend upon one particular state of facts. The same questions arise in each case,—is this a rent-charge? and, are the claimants possessed of a freehold interest of sufficient amount? All the parties claim under the same will.

(*a*) Which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or office, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same, any statute or usage to the contrary not withstanding. Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained."

Cresswell, J. It may be that one of the claimants might be found to have an interest in land, and, as to others, that the gift is to the corporate body. The circumstances affecting each claimant are different. Each case depends upon a different state of facts, as in *Prior*, [48] *App.*, *Waring*, *Resp.* I think we are bound by that decision, and must decline to hear this case.

Hindmarch. The principal question,—and that upon which each case must depend,—is, whether the parties have a freehold interest in land, of the yearly value of 40s. It would be scarcely possible to find cases so exactly alike in their circumstances as to present no point of difference.

Crowder, J. In *Barclay*, *App.*, *Parrott*, *Resp.*, post, p. 49, no less than sixty-two votes depended upon the decision in the principal case, the whole being alike in point of fact, and all involving the same single question of law.

Montague Smith (with whom was Manisty), for the respondent, was not called upon.

Cresswell, J. We are bound by the case referred to. This appeal must be dismissed.

The rest of the court concurring.

Appeal dismissed.

[49] Borough of Macclesfield.

Joseph Barclay, *Appellant*, Thomas Parrott, Town Clerk of Macclesfield, *Respondent*. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 77 : 3 Jur. N. S. 672 ; 5 W. R. 75.]

A notice of objection to a borough vote, sent by post in the manner prescribed by the 6 & 7 Vict. c. 18, s. 100, need not on the face of it shew the voter's place of abode.

At a court held for revising the lists of voters for the borough of Macclesfield, on the 30th of September, 1856, Joseph Barclay objected to the name of Matthew Lea Burgess being retained on the lists of voters for the township of Macclesfield in the said borough.

The stamped duplicate notice of objection was as follows :—

"Notice of objection.

"To Mr. Matthew Lea Burgess.

"I hereby give you notice that I object to your name being retained on the list for the township of Macclesfield of persons entitled to vote in the election of members for the borough of Macclesfield. Dated this 25th day of August, 1856.

"Joseph Barclay, of No. 2 Peel Street, 96 Park Terrace, Park Lane, on the list of voters for the township of Macclesfield."

The duplicate was addressed on the back, as follows :—

"Matthew Lea Burgess,
"13 Park Street, Macclesfield."

The notice of objection was sent by post, open.

It was urged by or on behalf of Burgess that the duplicate did not on the face of it shew his place of abode, although it appeared on the outside of both.

The revising barrister held that this objection to the notice was good, and did not call upon Burgess to prove his qualification ; nor did he offer to do so.

[50] The name of Burgess, and also the names of sixty-two other persons, who were objected to in the same manner and by the same party, and whose cases were consolidated with the principal case, were retained on the list, the revising-barrister holding the notice of objection to be insufficient.

The question for the opinion of the court was, whether the above notice of objection was sufficient ; if the court should be of opinion that it was, the names of Matthew

Lea Burgess and those of the sixty-two other persons referred to were to be expunged from the register.

Welsby, for the appellant. The notice of objection in this case was sufficient, and the decision of the revising-barrister was wrong. [Cresswell, J. Is there any section in the 6 & 7 Vict. c. 18, which requires the residence of the person to whom the notice is sent to be shewn upon the face of it?] In the case of counties, the form No. 5, in schedule A., requires the insertion of the "place of abode as described" in the list or register; but, in boroughs, the form No. 11 in schedule B. requires no such thing. The only question is whether the objector has properly complied with the 100th section, which enacts that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." Here, the notice was so directed. [Cresswell, J. And the party received it.] And he appeared. The clause goes on to provide, that, "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open, and in duplicate, to the **[51]** post-master of any post-office where money-orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed 2d. over and above the ordinary rate of postage), as shall from time to time be made by the post-master general in that behalf; and, in all cases in which such fee shall have been duly paid, the post-master shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate, shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." All that has been duly complied with. The revising-barrister was probably misled by the case of *Birch*, *App.*, *Edwards*, *Resp.*, 5 C. B. 45. There, however, the objection to the copy served was, that it was not a duplicate at all. Here, it was.

Byles, Serjt., for the respondent. This case, it is submitted, is disposed of by that referred to, *Birch*, *App.*, *Edwards*, *Resp.*,—where it was held, that the service of a notice of objection by post, under the 6 & 7 Vict. c. 18, s. 100, was not proved by the production of a stamped copy similar in all respects to the notice left with the post-master save that it had no external address; such copy not being a stamped duplicate, within the meaning of the act. [Cresswell, J. In that case the supposed duplicate had no address at all.] None on the outside: **[52]** and the court held both to be necessary. Williams, J., says: "If the notice is to be sent by the post, it cannot be said to be duly directed for that purpose, unless it also bears an external address." The act of parliament requires the notice to contain the place of abode of the person objected to. [Cresswell, J. The form No. 11 in schedule B. does not, as the form No. 5 in schedule A. (which is applicable to county voters) does.] There certainly is that difference between the two forms, though it is not easy to assign a satisfactory reason for it.

Cresswell, J. There is nothing in the act of parliament, or in the form given in the schedule of a notice of objection to a borough voter, to render it necessary to mention the voter's place of abode. The appeal must, therefore, be allowed. The result of this decision being to take away the franchise from the several parties objected to, that is an additional reason for not giving costs (*a*).

The rest of the court concurring,

Appeal allowed, without costs.

(*a*) See 17 C. B. 315, n.; ante, pp. 22, 33; post, p. 62.

[53] Borough of Ashburton.

JOHN HANNAFORD, *Appellant*, WILLIAM ROLSTONE WHITEWAY, *Respondent*.
Nov. 14, 1856.

[S. C. 26 L. J. C. P. 75; 3 Jur. N. S. 673; 5 W. R. 75.]

A notice of objection sent by post, pursuant to the 100th section of the 6 & 7 Vict. c. 18, is not vitiated by the fact of the post-master having received it out of the usual hours of business prescribed by the postmaster-general.

At a court held for the revision of the lists of voters for the borough of Ashburton, William Rolstone Whiteway objected to the name of John Hannaford being retained on the list of voters for the parish of Ashburton.

The facts of the case were as follows:—

The objector, being a person qualified to object, gave due notice of objection to the overseers; and he sought to prove service of the notice of objection on the party himself by post under the statute 6 & 7 Vict. c. 18, s. 100. All the provisions of that section were strictly complied with, except as to the time when the duplicate notices were delivered to the post-master.

The objector delivered the duplicate notice to the post-master of the post-office of Ashburton, at 6 o'clock in the morning of Monday, the 25th of August, 1856. He produced before the revising-barrister one of the duplicates bearing the Ashburton post mark of the 25th of August, 1856; and he proved that the notice would in the ordinary course of post have been delivered on that day at the place to which it was addressed.

During the month of August, 1856, the Ashburton post-office was open to the public, on week days, from 7 o'clock, A.M. until 50 minutes past 3 o'clock, P.M.; and it was not compulsory on the post-master to register any letter except within those hours. Public notice was given at the office that these were the hours of business.

The hours for receiving the duplicate notices under [54] 6 & 7 Vict. c. 18, s. 100, are the same as those for registering ordinary letters.

It was contended, on behalf of the voter, that the delivery of the duplicate notices to the post-master before 7 o'clock, A.M., not being within the regular hours of business, was irregular; that, before the stamped duplicate could be produced in evidence, the objector was bound to prove that he had complied with all the provisions of the 6 & 7 Vict. c. 18, s. 100, and, amongst other things, that he had delivered the notices to the post master within the hours appointed for the transaction of that business; and that, as he failed to prove this, the stamped duplicate could not be received as evidence of the notice having been given as required by the act.

The revising-barrister was of opinion, that, as the post-master had consented to receive and compare the notices, although delivered to him at an hour when he was not bound to do so, the statute had been sufficiently complied with; and he decided that the notice of objection was duly proved. He therefore called upon the voter to prove his qualification; which he failed to do; and the revising barrister thereupon expunged his name from the list.

If the court should be of opinion that the delivery of the duplicate notice to the post master at the time above stated was not sufficient within the meaning of the statute 6 & 7 Vict. c. 18, s. 100, the name of the voter John Hannaford was to be restored to the list.

Kinglake, Serjt., for the appellant. The provisions as to notices of objections, in the case of borough voters, are contained in ss. 17, 40, and 100, of the 6 & 7 Vict. c. 18. The 17th section enacts "that every person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person as not [55] having been entitled on the last day of July next preceding to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th day of August in that year, give or cause to be given a notice, according to the form numbered 10 in the said schedule B., or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted, or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London,

then to the town-clerk of such city or borough; and every person so objecting shall also give or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice according to the form numbered 11 in the said schedule B.; and every notice of objection shall be signed by the person objecting." The 40th section amongst other things enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers or by any other person, and such other person shall appear, by himself or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." And then comes s. 100, which provides, that, "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver **[56]** the same, duly directed, open, and in duplicate, to the post-master of any post-office where money-orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed 2d. over and above the ordinary rate of postage), as shall from time to time be made by the postmaster-general in that behalf: and in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." Thus, the statute points out various modes of serving notices of objection. The service may either be personal, or by leaving the document at the place of abode of the person objected to as stated in the list, or the person objecting may avail himself of the mode of service pointed out in s. 100. But, if the person objecting chooses to adopt this latter course, it is clear, that, as between him and the person objected to, the latter has a right to have a notice transmitted in strict accordance with the provisions of the act; all the conditions which the legislature has, for sufficient reasons no doubt, thought fit to impose must be complied with. The production of such stamped duplicate, —that is, a stamped duplicate with reference to which all the conditions have been complied with,—is made evidence of the original notice having reached the hands of the **[57]** person objected to according to the ordinary course of post. It is not for the court to say whether that which the act of parliament requires is wise or not: the only question is, whether the conditions annexed to this mode of service have been strictly and properly complied with. This matter underwent considerable discussion in *Bishop, App., Helps, Resp.*, 2 C. B. 45, the judgment in which case contains almost all that can be said upon the subject. There, a notice was posted, under s. 100, in sufficient time to reach the party, according to the ordinary course of the post, on the 25th of August; and it was held that such service was sufficient, notwithstanding that the actual delivery was accidentally delayed until the 27th. In delivering the considered judgment of the court, Tindal, C. J., says: "It was argued, on the part of the respondent, that the true construction of this section was, that it should be sufficient if the notice was effectually sent, that is, sent and delivered. And there is no doubt that this would be sufficient: but it would, at the same time, be unnecessary to have this provision, which is a very special one, in order to make such a sending sufficient; for, there is no doubt that any sending and delivery, by a servant or otherwise, by which the notice came to the voter, would be sufficient by the 7th section. It is, therefore, evident that some privilege is meant to be conferred by s. 100 on a mode of dealing with the notice which is so carefully provided for. The notice must be delivered at a select description of office; within certain hours; the postage must be paid; it must be registered, and the fee for registration must be paid; it must be delivered to the post master, open, and in

duplicate; compared; stamped; and the duplicate returned. And we think the meaning of the act is this,—when all these conditions are complied with, such a sending shall be a sufficient substitute for what the 7th section required to be done, that is, a sufficient substitute for [58] giving the notice to the person objected to, or leaving it at his place of abode." This privilege is not to be extended to one who has failed to comply with any one of the conditions. Another part of the judgment shews that this very objection was present to the mind of that learned judge: for, he says,—"If this be the true construction of that part of the section which provides what sending is sufficient, it follows that the objector has done all that the act requires him to do, to enable him to call on the voter to prove his right, whether the notice arrived or not, and whether it was prevented from arriving by insufficient description of the place of abode or by default of the post-office. So that, supposing, as was insisted for the respondent, that the evidence of the stamped duplicate is not conclusive as to arrival, and was answered by proof to the contrary, as it was here, it makes no difference as to the right of the objector: as the fact so disproved is not material to his right. The stamp on the duplicate is clearly evidence of the posting on the 24th; and there was no contradiction as to that fact; so that, whatever might be the consequence if it had been shewn in evidence that the notice was not really posted on the 24th, as the proof stood, all the facts constituting a sufficient sending were proved without contradiction." The same determination was come to in *Bagley, App., The Overseers of Nantwich, Resp.*, 2 C. B. 118, in the case of a notice of claim, which was duly posted at Manchester on the 19th of July, and ought according to the ordinary course of post to have been received by the overseers at Nantwich on the 20th, but, in consequence of extraordinary pressure at the post-office, had been delayed until the 22nd. *Toms, App., Cuming, Resp.*, 7 M. & G. 94, 8 Scott, N. R. 910, 1 Lutw. Reg. Cas. 200, also shews how rigidly the court will inquire whether the conditions on which the stamped duplicate is to be received in evidence have been complied with. There, the original [59] notice was signed by the objector himself, in accordance with s. 17, but the copy was signed by an agent in his name. [Cresswell, J. And therefore it was held not to be a duplicate.] The statute is no less positive as to the hours of posting the notice, than that it shall be delivered to the post-master in duplicate. *Birch, App., Edwards, Resp.*, 5 C. B. 45, is important with the same view: the stamped copy offered in evidence was a perfect duplicate in all respects, save that it had not the external address which appeared on the original. An external address was required only by s. 100. The notice would have been perfectly good without it, if served personally or at the place of abode. But the court held a strict adherence to the directions of the statute to be requisite. [Cresswell, J. The first part of s. 100 enacts that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." Suppose the person objecting proved that such a notice was sent by post, addressed to the voter, and that the voter received it in due time,—would that be sufficient?] It would still be necessary to give notice to produce the original, in order to let in secondary evidence of its contents. [Cresswell, J. I assume all that to have been done, and that the postman proves the delivery.] That probably would be a sufficient notice under s. 17. The proof by means of the stamped duplicate, however, can only be resorted to where the conditions imposed thereon by the legislature have been strictly observed. In *Godsell, App., Innous, Resp.*, 17 C. B. 295, a notice of objection to a county voter was addressed "to the overseers of the parish or township of B.," without adding the county, as required [60] by the 6 & 7 Vict. c. 18, s. 101. The overseers having acted upon the notice, although it did not appear when it reached their hands,—it was contended, on behalf of the objector, that the overseers had no right thus to waive the performance of a condition required by the statute: and the court seemed to think the argument well founded. [Cresswell, J. The Lord Chief Justice seemed to consider that the party had an interest in the objection.] If the court should hold that it is competent to the post-master to extend the time limited for the reception of these notices, it might be enabling him to extend facilities to one political party to the prejudice of the other.

Byles, Serjt., contrà, was stopped by the court.

Cresswell, J. It appears to me that there is nothing whatever in the objection

which has been urged in this case; and that those which have been cited are perfectly distinguishable. There is no pretence for saying that the post-master is not at full liberty to receive a notice of this sort at any hour which will enable him to send it off in due time. The first branch of the 100th section says that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." The second branch provides for what the person sending the notice shall do,—"And, whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open, and in duplicate, to the post master of any post-office where money-orders are received or paid, within such hours as shall have been previously [61] given notice of at such post-office, and under such regulations with respect to the registration of such letters, &c., as shall from time to time be made by the post-master general in that behalf." Unless the party does that, he cannot claim to have his notice sent by the post. The clause then goes on to provide that, "in all cases in which such fee shall have been duly paid, the post-master shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office." Now, the post-master was not bound to receive the notice in question out of the usual office hours; therefore the person objecting could not place himself in a position to demand the performance of this duty by the post-master. It seems to me that this was merely meant for the purpose of giving the objector information as to what he is to do to entitle him to the means of proving the sending of the notice, by the stamped duplicate.

Crowder, J.(*a*). I am of the same opinion. The object of the 100th section was to give power to the objector to forward the notice of objection by post, and also to give him a particular mode of proof of the notice. It is necessary, in order to enable the objector to obtain the stamped duplicate, that the original notice should be delivered to the post master in due time. There is nothing in the act to satisfy me that it was intended to be a condition essential to the validity of the notice, that it should be delivered to the post-master within the hours appointed by the post-master for that purpose. If the post master had declined to receive the notice after the hour limited for the receipt of these documents, the party [62] would lose the opportunity of availing himself of this statutory mode of service. But, as the post-master thought fit to receive it, I see no difficulty in holding the service to be good.

Cresswell, J. This being an appeal against the decision of the revising barrister, which decision we think was perfectly right, the appeal must be dismissed with costs.

Appeal dismissed, with costs.

Borough of Ashburton.

Edwin Paddon and Moses Woolland, *Appellants*, William Rolstone Whiteway, *Respondent*. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 77; 3 Jur. N. S. 673.]

See the marginal note of the preceding case.

This case differed from the last only in this,—that the notices of objection were delivered in duplicate to the post-master at the post office at Ashburton at 6 o'clock in the evening of Sunday, the 24th of August, 1856. The stamped duplicates produced had the Ashburton post-mark of the 24th of August; and it was proved that, in the ordinary course of post, the notices would have been delivered on the 25th at the places of abode to which they were respectively addressed. During the month of August, 1856, the Ashburton post-office was open to the public on Sundays only

(*a*) Williams, J., was absent, on account of indisposition; and Willes, J., was sitting at nisi prius.

from half-past 7 o'clock A.M. until 10 o'clock A.M; and it was not compulsory on the post-master to register any letter on Sunday except within those hours.

The same objection was taken as in the preceding case, and the revising-barrister came to the same conclusion.

Appeal dismissed, with costs.

[63] County of Durham, –Northern Division.

John Hornsby, *Appellant*, John Stephenson Robson, *Respondent*. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 55; 3 Jur. N. S. 674.]

Where a notice of objection, properly directed, is posted according to the provisions of the 6 & 7 Vict. c. 18, s. 100, the production of the stamped duplicate is sufficient evidence of the due service of the notice, although, in consequence of a delay (however caused) in the post-office, it does not reach the hands of the person objected to until after the time prescribed by the statute.

At a court held for the revision of the list of voters for the northern division of the county of Durham, at Lanchester in the said division, John Stephenson Robson, being on the register of voters for the time being for the said division, objected to the name of John Hornsby being retained on the list of voters for the township of Greencroft in the said list of voters.

The said John Hornsby appeared and took a preliminary objection, viz. an objection to the sufficiency of the service of the notices of objection required by the statute in that behalf to be given by the said John Stephenson Robson to the said John Hornsby and to the overseers of the poor of Greencroft aforesaid, which preliminary objection the revising-barrister overruled, and held the notices and the services thereof sufficient according to the statute. And the said John Hornsby having failed to prove that he was entitled on the last day of July then next preceding to have his name inserted in the said list of voters in respect of his qualification as described in such list, the revising-barrister expunged his name from the list.

John Hornsby having given notice of his intention to appeal against the decision, the revising-barrister stated the following case for the opinion of this court:

The notices of objection were according to the form prescribed by the 7th section of the statute, and, being signed by the objector with his name at length, and place of abode, and duly directed, the one to the overseers of Greencroft, and the other to the party objected to, as [64] required by the statute, were, on behalf of the objector, delivered, open, and in duplicate, to the post-master of the post office at Durham, at the proper office, and within the usual hours in that behalf, on the 22nd of August, 1856, and, the same being duly registered, and the usual fees being paid, and the said post-master having compared the notices with the duplicates, the latter on the same day returned the duplicates, stamped with the stamp of the post-office, to the persons who brought the same, as required by the said statute, and which duplicates, duly signed by the objector, and stamped with the Durham post-office stamp, indicating that the notices were posted at Durham on the 22nd of August, 1856, were produced before the revising-barrister on behalf of the objector.

John Hornsby's place of abode is, Greencroft Tower, and is so described in the list of voters; and Greencroft Tower is in the township of Greencroft; and the post-town for Greencroft and Greencroft Tower is Lanchester.

According to the usual course of the post between Durham and Lanchester, letters posted at Durham reach Lanchester on the same day they are posted, or the day after at latest; and Lanchester letters are usually delivered to the parties to whom they are addressed on the same day they arrive at Lanchester. But the notices in question did not in fact arrive at Lanchester until the morning of the 26th of August, and were delivered to the parties to whom they were directed, in the course of the same day, and not before. The delay arose in the post office at Durham, from whence the notices were dispatched so late that they did not reach Lanchester until the morning of the 26th of August, as above stated. It did not appear that any blame was imputable to the above objector, or his agents, in posting the said notices, or touching the miscarriage of the same or the delay aforesaid.

[65] Upon proof of the facts above stated, it was contended, on behalf of John Hornsby, that the service of the notices of objection was too late and insufficient. The revising-barrister ruled that by the 100th section of the statute the service was sufficient; and, Hornsby having failed to prove that he was entitled to have his name on the list of voters, in respect of his qualification therein stated, he expunged his name from the list of voters.

By the like ruling upon the like preliminary objections, and upon the same state of facts, mutatis mutandis, with the exception of the peculiarities hereinafter mentioned (*a*), the revising-barrister likewise expunged from the list of voters for Greencroft aforesaid the names of the eleven persons following, viz., Joseph Johnson, George Davidson, James Brown, Isaac Waugh, John Waugh, Ralph Norton, Thomas Turbot, Joseph Heron, John Whitfield, Joseph Clarkson, and William Whitfield, who were severally objected to by the said John Stephenson Robson, and who severally failed to prove that they were entitled to have their names on the said list in respect of their qualifications as described therein.

It was peculiar to the cases of John Waugh and Ralph Norton, that the notices of objection sent by the post to them, and which were produced before the revising-barrister on their behalf respectively, bore two Durham post-marks on the back thereof, —the one dated the 22nd of August, and the other the 25th of August, 1856: and the notice to John Waugh appeared to have been re-directed, by cancelling "Greencroft Hill," the place of his abode as described in the list of voters, and substituting "Warkworth, Auckland, Northumberland;" and the notice to Ralph Norton appeared to have been re-directed by adding to "Hag Hill," the place of his abode as described in the list of voters, "Axwell Park, Gateshead:" **[66]** and the only explanation of these peculiarities that was offered before the revising-barrister, was, that the notices were posted at Durham on the 22nd of August, reached Lanchester in the usual course of the post, were then re-directed by the post-master at Lanchester, and by him sent back to Durham on or before the 25th of August.

It did not appear that the objector, John Stephenson Robson, or any agent of his, was privy to the said re-direction of or dealing with the said notices by the said post-master at Lanchester as aforesaid.

It was peculiar to the case of William Whitfield, that, in the list of voters, his place of abode was described as "Greencroft Lodge," but, in the body of the notice of objection addressed to the overseers of Greencroft, the place of abode of William Whitfield was described as "Greencroft" only. Greencroft Lodge is in the township of Greencroft; and the variance did not mislead the overseers of Greencroft, either touching the identity of the said William Whitfield, or in any other respect.

The cases were consolidated.

Manisty appeared to support the appeal.

CRESSWELL, J. This case is disposed of by that of *Bishop, App., Helps, Resp.*, 2 C. B. 45, 1 Lutw. Reg. Cas. 353. The appeal must be dismissed with costs. The person objecting has done all that the statute requires of him; and he is not responsible for the delay at the post-office.

CROWDER, J., concurring,

Appeal dismissed, with costs.

End of the Registration Cases.

[67] MORISSE *v.* THE ROYAL BRITISH BANK. Nov. 25, 1856.

[S. C. 26 L. J. C. P. 62; 3 Jur. N. S. 137; 5 W. R. 138. See *Julius* v. *Bishop of Oxford*, 1879-80, 4 Q. B. D. 259; 5 App. Cas. 224.]

A creditor who has obtained judgment against a joint stock banking company, and has ineffectually issued execution against their property and effects, is, under the 7 & 8 Vict. c. 113, ss. 10, 13, entitled as of right to execution against a shareholder, on complying with the conditions imposed by the statute. And it is no answer to a motion for that purpose, that the affairs of the company are in course of arrange-

(*a*) See *Prior, App., Warring, Resp.*, 5 C. B. 56, 2 Lutw. Reg. Cas. 45, and *Robson, App., Brown, Resp.*, ante, p. 34.

ment under the winding-up acts and under a fiat in bankruptcy, and that assets to a large amount are already in the hands of the official manager, and that there is reasonable ground to believe that within a short (but indefinite) time enough will be realised to meet all the engagements of the concern.—Personal service of the ten days' notice required by s. 13 is not necessary: it is sufficient if the notice is left with a servant at the dwelling-house of the person sought to be charged.—The 10th section of the 7 & 8 Vict. c. 111, which enacts that the rights of creditors as against the person, property, and effects of shareholders shall not be prejudiced or affected by proof under a fiat against the company, and that no execution shall be issued against the person, property or effects of any member, until after proof of the debt under the fiat, is not repealed by the 182nd section of the general bankrupt act, 12 & 13 Vict. c. 106, which enacts that the proving or claiming a debt under a fiat shall be deemed an election by the creditor to take the benefit of such fiat, —that provision being merely a re-enactment of the 59th section of the 6 G. 4, c. 16.

Lush, on a former day in this term, obtained a rule calling upon Mr. Richard Hartley Kennedy to shew cause "why execution upon the judgment recovered by the plaintiff in this cause for the sum of 214l. 11s. 6d., should not be issued against the person, property, and effects of the said Richard Hartley Kennedy as a shareholder of the said bank, to satisfy the said sum of 214l. 11s. 6d. recovered in this cause pursuant to the act 7 & 8 Vict. c. 113."

The affidavits upon which the motion was founded were those of the plaintiff and of the two clerks of his attorney, which stated in substance as follows: That the action was commenced against the Royal British Bank on the 8th of September last, to recover the sum of 205l. 13s. 4d., being the balance due to the plaintiff on his drawing account: That, on the 24th of September, an order was made by Kindersley, V. C., to wind up the affairs of the said bank under the Joint Stock Companies Winding-up Act, 1848: That, on the 21st of October last, the plaintiff made an affidavit of his said debt under and in pursuance of the Joint Stock Companies **[68]** Winding-up Act (*a*), and such affidavit was filed on the same day at the proper office for that purpose, and the office copy of such affidavit was on the following day sent by the plaintiff's attorney to the defendants' solicitors: That, on the same 21st of October last, the plaintiff's pass-book was left by him at the said bank to be made up, and it was made up and returned to him on the same day; and the said book then shewed a balance standing to his credit amounting to 205l. 13s. 4d.: That, on the 9th of October last, a petition for adjudication of bankruptcy was presented against the said Royal British Bank, under which adjudication of bankruptcy had been made: That, on the 3rd of November instant, judgment was obtained by the plaintiff against the said Royal British Bank in this action for 205l. 13s. 4d., and 8l. 18s. 2d. for costs, making together 214l. 11s. 6d.: That, on the 4th of November instant, a writ of fi. fa. was issued in this action upon the above judgment, directed to the sheriffs of London, to levy the sum of 214l. 11s. 6d., with interest, costs of execution, &c., upon the effects of the Royal British Bank, at the head offices in Threadneedle Street; and on the same day the sheriffs made a return of nulla bona: That the deponent had been informed, and verily believed, that the official manager, under the said order of the Vice-Chancellor Kindersley for winding up the said Royal British Bank, had possessed himself of the property and effects of the said Royal British Bank under that order, and that such property and effects were insufficient to pay the debts of the said Royal British Bank, and the deponent verily believed that any further execution against the **[69]** property of the said Royal British Bank upon the judgment in this action would be unavailing, and that his only prospect of obtaining full satisfaction for his said debt was by proceeding against the individual members or shareholders of the said Royal British Bank: That a notice requiring payment of the said debt due upon the said judgment was served by his (the plaintiff's) attorney on Richard Hartley Kennedy, a shareholder in the said bank, on the 5th of November

(*a*) Under the Joint-Stock Companies Winding-up Act, 1848,—11 & 12 Vict. c. 45, s. 73, the creditor is required to prove his debt before the Master before commencing or proceeding with any action against the official manager or against the company.

instant: That the first meeting for proof of debts under the bankruptcy of the said Royal British Bank took place at the court of Bankruptcy, London, on the 6th of November instant, and the deponent attended the meeting, and there proved his said debt under the said bankruptcy, in the form prescribed by the bankrupt laws, and such his proof was then admitted, and still remained on the said proceedings in bankruptcy: That the said debt of 205l. 13s. 4d., with 8l. 18s. 2d., the costs of the said action, making together the said sum of 214l. 11s. 6d., was still justly due to him from the said Royal British Bank, and he had used every exertion to obtain payment of his said debt from the funds and property of the said company, but no payment in respect thereof had been made to him: That it was very uncertain when any dividend would be paid in respect or on account of his said debt, for that questions had arisen, and were still undetermined, as to whether the affairs of the said bank were to be wound up under the superintendence of the court of Chancery or of the court of Bankruptcy, and the deponent was informed and believed that the parties contesting such questions threatened and intended to appeal to the House of Lords for the settlement thereof.

The affidavit of one of the clerks to the plaintiff's attorney stated, that he did on the 5th of November instant serve Richard Hartley Kennedy, of, &c., with a notice (setting it out), stating that judgment had been **[70]** obtained in this action against the bank, and a return of nulla bona made to a fi. fa. issued against the bank, and that, unless he paid to the plaintiff's attorney within ten days from the date of the notice the amount due upon the judgment, application would be made to the court for leave to issue execution against his person, property, and effects, as a shareholder in the said bank, "by delivering to and leaving with the footman of the said Richard Hartley Kennedy, at his residence, at, &c., a true copy of the said notice:" That the deponent did, on the 6th of November instant, search at the office of returns to be made by banks, at Somerset House, for the last return made by the above-named Royal British Bank, and the name of Richard Hartley Kennedy, alderman, appeared on the list of shareholders returned to the said office in the month of June last, and that the said Richard Hartley Kennedy was and still is a shareholder in the said Royal British Bank.

There was also an affidavit verifying the signature of the commissioner of Her Majesty's inland revenue to the return of shareholders of the Royal British Bank.

Hugh Hill, Q. C., and Aspland, now shewed cause, upon the affidavits of Mr. Kennedy and his attorney. The former stated that the writ of summons in this action was issued on the 8th of September last, and judgment was signed on the 3rd of November, and the writ of fi. fa. issued on the 4th: That the said bank was a company established for the purpose of carrying on the business of banking under the 7 & 8 Vict. c. 113: That, on the 9th of October last, a petition for adjudication of bankruptcy against the said bank was presented, under the provisions of the 7 & 8 Vict. c. 111, for facilitating the winding up of the affairs of joint-stock companies unable to meet their engagements, by a creditor of the said bank, to the court of Bankruptcy **[71]** in London, on which upon the same day the said bank was adjudicated bankrupt, and Mr. Charles Lee was appointed official assignee of the estate and effects of the said bankrupt company, and on the 6th of November creditors' assignees were appointed: That, on the 6th of November, the plaintiff attended a meeting for proof of debts under the said adjudication, and then proved as a creditor under the said adjudication the debt sought to be recovered by him in this action, and such proof was duly admitted: That, on the 6th and 12th of September respectively, petitions were presented to the court of Chancery for winding up the affairs of the said bank under the Joint Stock Companies Winding up Acts, on which said petitions an order absolute for winding up the said bank was made under the provisions of the said acts by the Vice Chancellor Kindersley on the 24th of September: That, on the 27th of September, Mr. Harding was appointed interim manager of the property, assets, and effects of the said company under the 20th section of the Winding-up Act, 1848; and, on the 30th of October last, he was appointed official manager, under the same statute: That no proceeding had been taken by any person for setting aside or avoiding the said order absolute: That the deponent had obtained information from the said official manager, and found from him (which he has no doubt to be true) that the said official manager has money (being assets of the bank) in his hands, to an amount exceeding 100,000l., ready to be divided amongst the plaintiff and the other creditors of the

bank, and the said official manager would be able to collect, and would collect, further sums, to the amount of 150,000l., within a short time, and not exceeding a very few months from the present time, which sum would be applicable to a further dividend; and that further sums, to the amount of 50,000l. and upwards, would be realized **[72]** from the existing assets of the company within the same time, or a short time thereafter: That the deponent had also ascertained from Mr. Coleman, who acted as accountant, and had investigated the affairs of the said bank, and prepared a balance-sheet, which was laid before a meeting of shareholders of the said bank held in September last (and which information he believed to be true), that, of the assets of the said bank, 100,000l., in addition to the 100,000l. and upwards now in hand, would be collected and got in ready for division among the creditors within three months from the present time, besides other considerable sums which might probably be realized within a short time, by sale of the various premises in which the bank lately carried on business, and that the assets of the said bank would produce 300,000l. in addition to a further large sum expected to be realized by disposing of certain iron-works part of the assets of the bank: That, on the list of shareholders of the bank were many substantial persons contributories under the said winding-up order, who were able amongst them to meet all calls which it might be necessary to make for the purposes of satisfying the plaintiff and the other creditors of the bank; and the deponent had no doubt that all calls necessary for that purpose would be speedily made under the said winding-up acts, and that thereby, and by means of the assets of the bank the claims of the plaintiff and of all other creditors would be speedily satisfied, and more speedily than in any other way: That the deponent had ascertained from the said official manager and accountant that they also were of opinion that the contributories of the bank were able to meet the amount of all such calls: And that the deponent had no doubt that the plaintiff and the said other creditors would be speedily satisfied, whether the assignees in bankruptcy or the official manager had the disposition of the said assets of the bank.

[73] The affidavit of the attorney of Mr. Kennedy stated that he was present on the 24th of November instant in the court of Vice-Chancellor Kindersley, and heard him give judgment in the matter of an application to dissolve an injunction restraining the official assignee and manager under the adjudication of bankruptcy against the defendants from interfering with the assets of the said bank, and also in the matter of another application for an order directing the official manager appointed under the order absolute for winding up the said bank, to deliver over the assets of the said bank to the said official assignee: That his Honor dissolved the ex parte injunction which had been granted on the application of the said official manager, restraining the interference of the said official assignee and messenger with the said assets, and ordered that the said official manager should deliver over the said assets (less the expense incurred in collecting those already realised) to the said official assignee: That, although the effect of his Honor's judgment was substantially to assert the validity of the bankruptcy for the purpose of distributing the existing assets of the estate, his Honor observed that the order absolute for winding up was good and subsisting, and that the official manager would be the party to receive the calls which would have to be made upon the contributories: And that the deponent had no doubt that the assets of the bank already and to be collected, would be speedily distributed, and that all necessary calls for the satisfaction of the creditors of the said bank would be made with as little delay as possible.

1. The material point to consider in this case is, whether or not the court has any discretion,—whether they are bound to permit the execution to go against a shareholder, the judgment-creditor having performed all the conditions prescribed by the statute, or whether they may look at all the circumstances of the case, to see that it is **[74]** a fit one for their interference in this summary way. It appears that the affairs of the bank are in course of winding up, and that already a large sum of money is in the hands of the official manager. The 9th section of the act for the regulation of joint-stock banks, 7 & 8 Vict. c. 113, enacts that "every judgment, decree, or order of any court of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions thereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual

shareholder and former shareholder had been by name a party to such proceeding." The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution, in satisfaction of such judgment, decree, or order, against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose:" then follows a proviso limiting the extent of the liability of former shareholders. [Williams, J. The utmost diligence of the judgment-creditor could not obtain satisfaction out of the moneys in the hands of the official manager: they could not be reached by an execution. Willes, J., referred to the language of Alderson, B., in *Thompson* v. *The Universal Salvage Company*, 3 Exch. 310, 319, where that learned judge said, —"It would be very unjust, and not a fair construction **[75]** of the 7 & 8 Vict. c. 110 (s. 68), that a creditor should proceed against an individual shareholder, when he has a right to go against the assets of the whole company. When he has done so without success, he may again resort to the individual." Lush. In a case in the court of Exchequer in this term,—*Hill* v. *The London and County Insurance Company*, 1 Hurlst. & Norm. 398,—those expressions are repudiated. Cockburn, C. J. The real question is, whether the 13th section gives us any discretion. That section enacts, "that, in the cases provided by this act for execution on any judgment, decree, or order, in any action or suit against the company to be issued against the person or against the property and effects of any shareholder or former shareholder of such company, —or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company,—such execution may be issued, by leave of the court, or of a judge of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or discharge such motion (as the case may be), and to direct the costs of the application to be paid by either party or to make such order therein as to such court or judge shall seem fit." "Provided that any order made by a judge as aforesaid may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder, until ten days' notice there-**[76]**-of shall have been given to the person sought to be charged thereby." The execution is to issue "by leave of the court:" but the question is, whether that means any more than that the court must be satisfied that proper endeavours have been made to put the fi. fa. in force against the effects of the company. Can we enter into the merits of the question, and take upon ourselves to determine that this or that course will be more expedient for the general benefit of the creditors of the bank?] In a case in the court of Queen's Bench in the present term, —*Palmer* v. *The Justice Assurance Society*, 28 Law Times, 120, that court assumed to have a discretion under the 7 & 8 Vict. c. 110, s. 68, and enlarged the rule for a week; Lord Campbell saying, that, if it was then made to appear that there was a prospect of satisfaction being speedily obtained under the winding-up act, they would enlarge the rule still further. But, the affidavit not being satisfactory in that respect, the rule was ultimately made absolute. Here, the affidavits shew the strongest possible grounds for inducing the court to decline to permit the creditor to pursue this very stringent remedy. The statute should receive a large and liberal construction. [Cockburn, C. J. It certainly does seem very unjust that one creditor should thus be permitted to complicate this already more than sufficiently intricate matter. But the language of the statute seems to me to leave us no discretion. I fear we have nothing more to do than to see that the execution-creditor has complied with all the conditions which the legislature has thought fit to impose upon him. Having done that, the execution is matter of right.] The 182nd section of the

Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106 (*a*)[1], makes the proof of a debt an election not to **[77]** proceed against the bankrupt by action. In *Geikie* v. *Hewson*, 4 M. & G. 618, 5 Scott, N. R. 484, pending an action of debt by A. against B., as acceptor of a bill for 468l. 1s. 9d., and for 1500l. for goods sold and delivered, &c., A. filed an affidavit in the court of bankruptcy, under the 1 & 2 Vict. c. 110, s. 8, stating B. to be indebted to A. in 468l. 1s. 9d. for goods sold and delivered, &c., and also upon a bill for 468l. 1s. 9d. Afterwards, on the 11th of February, B., with C. and D. as his sureties, gave a bond to A. conditioned for the payment of such sum as should be recovered in the action for the alleged debt, or for the render of B. On the 15th of March a fiat in bankruptcy was awarded against B. On the 21st of March, A. signed judgment against B. for 1332l. 19s. 6d. On the 5th of April, A. proved under the fiat for 864l. 12s. 9d., being the amount of the judgment debt, excluding the 468l. 1s. 9d. On the 12th of April, a ca. sa. against B. was lodged with the sheriff. On the 30th of May, A. brought an action against C. and D. on the bond. It was held that the proof under the fiat was an election to relinquish the action against B., and that B. being entitled to be discharged if rendered, C. and D. were entitled to have the proceedings stayed. This raises a very important question, and one which the party proceeded against ought to have an opportunity of raising by plea to a scire facias. [Lush. By the 10th section of the 7 & 8 Vict. c. 111 (*a*)[2], the judgment-creditor is obliged **[78]** to prove under the fiat against the company, and it is expressly provided that such proof shall not prejudice his right to have recourse against the members.] The 12 & 13 Vict. c. 106, s. 182, being subsequent to that provision, must be taken to have repealed it. There is, therefore, no longer any necessity for proving the demand under the fiat. And there is no injustice in this: the principle of the bankrupt law is, that there shall be an equal distribution of the effects of the bankrupt amongst all his creditors. [Willes, J. The 182nd section of the 12 & 13 Vict. c. 106, is a mere re-enactment, in the same words, of that part of the 6 G. 4, c. 16, s. 59: it is not therefore, a provision enacted since the Joint-Stock Companies Winding-up Act, 1844, and consequently does not **[79]** repeal it. Crowder, J. What answer would you have to a scire facias, assuming your reliance upon the 182nd section of the 12 & 13 Vict. c. 106, to be unfounded?] An appeal to the equitable discretion of the court.

(*a*)[1] "That no creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy, or have any claim entered upon the proceedings, without relinquishing such action or suit; and the proving or claiming a debt under a fiat or petition for adjudication of bankruptcy by any creditor, shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt so proved or claimed."

(*a*)[2] Which enacts "that no action, suit, or other proceeding by any creditor or creditors of any such company or body, shall, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof, be deemed to prejudice or in any manner affect the right of such creditor or creditors to sue out or prosecute a fiat against such company or body, or his or their right to prove or claim under any fiat against such company or body any debt or demand remaining unsatisfied; and that no such fiat, or proof or proceeding thereunder, shall be deemed to prejudice or in any manner affect the right of any creditor or creditors of such company or body to institute or maintain any action, suit, or other proceeding, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof: Provided always, that nothing herein contained shall prevent remedy against co-partners: Provided also, that no execution in respect of any debt or demand proveable under the fiat against any such company or body adjudged bankrupt, shall be issued against the person, property, or effects of any member or members for the time being of such company or body, or any former member or members thereof, until after such debt or demand shall have been proved under such fiat, nor shall any such execution be issued after the appointment of a receiver in manner hereinafter mentioned, without leave of the High court of Chancery."

3. Then, the 13th section of the 7 & 8 Vict. c. 113, requires, that, previously to the application for execution, ten days' notice shall be given "to the person sought to be charged thereby." Now, the affidavit of service states that the notice was served by delivering it to Mr. Kennedy's footman, at his residence,—not stating that the footman was desired to give the paper to his master,—or that any subsequent inquiry was made of him as to whether he had done so or not; nor is shewn to have come to his hands. In *Esdaile* v. *Smith*, 18 Law Journ. Exch. 120, a rule for a scire facias to have execution against a member of a joint-stock company, was served on the father, sister, and son of the defendant, at the defendant's residence; and it was held not to be good service. [Willes, J. Personal service was not necessary. *Doe d. Griffiths* v. *Marsh*, 4 T. R. 464: a footman is of all persons the most proper person to whom to deliver a notice that is intended for his master. Crowder, J. It is not pretended that the notice did not reach the hands of Mr. Kennedy.] The giving of notice is a condition imposed by the act: the party moving should at least be in a position to prove facts sufficient to induce a belief that the notice came to the hands of the person sought to be charged ten days before the motion.

Lush and Beasley, in support of the rule. The judgment-creditor has a right given to him by the statute, and, having done all that the statute requires him to do as the condition upon which he is to be entitled to exercise that right, this court has no power to deprive him of it. The 9th section of the 7 & 8 Vict. c. 113, enacts "that every judgment, decree, or order of any [80] court of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The legislature thus shews itself scrupulously anxious to preserve the rights of creditors. Then comes the 10th section, which enacts "that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment, decree, or order, against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose." Then follows in s. 13 the machinery by means of which that right is to be enforced,—"In cases provided by this act for execution on any judgment, decree, or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company, or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company, such execution may be issued by leave of the court or of a judge of the court in which [81] such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or dismiss such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit." Permissive words like these, in other acts, have been held obligatory: see *Macdougall* v. *Paterson*, 11 C. B. 755 (over ruling *Jones* v. *Harrison*, 6 Exch. 328, 2 L. M. & P. 257); *Orchard* v. *Mossy*, 2 Ellis & B. 206; *Crake* v. *Powell*, 2 Ellis & B. 210; *Reid* v. *Gardner*, 8 Exch. 651. [Cockburn, C. J. According to your argument, even though the proceedings under the winding up acts, and in bankruptcy, will eventually produce 20s. in the pound, the judgment creditors may in the mean time fall upon any one shareholder and ruin him!] That undoubtedly is the law. [Cockburn, C. J. It may be so. The winding up acts have nothing whatever to do with the creditors. The 10th section of the 7 & 8 Vict. c. 111,—which is also a winding up act for these companies,—expressly reserves the rights of creditors. It

enacts "that no action, suit, or other proceeding by any creditor or creditors of any such company or body shall, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof, be deemed to prejudice or in any manner affect the right of such creditor or creditors to sue out or prosecute a fiat against such company or body, or his or their right to prove or claim under any fiat against such company or body any debt or demand remaining unsatisfied; and [82] that no such fiat, or proof or proceeding thereunder, shall be deemed to prejudice or in any manner affect the right of any creditor or creditors of such company or body to institute or maintain any action, suit, or other proceeding, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof: Provided always, that nothing herein contained shall prevent remedy against co-partners: Provided also, that no execution in respect of any debt or demand provable under the fiat against any such company or body adjudged bankrupt, shall be issued against the person, property, or effects of any member or members for the time being of such company or body, or any former member or members thereof, until after such debt or demand shall have been proved under such fiat, nor shall any such execution be issued after the appointment of a receiver as hereinafter mentioned, without leave of the High Court of Chancery." [Crowder, J. As the commencement of the 13th section of the 7 & 8 Vict. c. 113, shews that the party must have put himself in a position to demand execution against the shareholder, how do you deal with the words at the end "or to make such order therein as to such court or judge shall seem fit?"] It may be that the court may see reason to doubt the truth of the affidavits upon which the application is founded; or it may be that the application is at the suit of a shareholder, under ss. 11, 12 (*a*), who has been compelled to pay the judgment-[83]-creditor; or the applicant may be a debtor to the company, in respect of calls or otherwise. The statute clearly never intended to give the court any discretion, where the judgment-creditor has done all that is required of him. Indeed, it would seem absurd to hold that the 13th section gives the court a discretion, when the 10th section had already given the creditor an absolute right. [Cockburn, C. J. The right of the judgment creditor is to be exercised with the leave of the court. If the court see reason to think that great injustice will be done by allowing execution to issue, surely they may suspend the rule. It would be remarkable if any such discretion were given to the court, from any consideration of mercy to the shareholder, when the legislature has been so careful to preserve the rights of creditors intact. *Thompson* v. *The Universal Salvage Company*, 3 Exch. 310, was decided upon the 66th section of the 7 & 8 Vict. c. 110, the words of which are somewhat different from those of the 10th section of the 7 & 8 Vict. c. 113. [Crowder, J. The language of both is substantially the same. Under the one, the applicant must shew that he has used "due [84] diligence" to obtain satisfaction from the company; under the other, that his execution against the company is "ineffectual."] The case of *Hill* v. *The London and County Assurance Company* is decisive of the question. Martin, B., there says:

(*a*) Section 11 enacts, "that every person against whom or against whose property or effects any such execution shall have been issued shall be reimbursed out of the property and effects of the company, for all moneys paid, and for all damages, costs, and expenses incurred by him by reason of such execution, or of the action or suit in which the same shall have issued, or, in default of such reimbursement, by contribution from the other shareholders of the company."

And s. 12 enacts, "that, if any such execution be issued against any present or former shareholder of the company, and if, within fourteen days next after the levying of such execution, he be not reimbursed, on demand, out of the property and effects of the company, all such moneys, damages, costs, and expenses as he shall have paid or incurred in consequence of such execution, it shall be lawful for such shareholder, or his executors or administrators, to have execution against the property and effects of the company in satisfaction of such moneys, damages, costs, and expenses; and the amount of such moneys, damages, costs, and expenses shall be ascertained and certified by one of the masters or other officer of the court out of which such execution shall issue."

"My attention has been particularly called to the effect of the winding up acts, while sitting at Chambers with Cresswell, J. We were referred to a judgment of Vice-Chancellor Page Wood, in which that learned judge stated the true construction of the winding up acts. At the time of the decision in *Thompson* v. *The Universal Salvage Company*, it was supposed that the acts were intended to interfere with creditors. But, on further consideration, courts of equity have concluded that the statutes have not that effect. The real object was to compel the shareholders to contribute and pay equally according to their interests. They do not affect creditors, but leave them free to pursue their common-law remedies. But, as it is desirable that the official-manager should know what the debts are, parties are compelled to go before the master and prove their debts. The courts of common law stay the proceedings till that is done; but, subject to that, the creditor is free, and can proceed to enforce his judgment in any way he pleases. By the statute these companies are constituted quasi corporations, so that creditors must look for the fruits of their judgments first to the effects of the corporation; but, when that has been done, the shareholders are liable as partners. It is a great misfortune that it has ever been supposed that shareholders are in a different position from ordinary partners."

Cockburn, C. J. I was at first disposed to doubt whether the court did not possess some discretionary power under the 7 & 8 Vict. c. 113, s. 13. And, if such discretionary power had been vested in the court, I [85] should, under the peculiar circumstances of this case, have been very disinclined to allow execution to go against the shareholder. The subject, however, has already been discussed and decided by the court of Exchequer in the case of *Hill* v. *The London and County Assurance Company*, which is precisely in point. That court has held, that the statute leaves us no discretion, and that a creditor who has put himself in a position, by performing the prescribed conditions, to demand execution against a shareholder, is entitled to it as of right: and Martin, B., says, that, not only is that the opinion of the court of Exchequer, but also that of Vice-Chancellor Page Wood. I very reluctantly yield to the weight of that authority, and hold that this rule must be made absolute.

Williams, J. I am of the same opinion. The case of *Hill* v. *The London and County Assurance Company* shews that we have no discretion. The remarks of my Brother Martin are fully justified by the terms of the act. The only question is, whether execution is to go or not. A creditor who has obtained a judgment against the company, and has made an ineffectual attempt to obtain satisfaction thereof by execution against the property and effects of the company, and has given the notice required by s. 13, has acquired a legal right; and we are bound to give him the remedy the law allows. There was considerable discussion at one time as to whether the word "may," in the 13th section of the County-Court Act, 13 & 14 Vict. c. 61, was discretionary or imperative: the court of Exchequer, in *Jones* v. *Harrison*, 6 Exch. 328, 2 L. M. & P. 257, at first thought it gave the court a discretion; but this court, in *Macdougall* v. *Paterson*, 11 C. B. 755, and afterwards the court of Queen's Bench in *Orchard* v. *Mossy*, 2 Ellis & B. 206, and *Crake* v. *Powell*, 2 Ellis & B. 210, having held the contrary, the court of Exchequer, in a subsequent case of [86] *Reid* v. *Gardner*, 8 Exch. 651, concurred in the view taken by the other courts. I think it is quite impossible to suppose that the winding-up acts can or ought to have any effect to alter or abridge the rights of creditors. They were evidently intended only for the advantage of the shareholders, to enforce contribution amongst themselves. The only point which presented any plausibility of argument was, the suggestion that the 10th section of the 7 & 8 Vict. c. 111, was repealed by the 182nd section of the last bankrupt act, 12 & 13 Vict. c. 106. But it is clear that this last mentioned provision cannot, by merely re-enacting a previous section of the 6 G. 4, c. 16, operate a repeal of the intermediate enactment. Upon the whole I arrive not without some pain at the conclusion that we are bound to make this rule absolute.

Crowder, J. I agree with my Lord and my Brother Williams in thinking that the sound construction of the statute in question is, that, where the judgment-creditor has duly performed all the conditions imposed upon him, he is entitled as a matter of right to have the remedy which the statute has given him. The object of the 10th and 13th sections of the 7 & 8 Vict. c. 113, taken together, is, that, the judgment creditor having done all that is requisite to confer upon him that right, the court shall enable him to carry it out by execution, instead of the more expensive and circuitous proceeding by scire facias. If a scire facias had issued here, the party

against whom the application is made would clearly have had no answer. The only answer suggested, viz. that the 10th section of the 7 & 8 Vict. c. 111, is virtually repealed by the 182nd section of the 12 & 13 Vict. c. 106, is met by the remark that this latter section is in terms a mere re-enactment of the 6 G. 4, c. 16, s. 59, and therefore could not operate a repeal of the subsequent provision. There is consequently no answer to this motion, and the rule must be made absolute.

[87] WILLES, J. I am of the same opinion. As to the construction of the 182nd section of the bankrupt act, there is a recent case before Vice-Chancellor Kindersley, of *Wallace* v. *Blackwell*, 3 Drewry, 538, where the change of position of a clause, by its re enactment in a subsequent statute, was considered not to vary its operation. The other point seems to me to be perfectly clear. The 10th section of the 7 & 8 Vict. c. 113, gives the judgment-creditor a right to have execution against the person, property, and effects of any shareholder, if his execution against the company shall be ineffectual to obtain satisfaction against them. I agree that the 13th section only defines the mode of enforcing that right. I apprehend no answer could be made to the motion, when the creditor has complied with all the conditions imposed by the statute. The words in s. 13, "it shall be lawful for such court or judge to make such order therein as to such court or judge shall seem fit," are a mere expression of the power that is inherent in the court. Expressio eorum quæ tacitè insunt nihil operatur. The meaning is, that the court shall make an order, not according to attributive justice, but according to the usage and practice of the court. The court would not, for instance, have power to give time to a debtor. The doubts entertained by my Lord appear to have prevailed in the case of *Thompson* v. *The Universal Salvage Company*. But that case has since been to that extent overruled. It is now clearly settled that the winding-up acts were only intended to operate as between the shareholders themselves, — to give the official-manager the means of making calls to meet the claims against the company. Upon the whole, however painful it may be, we can only, in the discharge of the duty imposed upon us by the legislature, make this rule absolute.

Rule absolute.

[88] WARDE *v.* STUART AND ANOTHER. Nov. 4, 1856.

[S. C. 5 W. R. 6.]

A. entered into a contract with B., to proceed to the coast of Africa, and there procure and ship for B. in England, palm-oil and other produce, A. to receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the dry merchantable palm-oil received by B.: the agreement further provided that A. should not be entitled to any commission on "any wet, dirty, or unmerchantable palm-oil" that might be received:—Held, that A. was entitled to no commission in respect of palm-oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price.

This was an action for money payable by the defendants to the plaintiff for work done by the plaintiff for the defendants, at their request, and for commission due and payable by the defendants to the plaintiff in respect thereof, and for money received by the defendants for the use of the plaintiff, and for interest upon and for the forbearance by the plaintiff to the defendants, at their request, of divers sums of money due and owing from the defendants to the plaintiff, and for money found to be due from the defendants to the plaintiff on divers accounts stated between them. Claim 5000*l.*

The defendants pleaded,—first, except as to 1975*l.*, parcel of the plaintiff's claim, never indebted,—secondly, except as aforesaid, that the plaintiff's claim, except as aforesaid, was before suit satisfied and discharged by payment,—thirdly, except as aforesaid, a set-off for money payable by the plaintiff to the defendants for money paid by the defendants to the plaintiff's use, at his request, and for money had and received by him to their use, and for the insurance by the defendants for the plaintiff, at his request, of certain large amounts on commission and property of the plaintiff's against loss by perils of the seas and otherwise, and for interest upon the forbearance by the

defendants to the plaintiff, at his request, of moneys due from the plaintiff to the defendants on accounts stated between them,—fourthly, as to the 1975l., parcel of the plaintiff's claim, payment into court.

The plaintiff took and joined issue upon the first three [89] pleas, and replied to the fourth by accepting the 1975l. in satisfaction of his claim pro tanto.

The cause was tried before Bramwell, B., at the last assizes at Liverpool. The facts were as follows:—The plaintiff had been for some years engaged as a factor or agent in the African coasting-trade. The defendants, Messrs. Stuart & Douglas, are merchants at Liverpool largely engaged in the African trade. In the year 1853, the plaintiff proceeded to Africa in the capacity of supercargo or agent for the defendants, for the purpose of procuring goods by way of barter, upon the terms contained in the following agreement:—

"Agreement made and entered into this 19th day of September, 1853, between Peter Stuart and Peter Douglas, both of Liverpool, in the county of Lancaster, merchants and co-partners, of the one part, and John Angus Warde, of Liverpool aforesaid, agent and supercargo, of the other part, as follows:—

"1. That the said John Angus Warde shall go out to the river Bonny, on the west coast of Africa, in such vessel as the said Peter Stuart and Peter Douglas shall as soon as practicable appoint, and there remain in the service and as the agent of the said Peter Stuart and Peter Douglas, or the survivor of them, for the purposes of the adventures in which the said co-partners are and shall be interested, and take charge of, discharge, reload, and dispatch all such vessels, and sell, barter, and dispose of all such articles, goods, and merchandises as the said Peter Stuart and Peter Douglas shall transmit and consign to him for those purposes, and shall purchase or procure in exchange for such articles, goods, and merchandise, the utmost quantity of specie, palm oil, ivory, or other African produce that he can obtain, and shall from time to time, with the least possible delay, ship and transmit the same to the said Peter Stuart and Peter Douglas, and the survivor of them, in Liverpool afore-[90]-said, or other port or ports as ordered, in and on board such ships or vessels as they or he may consign to him as aforesaid.

"2. That the said John Angus Warde shall remain in the river Bonny aforesaid as such agent of the said Peter Stuart and Peter Douglas until he shall have purchased about eleven hundred tons, more or less, of palm-oil.

"3. That, should the said John Angus Warde, from sickness or any other cause, be rendered incapable of attending to his duties, he is, in the absence of any instructions from the said Peter Stuart and Peter Douglas, to appoint such persons as he may think most competent to take his place.

"4. That the said John Angus Warde shall sign the bills of lading, inventories, or other accounts for all articles, goods, wares, and merchandise that may be transmitted to him by the said Peter Stuart and Peter Douglas, or the survivor of them, in acknowledgment of his having received the same articles, immediately on receipt of each vessel, and shall return such bills of lading or inventories in original and duplicate to them by the master of each vessel bringing such consignment, and also by the first eligible opportunity that may present itself after such arrival outwards.

"5. That, in the event of there being any deficiency in the goods, wares, things, and merchandise purporting by any such bills of lading or inventories to have been consigned to him the said John Angus Warde, he shall immediately note the particulars of such deficiency upon such bill of lading or inventory, in the presence of the master or mate or other two senior officers for the time being of the vessel by which such things shall purport to have been consigned; and, in the event of the said John Angus Warde in any instance failing or neglecting to make such note in such presence, or of his [91] failing to return such bills of lading or inventories in original and duplicate as aforesaid, he shall in every instance of such omission be deemed and taken to have received the whole of the goods and merchandise mentioned in such bills of lading or inventories, and shall account for or make good the whole thereof to the said Peter Stuart and Peter Douglas, or the survivor of them, and the cost thereof be made a set-off against his commission.

"6. That the said John Angus Warde shall from time to time and at all times during his stay on the coast of Africa under and in pursuance of this agreement, obey and follow such instructions as may be forwarded to him by the said Peter Stuart and Peter Douglas, or either of them, by letter.

"7. That the said John Angus Warde shall whilst on the coast of Africa exclusively devote the whole of his time and attention to the business and employment of the said Peter Stuart and Peter Douglas, or the survivor of them, and shall not engage in any other business, speculation, or employment whatever, either by or for himself or for or with any other person or persons whomsoever, or allow any person or persons under his command to trade for themselves or for account of any other person or persons than the said Peter Stuart and Peter Douglas.

"8. That the said Peter Stuart and Peter Douglas and the survivor of them shall allow and pay to the said John Angus Warde, as a remuneration for his services, a commission of 6l. sterling per cent. on the net proceeds of the dry merchantable palm-oil or other African produce received by the said Peter Stuart and Peter Douglas, such commission to become due when the said proceeds have been received in cash, making the usual deductions in accordance with the rules and regulations of the Liverpool African Association.

"9. That the said John Angus Warde shall not be [92] entitled to any commission or other remuneration whatever on any such specie, palm-oil, or other African produce that may be bartered for or purchased by him as aforesaid, but which from loss of ship or otherwise shall not be actually received in Great Britain, or in any wet, dirty, or unmerchantable palm-oil that may be received: and it being further expressly understood and agreed that the said Peter Stuart and Peter Douglas shall have an absolute lien and charge on all such commissions for any deficiency in goods, wares, or merchandise belonging to them that may come into the possession of the said John Angus Warde and that he may fail to account for as aforesaid, and shall be entitled to retain, set-off, and deduct the amount or value thereof out of any such commissions prior to paying over or accounting for the same to the said John Angus Warde.

"10. And it is further understood and agreed, that all debts, sum and sums of money, claims, and demands which he the said John Angus Warde shall or may have or claim to have under or by virtue of this agreement or otherwise, shall be entirely discharged and extinguished by such set-off and retainer, to the extent of the claims, liens, charges, and cross-demands of the said Peter Stuart and Peter Douglas, or the survivor of them, so set off and retained.

"11. That, if the said John Angus Warde shall neglect or fail in the performance or observance of all or any of the provisions, stipulations, and agreements hereinbefore on his part engaged and agreed to be observed, done, and performed, then and in any and every such case the said John Angus Warde shall forfeit and pay for each breach to the said Peter Stuart and Peter Douglas, or the survivor of them, the sum of 100l. sterling as liquidated damages for every such breach, neglect, or non-performance, over and above paying to them any loss or damage they may sustain thereby, and making good to [93] them the amount in value of the deficiency of any goods or merchandise belonging to them that may come into his hands as aforesaid.

"12. It is also further agreed upon and understood, that the said John Angus Warde shall pay to the said Peter Stuart and Peter Douglas, or the survivor of them, out of any commissions, wages, or emoluments that may become due to him and payable by the said Peter Stuart and Peter Douglas, the sum of 5l. sterling per month as part payment of the wages of each and every captain or sailing master that may take out vessels consigned to him by the said Peter Stuart and Peter Douglas as aforesaid."

The plaintiff brought home a large quantity of palm-oil and other produce; but, inasmuch as some of the palm-oil contained small quantities of water, and was on that account sold subject to an allowance varying from 6d. to 1s. and 1s. 6d. per cwt. (on a selling price of from 48l. to 48l. 15s. per ton), the defendants insisted that the plaintiff was by the terms of the eighth and ninth articles of the agreement disentitled to commission. And a broker was called, who stated that palm-oil was considered in the market to be "wet" if it contained any portion of water, however minute; but all the witnesses admitted that the presence of so small a quantity of water as was proved here did not render the oil unmerchantable.

The learned judge left the case to the jury upon the evidence; telling them, that, according to the true construction of the contract, in order to disentitle the plaintiff to his commission, the oil must be sensibly wet.

A verdict was found for the defendants; and leave was reserved to the plaintiff

"to move to enter a verdict for him, on the ground that, though the oil was wet or dirty, still, as it was merchantable, though subject to allowance, the plaintiff was entitled to commission in [94] respect of it. If the rule were made absolute, Mr. B. (a merchant) to certify the amount for which the verdict was to stand. If a rule nisi were refused, or discharged, then the verdict to be subject to Mr. B.'s certificate, who was to have power to take the accounts on the principle that the plaintiff was not entitled to commission on oil on which allowances had been made. If he found any balance due on the account over the money paid into court, the verdict was to be entered for the plaintiff for that amount. The defendants not to claim anything but admitted items of set-off."

Hugh Hill, Q. C. (with whom was Quain), now moved to enter a verdict for the plaintiff pursuant to the leave reserved. He submitted that, according to the true construction of the agreement, the plaintiff was to lose his commission only in the event of the oil being so wet or dirty as to be unmerchantable; and that the parties never could have contemplated that the defendants should have the plaintiff's services for nothing by reason of so small an amount of wetness as to justify a reduction or allowance to the extent of one and a half or two per cent. only.

Cresswell, J. I see no reason to find fault with the construction which my Brother Bramwell put upon the contract. The parties seem to have taken great pains to express themselves with clearness and accuracy. They first say, in article 8, that the plaintiff shall receive as a remuneration for his services a commission of 6l. per cent. on the net proceeds of the dry merchantable palm-oil received by the defendants: and then they proceed to say that he shall not be entitled to any commission on "any wet, dirty, or unmerchantable palm-oil that may be received." Now, the evidence shewed that the oil in question was, according to the understanding of [95] the trade, "wet" palm-oil. The terms of the contract, therefore, expressly disentitled the plaintiff to any commission. The rule must be refused.

Crowder, J., and Willes, J., concurring,

Rule refused.

Prior and Another *v.* Wilson. Nov. 5, 1856.

The defendant published of the plaintiffs, coal-merchants, what purported to be a report of an inquiry before a board of guardians respecting the fraudulent conduct of the plaintiffs' agent, who, in performance of a contract for "best coals," had delivered at the workhouse coals of an inferior description, and (by falsifying the weighing machine by means of a wedge) deficient in weight.—The libel commenced, "The way in which Messrs. P. (the plaintiffs) do things at Guildford. Inserting the wedge:" and ended with a recommendation of one of the guardians to "have nothing more to do with Messrs. P.,"—innuendo, "the defendant meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently."—The defendant pleaded a justification, following the innuendo, and saying that the coals delivered, as mentioned in the libel, were inferior in quality, as the plaintiffs well knew, and deficient in weight. —The judge ruled, that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it: and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shewn some complicity on their part in the misconduct and fraud imputed to their agent. The jury having found for the plaintiffs, —Held, that there was no misdirection, and that the libel imputed personal misconduct and fraud to the plaintiffs.

This was an action for a libel published of the plaintiffs in the way of their trade.

The declaration stated that the plaintiffs are, and were at the time of the publishing of the libel thereinafter mentioned, coal-merchants in partnership together, and carrying on an extensive trade as coal-merchants in England, and, among other places, at Guildford, in the county of Surrey, and, shortly before the publishing of the libel thereinafter mentioned, one William Smart had been their agent at Guildford in the said trade, and had entered into a contract as such agent with the board of guardians of the poor of the Guildford union for the supply to the said board of coals, and the

said board had complained of the mode in which, both with respect to the quantity and quality of the coals, the said William **[96]** Smart had begun to carry out the said contract; and a meeting of the said board had been held, to inquire into these complaints, at which meeting the governor of the union workhouse and several witnesses attended; and thereupon the defendant, referring to the matters hereinbefore mentioned, falsely and maliciously printed and published of the plaintiffs in their said trade the words following, that is to say,—"Guildford Coal Contract. The way in which Messrs. Prior (meaning the plaintiffs) do things at Guildford!! Copied in extenso from the *West Surrey Times*, January 12th, 1856. The coal contract. Inserting the wedge. The clerk read the copy of a note which he had sent by order of the board to Messrs. Prior, who were under contract to supply the union with thirty tons of the best coal, at 24s. 6d. per ton, complaining that the coals sent were inferior in quality and deficient in quantity, and they were to supply no more. A reply from Messrs. Prior was also read, in which they promised to investigate the matter, complaining that a firm of their standing in the coal-trade should have been addressed in the terms in which the clerk addressed them. (Laughter.) A second communication was also read, from Messrs. Prior, containing a long letter from Mr. Smart (their agent at Guildford), explanatory of the matter. Mr. Smart asserted that 'First quality Derby Bright Coals' had been ordered, and these were supplied; and, in the matter of deficiency in quantity, so opposite was the fact, that, on two occasions, they had been obliged to take coals back again; and, in one instance, in two tons sent, as much as 1 cwt. was returned as overweight. The guardians must have known, continued Mr. Smart, that the best sea-borne coals could not be purchased at 24s. 6d. per ton; and he would undertake to prove that the union had not for a long time past been supplied with sea-borne coals. He had the machine examined by Superintendent Parr **[97]** and a gentleman named Filmer; and he admitted there was some mystery in the action of the scales. Messrs. Prior stated that they had directed Mr. Smart to attend before the guardians and explain the matter. At the suggestion of the guardians, the contract was read: the words were 'best coals;' and not a word occurred about 'best quality Derby Bright' in it. Several guardians said that the best coals were sea-borne coals. The clerk said that it was the first time that 'first quality Derby Brights' had been introduced to the board, and perhaps it would be better in future to mention the sort of coals. The chairman inquired if there was any report from Mr. Parr to the board. It was ascertained that none had been received. The governor was then called in; and, in answer to questions, stated that he believed the inspector of weights and measures had attended at the union and examined the machine of Messrs. Prior and that belonging to the union, but he was not present at the time.

"The porter, on being called, stated that he was present when the machines were examined; they differed considerably; and his opinion was that Messrs. Prior's machine was wrong, and the union one was right. He had every reason to believe that Messrs. Prior's machine then produced was the same that was brought with the coals the week previously. He had noticed the wooden wedge placed under the lever of the machine the week before; and, seeing it was not there when the inspector was examining it, he asked where it was then. Mr. Smart asked his man, and he said it was at the coal-pens.

"By Major Onslow. When the wedge was inserted, it prevented the scale going down.

"The Chairman. Then you think this wedge was put there to prevent the lever from acting freely?

"The Porter. I think so.

[98] "Major Onslow. Do you think that Mr. Smart knew of this wedge being inserted?

"The Porter. I do not know. When the wedge was not there, the coals weighed the same on both machines. It was the opinion that the machines were both right when the wedge was not there.

"The Chairman. Were some of the coals sent in at first overweight?

"The Governor. By their machine: we had no machine then; and they did take some coals away.

"The Chairman. With regard to the quality of the coals?

"The Governor. They burn very fast, and reduce to a white ash. We shall require a larger quantity of them.

"The Chairman. Do you think you have had sea-borne coals under former contracts?

"The Governor. I believe we have.

"The Chairman. Are you sure of that?

"The Governor. I should not like to swear that we had: but we never had this sort before.

"Mr. Drury. Do they send tickets with the coals?

"The Governor. Yes. The first ticket described the coals as 'best Derby Bright.' We complained about that; and then the succeeding tickets were altered to 'best.'

"The Chairman. Did you complain of the coals the first time they came?

"The Governor. I said that they were not the same sort of coals that we had been having.

"The porter stated that the same difference existed between the machines, viz. 7 lbs., when weighing empty sacks, as there did when full ones were weighed. Every empty sack weighed 14 lbs. on their machine, and 7 lbs. on the union one.

"Major Onslow. Was the wedge under then?

[99] "The Porter. Yes.

"Mr. Strong. That made the 7 lbs.

"The Chairman. Is it your opinion that the union has been supplied with sea-borne coals before this?

"The Porter. To the best of my belief we have. The moment these came in, I said they were not the right coals.

"The Chairman observed that Mr. Smart wrote to the firm, and said that he had just got an order to supply thirty tons of the 'first quality Derby Bright coal' to the Guildford union.

"Mr. Strong said that 24s. 6d. was a long price for Derbyshire coals: he could get them delivered at Woking for 15s.: not the best sort.

"The Chairman stated that similar coals as the 'Derby Bright' were to be purchased for 21s. a ton.

"Mr. Drury stated that it was unfair to other persons who had sent in tenders, for Mr. Smart to supply an inferior description of coals; because no doubt the other merchants had entered their prices calculating that the coals were to be the best coals. One of the merchants had said to him, that he could not understand how Messrs. Prior could supply best coals at 24s. 6d. per ton.

"The Chairman inquired if they would have Mr. Smart in, and hear his statement.

"Mr. Drury would like to have the matter of the wedge explained.

"Mr. Smart was then called in, and

"The Chairman detailed what information had been given to the board relative to the use of the wedge, and suggested an explanation.

"Mr. Smart then informed the board of the description of machine he used; that it dropped below the proper level, which it should not do; and, in order that it should not have so much play, he at first had an iron hoop made to prevent this. The hoop was broken, and [100] a wedge was put in, at the suggestion of the governor and the porter of the house. The man who brought the coals should come before the board, and tell them what he knew about the matter. The insertion of the wedge could not make any difference. He admitted that there was a difference of 7 lbs. in the machines. He could assure the board that this was a mystery to him, and he should be thankful if they would help him to solve the difficulty. He had been informed, that, if a tall man put the coals on the machine, they went further over the scale, and the leverage was altered, and the difference in weighing would amount to 5 lbs., 6 lbs., or 7 lbs.

"The Chairman. The same difference appears in weighing empty sacks.

"Mr. Smart. That is positively false; and Mr. Ames cannot deny it. When I left the union, on the Saturday referred to, I did so quite free from any knowledge of wrong being attempted. I was under the impression that there was some mystery in the matter, and went to Captain Hastings to get the machine tested. He (Captain H.) referred me to Mr. Parr, and to him I also went; but Mr. Parr said, that, as the machine was in the borough, he could not act. I then went to Mr. Vickers, who informed me, that, although he was gazetted as inspector of weights and measures for

Guildford, he had no apparatus for testing the machine. In this dilemma, I went to Mr. Filmer, a gentleman of high standing, who tested the machine: and, though there had been some mystery in its action, it made no material difference. I think the machine must have had some dust in it.

"Mr. Strong. That would not make a quarter of a pound difference.

"The Chairman. It would not differ 7 lbs. in consequence.

"Mr. Smart. I am told it would.

"The porter and governor were then recalled.

[101] "The Chairman. You informed the board that there was 7 lbs. difference in an empty sack weighed on both machines?

"The porter reiterated his former statement.

"Mr. Smart. That is positively false.

"The Chairman. You also know about the wedge. Did you or the governor order that to be made?

" The porter and governor both replied in the negative.

"Mr. Smart said his man had told him it was the case.

"The porter said, that, noticing the wedge was not in the machine as formerly, he did ask where it was. This was in the absence of the governor.

"The Chairman (to Mr. Smart). You say in your letter that you had received an order for thirty tons of 'first quality Derby Bright.' It appears that you received no such order; the contract only said 'best coals.'

"Mr. Smart inquired what sort the board required.

"The Chairman. If you had 'best coals' ordered, should you not invariably send sea-borne coals?

"Mr Smart. Not invariably.

"The Chairman. The board have made up their minds that the best coals are sea-borne coals, and also that they have in former contracts been supplied with sea-borne coals.

"Mr. Smart. No.

"The Chairman. The opinion of the board is, that 24s. 6d. is an extravagant price for Derby coals.

"Mr. Smart. Any member of the board must know, that, as sea-borne coals cannot be supplied in London for less than that sum, they could not be supplied at Guildford for that sum.

"The Chairman. We have nothing to do with that. We have only to look to the figures in the tenders. You tell your firm that 'Derby Brights' are ordered, when our contract does not mention that sort.

[102] "Mr. Smart. Shewing the conviction on my mind at the time.

"Major Onslow. Do you call the 'Derby Brights' the best coals?

"Mr. Smart. Yes, I do.

"Major Onslow. The very best?

"Mr. Smart. Yes.

"Major Onslow. Then, as a guardian, I beg to differ with you.

"Mr. Smart then retired, and sent in his man, who had brought the last coals to the union.

"Charles Adey stated that he was a servant of Messrs. Prior. He had brought some best inland coals to the union, and weighed them in the presence of the porter. He knew about the wedge. It was because the beam had too much play. He did not bring the wedge on this occasion: it was in the yard of the house.

"The Governor. Who cut it?

"Adey. Daniels; on the tub.

"The Porter. Did you take the wedge away?

"Adey. Yes.

"The Chairman. Where is the wedge now?

"Adey. On the platform at the station.

"Major Onslow. Why was it left there?

"Adey. Because Filmer said it was not wanted.

"Major Onslow. Who is Daniels?

"Adey. One of Messrs. Prior's carmen.

"By the Chairman. I did not tell Mr. Smart that the officers of the house had the wedge put in.

"The Chairman (to the Governor). Could that wedge have been made in the yard without your knowledge?

"The Governor. Yes.

"Mr. Drury. Suppose you carry coals elsewhere, would you take the wedge?

"Adey. Yes, Sir.

[103] "Mr. Elwin. What difference would that make in weighing?

"Adey. I do not know.

"Mr. Strong. Why was it put there at all?

"Adey. Because some people said the beam had too much play.

"The Chairman then asked about the empty sacks weighing 7 lbs. less on one machine than on the other. He denied, at first, that it was so: but, when the porter repeated the question, the man admitted the fact.

"This concluded the examination; and Adey withdrew.

"Major Onslow asked if the board was not competent to throw up the contract.

"The Clerk. That has already been done.

"Major Onslow said he was not at all satisfied with the explanation that had been given.

"The Chairman said, that, under the contract, Messrs. Prior ought to have furnished the best coals: yet he thought in future the sort of coals should be named. They had a public duty to perform, as much to the tradesmen of the neighbourhood as to the rate-payers. He thought the board was entitled to compensation from Messrs. Prior for their breach of contract.

"Mr. Strong had no doubt they could recover compensation by going to law: but he thought the best plan was, to let the matter end there, and have nothing more to do with Messrs. Prior.

"The board confirmed their previous decision (to throw up the contract), and ordered that fresh forms of tender should be sent to all the coal-merchants except Messrs. Prior.

"Mr. Smart was then called in, and informed of the decision of the board.

"Finding that Mr. Smart was about to enter into a lengthened statement, the guardians stopped him. Some [104] amusement was caused by the importunate requests made by Mr. Smart that the board would test his machine again.

"The board declined to have anything further to do in the matter, and went on with other business," -the defendant meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently. And the plaintiffs claimed 500*l*.

The defendant pleaded,—first, not guilty,—secondly, as to the printing and publishing the said words, that, before the committing of the grievances in the declaration mentioned, and before and at the several times of the happening of the matters and things mentioned and referred to in and by the words in the declaration alleged to have been printed and published, that the plaintiffs carried on the business of coal-merchants at Guildford and other places, their said business of coal-merchants at Guildford being conducted and managed by William Smart, being the same person as in the said words was mentioned as Mr. Smart: That, whilst the plaintiffs so carried on the said business at Guildford, they the plaintiffs, by the said William Smart, their agent in that behalf, made a contract in writing with the board of guardians of the poor of the said Guildford union in the declaration mentioned, whereby the said plaintiffs agreed to sell and deliver to the said guardians at the workhouse of the said union thirty tons of coals in the said contract described as best coals, at the price of 24*s.* 6*d.* per ton: That, in part performance of the said contract, the plaintiffs, on divers occasions before the committing of the said grievances, delivered at the said workhouse for the said guardians coals of a sort called Derby Brights, as the plaintiffs well knew: That, at the time of the [105] making of the said contract, and from thence thitherto, coals brought by sea from Newcastle and other places on the coast of Northumberland and Durham were and are coals commonly called and known by the name of best coals, and which said best coals were and are superior in quality and of greater price than a certain other sort of coals called and known by the name of Derby Brights, as the plaintiffs well knew: nevertheless, the plaintiffs directed their said agent the said William Smart to represent and pretend to persons proposing to buy and buying coals from the plaintiffs through the said William Smart, that the said

coals called or known by the name of Derby Brights were better in size and quality than coals brought from Newcastle aforesaid: That, in part performance of the said contract, the plaintiffs, and the said William Smart, as their agent, relying on the directions aforesaid, afterwards, on divers occasions before the committing of the said grievances, delivered at the said workhouse for the said guardians coals of the said sort called Derby Brights, instead of and not being best coals, and being of an inferior quality and less price than best coals, as the plaintiffs well knew: That, on the occasions on which the said coals were delivered at the said workhouse as aforesaid, the plaintiffs sent with the said coals a weighing-machine for the purpose of therewith weighing the said coals; and that, in weighing the said coals with the said machine on the occasions of their being so delivered as aforesaid, a wooden wedge was by the servants of the plaintiffs placed under the lever of the said machine, which prevented the said lever from acting freely: That coals weighed in the said machine when the said wedge was so placed under the said lever thereof, appeared to weigh more than the same coals appeared to weigh in the said machine when the said wedge was not so placed unto the said lever thereof, and more than the true weight thereof: That, on the first occasion when **[106]** the plaintiffs so as aforesaid delivered at the said workhouse for the said guardians a part of the said coals so contracted for as aforesaid, the said coals sent were weighed by the said machine of the plaintiffs with the said wedge placed under the said lever thereof; and that it then appeared by such weighing that more coals had been brought to the said workhouse in the waggons of the plaintiffs than was sufficient to make up the quantity of coals on that occasion to be delivered; whereupon a part of the coals so brought was carried back in the said waggons, and the residue thereof only was delivered at the said workhouse: and the said residue was in fact deficient in quantity: That, after the said first occasion when the plaintiffs so as aforesaid delivered at the said workhouse for the said guardians part of the said coals so contracted for as aforesaid, the said guardians, being possessed of a machine for the weighing of coals, certain sacks full of coal, and certain empty sacks, were weighed in the said machine of the said guardians, and the same were also weighed in the same machine of the plaintiffs without the said wedge being placed under the said lever thereof, when the said sacks full of coal and empty sacks appeared according to both of the said machines to be of the same weight; but that sacks, whether filled with coals or empty, being weighed in the said machine of the plaintiffs when the said wedge was placed under the said lever thereof as aforesaid, appeared to weigh more, to wit, 7 lbs. more, than the same sacks filled with coals, or the said empty sacks, appeared to weigh when weighed in the said machine of the said guardians: That, afterwards, and before the committing of the grievances in the declaration, a meeting of the said guardians was held at the said workhouse, which was attended by the then chairman of the said guardians, and also, among other of the said guardians, by Major Onslow, Mr. Drury, Mr. Strong, and Mr. Elwin, respectively mentioned in **[107]** the said words so printed and published, and there were present at the said meeting the said William Smart, and the governor of the said workhouse, and the porter of the said workhouse: And that, at the said meeting, the several letters were read, and the several questions were asked, and the several answers thereto were given, and the said statements were made, which were mentioned in the said words in the declaration alleged to have been printed and published by the defendant, and which said words so printed and published contained and were a true report and account of all that was said or done at the said meeting; and the matters and things therein contained of and concerning the plaintiffs, and of and concerning them in their said trade, were and are true.

The plaintiffs took issue upon both these pleas (*a*).

(*a*) The plaintiffs also demurred to the second plea, alleging for cause "that the plea, although it does not deny that the libel was published in the sense attributed to it by the declaration, does not shew any facts which justify the publication of it in that sense; for, it does not shew that the plaintiffs were cognisant of and had sanctioned the improper and fraudulent conduct of their agent at Guildford which is mentioned in the libel, and that they were accustomed to carry on their trade there improperly and fraudulently."

The defendant joined in demurrer, the points marked for argument on his part being,—"1. That the second plea is good, inasmuch as it shews that the statements

[108] The cause was tried before Willes, J., at the sittings in London after last Trinity Term.

It appeared that the plaintiffs and the defendant were rival coal merchants. On the part of the defendant, it was submitted, that the libel did not impute personal misconduct to the plaintiffs, but only to their agent; and that, although the innuendo stated that the defendant meant to impute to the plaintiffs that they had sanctioned the fraudulent and improper conduct of their agent, and the defendant by his plea of justification adopted that construction of the libel, still he was not bound to prove it.

The learned judge, however, ruled that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it: and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shewn some complicity on their part in the misconduct and fraud imputed to their agent.

The jury returned a verdict for the plaintiffs, damages 40s.

Byles, Serjt. (with whom was Collier, Q. C., and Unthank), now moved for a new trial, on the ground of misdirection. The question is, whether the libel imputes personal misconduct to the plaintiffs, or only imputes fraud and misconduct to their agent, and whether the record is so framed that it was necessary for the defendant, in order to support his justification, to prove that the plaintiffs were cognisant of and sanctioned the alleged fraud. The innuendo is, "meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently." The defendant by his plea follows the innuendo, and says that the coals delivered, as men-[109]-tioned in the libel, were inferior in quality, as the plaintiffs well knew, and deficient in weight. The real issue is, does the alleged libel state, or by fair inference imply, that the Messrs. Prior were personally guilty of fraud in the transaction, or cognisant of and participant in the fraud of their agent. Since the Common Law Procedure Act (*a*), it is not necessary to prove the whole plea.

Cresswell, J. I cannot entertain the slightest doubt that the libel in question does impute to the plaintiffs complicity with their agent,—personal misconduct and fraud. It begins with these words "The way in which Messrs. Prior do things at Guildford!!" and ends with a recommendation of one of the guardians to "have nothing more to do with Messrs. Prior."

Willes, J. I thought the defendant was very fortunate to have a verdict against him for 40s. only.

Rule refused.

[110] Attwood and Others *v.* Emery. Nov. 7, 1856.

[S. C. 26 L. J. C. P. 73; 5 W. R. 19. Commented on, *Hydraulic Engineering Company* v. *M'Haffie*, 1878, 4 Q. B. D. 670.]

A contract by a manufacturer to furnish certain specified goods "as soon as possible," means, within a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand.

This was an action for not accepting and paying for goods contracted for.

The first count of the declaration stated, that it was agreed by and between the plaintiffs and defendant, that the plaintiffs should as soon as possible send to the

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made in the alleged libel are true. 2. That the alleged libel on the face of it shews that no fraud of which the plaintiffs were personally cognisant is imputed to them. 3. That, notwithstanding the 61st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the plaintiffs cannot enlarge the sense of a written libel like that declared on and set out verbatim. 4. That the plea affects to justify merely the printing, &c. of the very words used, and does not justify the sense imputed, supposing that, in a case like the present, such sense can by innuendo be carried beyond the meaning of the words themselves."

(*a*) See 15 & 16 Vict. c. 76, ss. 61, 76, 77.

defendant, at the Cooperage, Blackwall, 350 bundles of iron hoops, each bundle to contain twenty-four hoops of certain sizes specified in the order for the said hoops, dated the 30th of November, 1855, also 200 bundles of iron hoops, each bundle to contain forty-eight hoops of certain sizes specified in the said order, and each of the said 550 bundles to be firmly tied with rope-yarn; and that the defendant should accept the said bundles of hoops, and pay the plaintiffs for the same so much as they should be reasonably worth. Averment, that the plaintiffs did all things necessary for them to do, and were ready and willing to do all things necessary for them to be ready and willing to do, to entitle them to have the agreed bundles of iron-hoops accepted and paid for by the defendant as agreed, and that the time for doing so elapsed before this suit: Breach, that the defendant made default in accepting and paying for the said hoops as agreed, and would not accept the same, or any part thereof; whereby the plaintiffs not only lost all the benefits and profits which would have accrued to them from the performance of the said agreement, but were put to great trouble, costs, and damages, and did much work, and consumed much time of their servants in and about sending the said hoops according to the said agreement, and taking the same away from the said cooperage, and storing and keeping the same, when re-**[111]**-fused by the defendant, and used and occupied much valuable store-room in so storing and keeping the same.

The declaration also contained counts for work done and materials provided, goods sold and delivered, goods bargained and sold, interest, and money due on accounts stated.

The defendant pleaded,—first, to the first count, that it was not agreed by or between the plaintiffs and defendant in manner and form as in that count alleged,—secondly, to the first count, that the plaintiffs did not, according to the said agreement in the said first count mentioned in that behalf, as soon as possible, according to the true intent and meaning of the same agreement, send to the defendant at the said Cooperage, Blackwall, such bundles of iron hoops as they ought to have sent according to the said agreement in that behalf, or any part thereof, nor were they ready and willing so to do,—thirdly, to the residue of the declaration, never indebted. Upon these pleas the plaintiffs joined issue.

The cause was tried before Willes, J., at the sittings at Westminster after the last term. The facts were as follows: The plaintiffs are iron merchants carrying on business under the name of "The Weardale Iron Company," and having extensive works at Darlington and at Ferry Hill, and also a counting-house and place of business at White Lion Wharf, Upper Thames Street, London. The defendant is a cooper carrying on business at Blackwall. In November, 1855, the defendant, having entered into a contract with government for a large number of casks to be furnished within a limited time, called at the plaintiffs' counting-house in Upper Thames Street, and asked the plaintiffs' manager within what time he could execute an order for iron-hoops. The manager, referring to a former transaction with them, on which occasion the order had been executed within five weeks, said they would not exceed that time. **[112]** Shortly afterwards, viz. on the 30th of November, the defendant instructed his clerk to send to the plaintiffs' counting house a written order for the quantity of hoops required (about 15 tons), which was done, the letter requesting the plaintiffs to deliver them as soon as possible.

On the 7th of January, 1856, the defendant wrote to the plaintiffs' manager, saying that the hoops must be delivered immediately, or he must decline taking them; and, the time for the execution of his contract with the government having expired, the defendant was compelled to obtain the hoops elsewhere, and on the 28th of January he sent them the following letter.

"Cooperage, Blackwall, Jan. 28, 1856.

"The Weardale Iron Company.
"Agent, Mr. Trowbridge.

"Sir,—In consequence of your not delivering the hoops ordered, according to time, I shall not be able to take them, as I have been obliged to get them elsewhere.

"WILLIAM EMERY."

To this the defendant on the 31st of January received from Trowbridge the following reply:—

"The Weardale Iron Company, White Lion Wharf,
"Upper Thames Street, Jan. 30, 1856.

"Mr. W. Emery.

"Dear Sir,—Had your note countermanding your order for hoops arrived before they were made, we would gladly have cancelled it, as we are so full of orders for hoops, it would have been a relief to us: but they are now all made, and at some considerable extra expense. A portion have been forwarded per rail, and, we presume, delivered to you, they having arrived at King's Cross yesterday morning: the remainder will follow immediately. "For The Weardale Iron Company,
"R. Trowbridge."

[113] About one third of the hoops were sent by Trowbridge to the defendant's cooperage on the 4th of February, another third on the 10th, and the remainder in the beginning of March; but the defendant declined to receive them, alleging that there had been unreasonable delay.

There was no evidence to shew that there had been any undue delay in putting the work in hand: but it was suggested, that, if the plaintiffs had put aside all other business for the purpose of attending to the defendant's order, they might have completed it much sooner than they did.

On the part of the plaintiffs, it was insisted that they were by the terms of the contract only bound to deliver the hoops within a reasonable time, regard being had to the means they had of executing the order, and the quantity of work they might happen to have in hand.

For the defendant it was submitted, that, "to be delivered as soon as possible" meant something more than "within a reasonable time;" and that, to entitle them to recover, the plaintiffs were bound to shew that they had used due diligence to complete the order without delay.

The learned judge told the jury that the defendant must be bound by the terms of his written order; that the words "as soon as possible" must be taken with reference to the means of the parties employed, the capacity of their works, and the amount of orders in hand for other persons: and that, in effect, it meant "within a reasonable time." But he reserved leave to the defendant to enter a verdict if the court should be of opinion either that the plaintiffs were bound to procure the articles elsewhere if they were unable to make them themselves at once, or that they were bound to lay aside every other work in order to proceed to the execution of the particular contract.

The jury returned a verdict for the plaintiffs, damages 75*l*.

[114] Petersdorff (with whom was Byles, Serjt.) now moved, pursuant to the leave reserved, to enter a verdict for the defendant, or for a new trial on the ground of misdirection. The question is, what is the meaning of the words "as soon as possible." The expiration is one that is susceptible of several different significations. It might mean one thing as applied to a small manufacturer, and something very different in the case of persons like the plaintiffs, who have a large number of men and numerous mechanical appliances and facilities at their disposal. [Cresswell, J. In general, I should say that "as soon as possible" means no more than "without unreasonable delay."] It clearly must have meant in this case, seeing the purpose for which the goods were wanted, something more prompt than that. [Cresswell, J. Do you contend that the plaintiffs were bound to lay aside all other work in order to proceed at once to execute this contract?] It may be that they were bound to do so, or to decline to receive the order. The defendant was entitled to have his order executed at least with the same amount of dispatch that any other manufacturer, with the same means, would have used. The plaintiffs gave no evidence as to what steps were taken on receipt of the order: they should at least have shewn that they had made some efforts to execute it within a reasonable time. [Willes, J. No evidence was given on either side as to the extent of plaintiffs' works. The agent who received the order proved that he sent it down to the manufactory at once. It was not suggested that the plaintiffs did not make out a primâ facie case.] Suppose a builder were employed to build a house, in terms similar to those used here, would the construction of the contract depend upon the pecuniary capability of the party to furnish materials and labour? Would not the true test be, the time within which similar work could be executed by

a person possessing all the ordinary means and appliances and the requisite command of capital?

[115] CRESSWELL, J. I am of opinion that there should be no rule in this case. By the terms of the contract tendered to the plaintiffs' agent, the hoops were to be furnished "as soon as possible." My Brother Willes reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion either that the plaintiffs were bound to procure the goods elsewhere if they were not themselves in a position to execute the order at once, or that the plaintiffs were bound to proceed at once to its execution, laying aside all other orders they might have. I think neither of these is the true construction of this contract. Mr. Petersdorff has argued this case upon an assumption that the plaintiffs' engagement was, to execute the work with more speed than would have been required had the words been "within a reasonable time." If that had been so, the contract must have been very differently framed from that now before us. If the defendant had intended to have the hoops within a limited time, he should have taken care to express himself accordingly. I think this contract means no more than a reasonable time, regard being had to the plaintiffs' facilities and extent of business, and to the contracts they already had in hand.

WILLIAMS, J. I am of the same opinion. Substantially, the leave reserved was, to enter a verdict for the defendant if the court should be of opinion that the plaintiffs by their acceptance of the contract bound themselves to execute the order as soon as it could by possibility be executed, and without reference to prior orders. To that view I cannot accede. My Brother Willes in substance told the jury that the plaintiffs were entitled to recover, if they thought the contract had been performed within a reasonable time, regard being had to other orders which they might previously have received. It seems to me that that was perfectly right. The plain-**[116]**-tiffs could not be supposed to be contracting without regard to orders which they had already received, and which were entitled to priority of execution. It might be that the plaintiffs' engagements were such as to protract the performance of the contract beyond all reasonable bounds. That, however, is not suggested here. I must say I think a man is not justified in accepting orders which he knows he will be unable to execute for years, or for a period which a jury could have no difficulty in pronouncing to be unreasonable.

CROWDER, J. I also am of opinion that the acceptance of this order in the vague terms in which it was given, only bound the plaintiffs to take care that they were guilty of no unreasonable delay in its execution. It is contended that my Brother Willes misdirected the jury, in referring to the ability of the parties contracting, and not to the general ability of the trade. I think he was quite right. How can it be supposed for a moment that the contracting parties meant the performance of the contract should depend upon anything but what the plaintiffs themselves could do? The words "as soon as possible" clearly meant "as soon as you possibly can." Nor can I understand how it can reasonably be suggested that either party contemplated that the plaintiffs were to put aside any other engagement, in order that this particular one should be performed. If the defendant had desired to have the goods by a limited time, he should have taken care to give a more limited order.

WILLES, J. I concur with the rest of the court in thinking that there should be no rule in this case. The case put by my Brother Williams, of a manufacturer delaying the execution of an order for several years, would amount to a business impossibility.

Rule refused.

[117] FINNEY *v.* THE HON. BROWNLOW THOMAS MONTAGUE CECIL, COMMONLY CALLED LORD BROWNLOW CECIL. Nov. 7, 1856.

[S. C. 26 L. J. C. P. 53; 5 W. R. 19.]

To a declaration by an indorsee of a promissory note for 1000*l.*, made by the defendant, payable to one John Jackson Lee, the defendant pleaded his discharge under the insolvent debtors act 1 & 2 Vict. c. 110. The entry in the defendant's schedule, by which it was sought to support this plea, was,—"James Jackson Lee, of, &c., 1000*l.*, the amount of my bond given by me to this creditor for 725*l.* money lent,"

&c. The name of the plaintiff, who claimed as indorsee of the note, did not appear in the schedule at all:—Held, not a sufficient description of the debt to sustain the plea.

The declaration stated that the defendant, on the 8th of May, 1849, by his promissory note, now overdue, promised to pay to Mr. John Jackson Lee, or order, 1000*l.*, with lawful interest for the same, eight months after date, and the said John Jackson Lee indorsed the same to the plaintiff, but the defendant did not pay the same; and the plaintiff also sued the defendant for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded,—first, never indebted,—secondly, that the note was altered in a material part after the making thereof,—thirdly, that theretofore, and before the commencement of this suit, to wit, on the 15th of February, 1854, by a certain order of adjudication then in that behalf made by the county-court of Kent holden at Dover, the defendant was duly discharged according to an act of parliament passed in the session of parliament holden in the first and second years of Her present Majesty, intituled, &c. [c. 110], and a certain act passed in the session of parliament holden in the tenth and eleventh years of Her present Majesty, intituled "An act to abolish the court of review in bankruptcy, and to make alterations in the jurisdiction of the courts of bankruptcy and court for relief of insolvent debtors" [c. 102], which said order still remains in force.

Replication, that the defendant was not by the said order in the third plea mentioned discharged according to the said statutes of or from the said causes of action **[118]** in the said declaration mentioned, or from any or either of them, as alleged. Issue.

The particulars of demand, delivered pursuant to a judge's order, were as follows:—

"Principal due on a promissory note for 1000*l.*, dated the 8th of May, 1849, made by the defendant in favour of Mr. John Jackson Lee, and payable with interest at eight months after date, indorsed to the plaintiff . .	£1033	6	8
Interest on the said sum of 1033*l.* 6*s.* 8*d.* at 5*l.* per cent. per annum from the 11th of January, 1850, to the 7th of January, 1856, the date of the writ . . .	309	8	7
Notarial charges on the dishonor of the said note . .	0	8	6
	£1343	3	9

"The plaintiff also claims interest at 5*l.* per cent. per annum on the above sum of 1033*l.* 6*s.* 8*d.* from the date of the writ until the day of payment or judgment. Dated, &c."

The cause was tried before Willes, J., at the sittings in London after last Trinity Term. The evidence as to the second plea failed. In support of the third plea, an extract from the defendant's schedule was put in, in which the debt supposed to represent the claim in this action was entered as follows:—

"Mr. James Jackson Lee, solicitor, 45 Regent Square, Gray's Inn Lane, Middlesex, or the said Mr. James Evelyn, Guards' Club, Pall Mall, Middlesex." "1000*l.*, the amount of my bond given by me to this creditor for 725*l.* money lent by him to me, conditioned for payment of interest thereon at the rate of 5*l.* per cent. until the principal was paid. Also 375*l.* advanced by this creditor **[119]** to me on a bill of exchange for 500*l.*, to which myself and Mr. James Evelyn, creditor 44, were jointly party, he indorsing the same for my accommodation. To further secure the first-named sum, I gave this creditor a policy of assurance for 1000*l.* effected on my life, in (I believe) the Rock Life-Assurance Company, of Bridge Street, Blackfriars, London, as is fully set forth in my special balance-sheet."

The order of adjudication was also put in, from which it appeared that the defendant obtained his discharge on the 15th of February, 1854.

It was also proved, that, shortly after the note became due, the plaintiff wrote to the defendant demanding payment.

The learned judge directed a verdict for the plaintiff for the amount claimed, viz. 1368l., reserving leave to the defendant to move to enter the verdict for him if the court should be of opinion that the debt in question was sufficiently described in the defendant's schedule.

Byles, Serjt. (with whom was Lush), now moved for a rule nisi accordingly. The question turns upon the 69th and 75th sections of the 1 & 2 Vict. c. 110. By the former, the insolvent is required, within fourteen days next after the making of the vesting order, to deliver in to the court a schedule containing, amongst other things, "a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." And the 75th section provides that the adjudication of the commissioner, adjudging that such prisoner shall be discharged from custody and entitled to the benefit of **[120]** the act, shall operate his discharge "as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid." The question is, whether the entry in the schedule is a sufficient description of the note declared on, or a wilfully inaccurate statement, and one calculated to mislead. It cannot be denied that the defendant at one time knew that the note was in the hands of the plaintiff. The mere circumstance of his calling it a bond in the schedule would not matter, if it had remained in the hands of the person named. Nor is the misnomer, "James" for "John," of much importance. But the greater difficulty is the absence of all mention of Finney's name: and even that would not be material, if he knew not nor had the means of knowing that Finney was an indorsee. [Cresswell, J. The instrument is not properly described. Have you any case to warrant the motion?] There is no case precisely in point, or even very near the present. [Crowder, J. This clearly is not "a full and true description," within the 69th section (*a*).] The 69th section does not relate to negotiable securities. [Willes, J. This is not "a negotiable security set forth in the schedule," within s. 75.]

Per Curiam. There is no ground whatever for this motion.

Rule refused.

[121] BARBER *v.* BROWN AND ANOTHER. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 41; 3 Jur. N. S. 18; 5 W. R. 79.]

In 1811, W. L., being possessed of certain premises under leases which would expire at Midsummer, 1854, granted to T. and E., respectively, an annuity of 222l. 4s. 5d. for three lives, to secure which he granted to each of them an underlease of the same premises for forty-three years, if the lives, or the survivor of them, should so long endure.—In 1827, the premises in the annuity-deeds mentioned were assigned to the plaintiff for the residue of the terms granted to W. L., subject to the annuities to T. and E., and to the underleases for securing the same.—In 1825, T. and E. were let into possession of the premises so underlet to them; and, in 1830, the plaintiff became tenant to them of part of the premises at the rent of 550l., payable to them in equal moieties.—T., the last survivor of the cestuis-que-vie in his annuity-deed, died in 1851; and, from the time of his death, down to the time of the expiration of the leases granted to W. L., one W. E., as their agent, applied for and received the rent of 550l. from the plaintiff for them and the representative of E., and accounted for a moiety to each of them,—deducting certain payments thereout in respect of ground-rent, rates, taxes, insurance, repairs, and commission:—Held,

(*a*) See *Hughes* v. *Blore*, 14 M. & W. 387.

that the plaintiff was entitled, in an action for money had and received, to recover back the sums so paid by him under the mistaken impression that the right to receive them still continued,—deducting only the sums paid by the agent in respect of ground-rent, rates, and taxes.

This was an action brought to recover back a certain sum alleged by the plaintiff to have been paid by him to the defendants for rent of certain premises after the title of the defendants to the premises had expired.

The declaration was for money received by the defendants to the plaintiff's use. The plaintiff by his particulars of demand claimed a sum of 1650*l.* in respect of six half yearly payments of 275*l.* each "for rent supposed to be payable to the defendants for certain premises in Thames Street known as Lingham's Warehouses, in the occupation of the plaintiff," between the 1st of November, 1851, and the 30th of May, 1854.

The defendants pleaded, first, never indebted,—secondly, a set-off for money paid by the defendants for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them,—thirdly, that the debts and claims in the declaration mentioned were at all times due from and existed against, and still were due from and existed against the defendants, jointly with others, and not from or against the defendants alone: and that the plaintiff, [122] at the commencement of the suit, was and still remained indebted to the defendants and the said others in an amount equal to the plaintiff's claim, for money payable by the plaintiff to the defendants and the said others before the suit, for money paid by them for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them, which amount the defendants and the said others were willing to set off against the plaintiff's claim.

The particulars of the defendants' set-off were as follows:—

	£	s.	d.
"Michaelmas, 1851.			
To cash paid half-year's ground-rent due Michaelmas to S. Wilkes, Esq., less property-tax	71	7	2
Ditto, ditto, Byde's trustees, net	71	7	2
Insurance of the property to Michaelmas, 1852	16	0	0
Tithe, half-year due Christmas, 1850 £12 0 0			
Michaelmas, 1851 12 0 0			
	24	0	0
Poor-rates, July, 1851	20	12	6
Property-tax (Ship Afloat), 4 quarters, March, 1851	1	15	0
Land-tax, two quarters, September, 1851	11	10	9
Police-rate, one quarter, Lady Day, 1851 £2 0 7½			
Midsummer, 1851 2 0 7½			
Michaelmas, 1851 2 0 7½			
Ward-rate, one year, Christmas, 1850 1 7 1			
	7	8	11½
Water-rate, two quarters due at Midsummer	0	15	0
Consolidated rate, 1851 £8 2 6			
Ditto, ditto 8 2 6			
	16	5	0
Sewer-rate, 1851	5	8	4
Carpenter's account	0	6	2
Commission, and stamps	17	19	3
Lady Day, 1852.			
To cash, paid half-year's rent due to Byde's trustees	71	7	2
Ditto, ditto, to J. Wilkes, Esq.	71	7	2
Rates, as under,			
House tax, 4 quarters, Lady Day, 1852 £1 17 6			
Land-tax, 2 quarters, Lady Day, 1852 11 10 9			
Sewer-rate, ditto 5 8 4			
Consolidated-rate, 1852 8 2 6			
Poor-rate, February, 1852 18 15 0			
Church-rate, 1851 8 9 3			
[123] Church-rate, 1852 8 9 3			
Water-rate, Christmas, 1851 0 15 0			

	£	s.	d.	£	s.	d.
Police-rate, Christmas, 1851	2	0	7½			
Ditto, Lady Day, 1852	2	0	7½			
Ward-rate, 1851	1	7	1			
				68	15	11
Carpenter, small repairs.				0	11	9
Clarke allowance, 5s.; Raymond account, 5s. 6d.				0	10	6
Commission, and stamps				18	2	0
Michaelmas, 1852.						
To cash paid half-year's ground-rent due Michaelmas to the trustees of Byde (less property-tax)				71	7	2
Ditto, ditto, J. Wilkes, Esq.				71	7	2
Rates.						
Tithe, 2 quarters due Christmas, 1851, 12l.; Midsummer, 1852, 12l.	£24	0	0			
Police, 1 quarter, Midsummer, 1852	2	0	7½			
1 quarter, Michaelmas, 1852	2	0	7½			
Consolidated rate, 1852.	12	3	9			
Poor-rate, August, 1852.	16	17	6			
Water-rate, 2 quarters, Midsummer, 1852	0	15	0			
				57	17	6
Insurance of the premises to Michaelmas, 1853				16	0	0
Carpenter, for generally repairing woodwork throughout, 52 Thames Street				2	12	5
Ditto, ditto				0	16	9
Commission, and stamps				17	16	9
Lady Day, 1853.						
To cash paid half-year's moiety ground-rent due Lady Day, 1853, to J. Wilkes, Esq. (net)	£71	7	2			
Ditto, ditto, Byde's trustees	71	7	2			
				142	14	4
Rates, as under,—						
Property-tax, house and warehouse, four quarters, Lady Day, 1852	£15	8	0			
Ditto, Lady Day, 1853	15	8	0			
				£30	16	0
Ditto, Ship Afloat, four quarters, Lady Day, 1852	£1	13	3			
Ditto, Lady Day, 1853	1	13	3			
				3	6	6
Tithe, two-quarters, Christmas, 1852				12	0	0
Water-rate, ditto				0	15	6
Land-tax, warehouse, two quarters, Sep., 1852	£9	0	11			
House	2	9	7			
				£11	10	6
[124] Ditto, house and warehouse, two quarters, Lady Day, 1853	11	10	6			
				23	1	0
Police, one quarter, Christmas to Lady Day, 1853				2	14	2
Church-rate				11	5	0
House-tax, four quarters, Lady Day, 1853.				1	17	6
				85	15	2
Jewson allowance, 4s 2d., 5s., Howard ditto, 10s. 6d., Raymond account, 1s. 6d., Bloomfield account, 3s. 4d.				1	4	3
Buzzard account, external painting 52 Lower Thames Street				10	13	0
Smith, account for sundry repairs, and cleaning ditto				5	10	6
Commission, and stamps				18	9	3
Michaelmas, 1853.						
To cash paid half-year's ground-rent due to J. Wilkes, Esq., for moiety of premises (less property-tax)				71	7	2

	£	s.	d.
To cash paid half-year's ground-rent due to Byde's trustees, for remaining moiety (less property-tax)	71	7	2
Rates, as under,—			
Poor-rate made September, 1853 £16 17 6			
Tithe, half-year, Midsummer 12 0 0			
Water, Midsummer 0 15 0			
Police, one quarter, Lady Day, 1853 2 14 2			
Ward, one year, 1852 1 7 1			
Police, one quarter, Midsummer, 1853 2 14 2			
Ditto, Michaelmas, 1853 1 7 1			
Property-tax, one year, 1853 2 0 7½			
Sewer, one year, 1853 2 14 2			
Consolidated, half-year, 1853 10 16 8			
Ditto, ditto 9 9 7			
	62	16	0½
Insurance of the property to Michaelmas, 1854	16	0	0
Verry, account for printing, &c.	2	5	0
Nicholson, sundry repairs	5	4	4
Smith, repairing roof, &c	1	0	0
Commission, and stamps	18	1	9
Lady Day, 1854.			
To cash, paid one moiety of ground-rent to J. Wilkes, Esq. (less property-tax)	71	7	2
Ditto, ditto, Byde's trustees	71	7	2
Rates, as under,—			
Property-tax, 4 quarters, Michaelmas, 1854 £15 5 1			
Poor-rate, September, 1853 16 17 6			
Ditto, March, 1854 18 15 0			
Police-rate, Christmas, 1843 £2 14 2			
Ditto, Lady Day, 1854 2 14 2			
Ward, one quarter, Christmas 1 7 1			
6 15 5			
[125] Land-tax, September, 1853 £11 10 3			
Ditto, Lady Day, 1854 11 10 3			
23 0 6			
Church-rate, 1854 8 5 0			
Tithe, half-year, Christmas, 1853 £12 0 0			
Ditto, one quarter, Lady Day, 1854 6 0 0			
18 0 0			
House-tax four quarters, Lady Day, 1851 1 17 6			
Water-rate, Christmas, 1853 £0 15 0			
Ditto, Lady Day, 1854 0 7 6			
1 2 6			
Sewer, 1854 1 7 1			
Consolidated, six months, 1854 9 9 7			
	120	15	2
Property-tax, Ship Afloat, four quarters, Lady Day, 1854	1	15	0
Raymond, account	0	10	6
Carpenter's account	0	3	0
To business account	3	3	0
To commission, and stamps	18	1	9"

The cause was tried before Jervis, C. J., at the sittings after Hilary Term, 1856, and a verdict found for the plaintiff for the damages in the declaration, subject to the following case: –

The plaintiff is a warehouse-keeper carrying on business in Lower Thames Street, London. The defendants are executors of John Thackeray, late of Lewisham, deceased.

On the 11th of January, 1811, one William Lingham was possessed under two leases dated respectively the 15th of August, 1794, and 9th of January, 1795, for two certain terms of years, both of which expired at Midsummer, 1854, of certain premises

in the city of London, of which certain warehouses called Lingham's Warehouses, formed part; and by indenture of that date, in consideration of the sum of 2000l., he granted to the said John Thackeray an annuity of 222l. 4s. 5d. for the lives of the said John Thackeray, of one Elizabeth Yar-**[126]**-nold, and of one Samuel Thackeray, and for the lives and life of the survivors and survivor of them, payable quarterly, and without any deduction on account of any present or future taxes, charges, or impositions whatsoever except property-tax or income-tax: and, for securing the same, he demised to the said John Thackeray the said premises, including Lingham's Warehouses, for the term of forty-three years from the 10th of January, 1811, if the said John Thackeray, Elizabeth Yarnold, and Samuel Thackeray, or the survivors or survivor of them, should so long live.

By another indenture, of the 11th of January, 1811, the said William Lingham, in consideration of another sum of 2000l., granted to one Ralph Ellis another similar annuity of 222l. 4s. 5d. during the lives of the said Ralph Ellis, and his sons Henry Ellis and Ralph Ellis, and the survivors and survivor of them: and, for securing the same, he demised to the said Ralph Ellis the same premises, including Lingham's Warehouses, for the term of forty-three years from the said 10th of January, 1811, if the said Ralph Ellis, and his sons Henry Ellis and Ralph Ellis, or the survivors or survivor of them, should so long live.

By indenture of assignment, bearing date the 14th of March, 1817, the said William Lingham assigned the said premises for the whole residue of his term and interest therein, subject to the said annuities and terms of years for securing the same, to John Kew and William Kew, as a security for a certain debt of 2168l. 6s. 5d. then due from the said William Lingham to the said Messrs. Kew, and interest; and also to secure such further sum and interest, not exceeding 4317l. 10s. 6d. (being the amount which the said John Kew and William Kew were liable to pay to the Bank of England on account of the said William Lingham), as the said John **[127]** Kew and William Kew might pay to the Bank of England for the said William Lingham.

By an agreement in writing bearing date the 10th of May, 1824, made between the said John Kew and William Kew of the one part, and Thomas Lingham, a son of the said William Lingham, of the other part, reciting that there remained due to the said John Kew and William Kew, upon or by virtue of their said assignment, by the said William Lingham, the sum of 5705l. 3s. 8d., principal money, with the sum of 1383l. 9s. 6d. for interest on the same, and that the said Thomas Lingham had agreed with the said John Kew and William Kew for the purchase of the said debt of 5705l. 3s. 8d. and all interest then due and thereafter to become due thereon, at the price of 1150l.; and reciting that he had paid the sum of 550l. in part of the said purchase-money, the said John Kew and William Kew severally agreed with the said Thomas Lingham, that, on payment of the further sum of 600l., they would, at the costs of the said Thomas Lingham, and by such assurances as he or his counsel should acquire, assign to him, his executors, administrators, or assigns, the said debt of 5705l. 3s. 8d. and all interest due and to become due in respect thereof, and also the said indenture of the 14th of March, 1817, and all benefit and advantage thereof, and of the trusts therein contained: and the said Thomas Lingham agreed on or before the 1st of July then next to pay the said sum of 600l. upon having such assignment executed as thereinbefore agreed.

Messrs. Kew, by deed bearing date the 25th of May, 1824, assigned all their personal estate to George Augustus Lingham, Charles Dixon, and John Abbott, for the benefit of their creditors. They had previously deposited the assignment of Mr. William Lingham's leases with Messrs. Dixon & Morgan, as a security for a considerable debt owing to them.

[128] William Lingham died in 1825, having made his will, and thereof appointed his sons, the said Thomas Lingham and George Augustus Lingham, and his daughter, Sarah Crowley, executors and executrix. Mrs. Crowley renounced probate; and the two sons duly proved the will on the 14th of November, 1825.

On the 3rd of December, 1825, Thomas Lingham became bankrupt; and William Simpson was appointed sole assignee of his estate and effects, under a commission of bankruptcy issued against him; and the usual assignment was made to the said William Simpson.

Shortly after the death of William Lingham, and before his will was proved, the ground rents due from William Lingham in respect of the premises comprised in the

annuity-deeds being greatly in arrear, an arrangement was come to for discharging the same, and for other matters, by an agreement bearing date the 25th of October, 1825, between the said John Thackeray and Ralph Ellis, and the said Thomas Lingham, George Augustus Lingham, and one Richard Ellis, of which the following is a copy :—

"In consideration of each of the undersigned John Thackeray and Ralph Ellis having, at the instance and request of us the undersigned Thomas Lingham, George Augustus Lingham, and Richard Ellis, and each and every of us, agreed to advance and pay to Mr. R. Hains as the agent of the ground-landlords of the premises on lease to the late Mr. William Lingham, half (making together the full amount) of the ground rents due at Michaelmas last, and of one year's insurance to that time,—each moiety amounting to the sum of 342*l.* ; and in order to induce each of them the said John Thackeray and Ralph Ellis so to do, we, the said Thomas Lingham, George Augustus Lingham, and Richard Ellis, do hereby jointly and severally engage and undertake with each of them the said John Thackeray and [129] Ralph Ellis, that the will of the said William Lingham shall be proved in the Prerogative Court of Canterbury within fourteen days from this time ; and that one moiety of the money now due to the estate of the said William Lingham from the commissioners of His Majesty's Customs for rent of part of the said premises, and also one moiety of all other rents now due and hereafter to become due in respect of the said premises, shall in the first instance be applied in payment to each of them the said John Thackeray and Ralph Ellis of his said sum of 342*l.*, with interest thereon, at the rate of 5*l.* per centum per annum, from the date of the advancement thereof by each respectively of them the said John Thackeray and Ralph Ellis ; and that the said leasehold premises shall be chargeable with the same sums and interest ; and also that both moieties of the residue of the same rents and profits shall in the next place, and after payment of the ground-rents and taxes payable thereout, be applied in manner following, that is to say, one moiety in payment and discharge of the present arrears of the annuity granted to each of them the said John Thackeray and Ralph Ellis by the said William Lingham, and charged upon the same premises, and all the future and growing payments of the same annuity ; and that possession of such parts of the said leasehold premises as are in hand shall this day be delivered to the said John Thackeray, as having the prior legal title to the possession or receipt of the rents of the premises ; but all the rents and profits applicable to the payment of the said annuities or either of them shall be applied in payment and discharge of both of the said annuities pari passu, that is to say, by an equal pound-rate : And this undertaking shall be a sufficient authority and consent and direction to and for the tenants of such parts of the said leasehold estates as are in the possession of tenants, for paying their arrears and future and [130] growing payments of their rents to the said John Thackeray, to be by him applied for the purposes aforesaid : And also that the costs and charges of the said John Thackeray and Ralph Ellis of and occasioned by the negotiation and attendances upon, and correspondence with, Mr. Broughton, Messrs. Ellis & Co., and Messrs. Sherwood & Son, which have led to this arrangement, and also the costs of this undertaking, and consequential thereon (not exceeding in the whole the sum of 600*l.*), shall be paid and discharged out of the rents and profits of the said leasehold estates, and shall be a charge on the said leasehold estates and the rents and profits thereof ; and that, for the purpose of securing the said several sums of 342*l.* and 342*l.*, and the said costs and charges, an underlease or underleases, and not an assignment by way of mortgage, and at a pepper-corn rent, shall, at our costs and charges, be executed to the said John Thackeray and Ralph Ellis respectively, or to a trustee for them and him respectively ; but that the sum to be secured to each of them the said John Thackeray and Ralph Ellis for the said sum of 342*l.* and his share of such costs and charges, shall not exceed in the whole the sum of 942*l.*"

In pursuance of the said agreement of the 25th of October, 1825, the said John Thackeray, on or about the date thereof, paid one of the said sums or moieties of 342*l.*, and also the sum of 63*l.* 3*s.* 7½*d.*, being a moiety of the costs and charges mentioned in the said agreement.

By another memorandum, made on the said 25th of October, 1825, the said George Augustus Lingham and Thomas Lingham authorised, impowered, and requested the said John Thackeray and Ralph Ellis to pay to the rector of the parish in which the said premises included in the said annuity securities were situate, certain arrears of

tithe due in respect of and chargeable upon the said premises, and agreed that they might retain what they [131] should so pay out of any moneys which might come to their or either of their hands under their several securities, from the said late William Lingham, or under the first-mentioned agreement of the 25th of October, 1825.

The said John Thackeray, in pursuance of this request and agreement, paid to the said rector sums amounting to 90l. 2s. 8d., being a moiety of the said arrears of tithe.

The said Ralph Ellis, in pursuance of the said agreement of the 25th of October, 1825, and memorandum of the said date, made similar payments of other sums or moieties of 342l., 63l. 3s. 7½d., and 90l. 2s. 8d., at the same times and on the same accounts as the payments so made by the said John Thackeray.

By an indenture under seal, bearing date the 11th of October, 1826, made between the said George Augustus Lingham and Thomas Lingham, therein described as executors of William Lingham, of the first part, Stover Smith, sole assignee of the estate and effects of the said George Augustus Lingham, under a commission of bankruptcy against him, of the second part, William Simpson, sole assignee of the estate and effects of the said Thomas Lingham under the said commission of bankruptcy against him, of the third part, the said John Thackeray and Ralph Ellis of the fourth part, and Joseph Barber (the plaintiff) of the fifth part,—reciting, amongst other things, that, in pursuance of the said agreement of the 25th of October, 1825, the said John Thackeray and Ralph Ellis had severally paid the said sums of 342l. each, and that the said John Thackeray had been duly let into, and had ever since continued in, the possession of such parts of the said leasehold premises as were in hand, and into the receipt of the rents and profits of such parts of the said premises as were tenanted,—the above-named plaintiff became tenant to John Thackeray of a portion of the premises comprised in the annuity-deeds until the 25th of March, 1827, and thenceforth as yearly [132] tenant, but so as not to exceed twenty-one years from the date of the deed, and to be determinable by a half-year's notice by the said John Thackeray or the said plaintiff, as therein mentioned, at a yearly rent of 409l.: And by the said indenture it was agreed and declared between the said Thomas Lingham, George Augustus Lingham, John Thackeray, and Ralph Ellis, that the said yearly rent of 409l. reserved to the said John Thackeray as aforesaid should be paid, applied, and disposed of, in the first place in payment of the ground-rents, and all taxes, rates, tithes, and assessments which should from time to time become due in respect of the premises thereby demised, during the term thereby granted; in the second place, in payment of 150l., and no more, being a sum which the said John Thackeray and Ralph Ellis had agreed might be paid out of the rents and profits of the said premises towards putting the same in repair, and to be applied for that purpose and no other; and lastly, in such payments, and for such purposes, as according to the true intent and meaning of the said agreement bearing date the 25th day of October, 1825, were agreed to be paid. [A copy of this deed accompanied the case.]

By indenture of the 19th of June, 1827, made between Messrs. Kew of the first part, Messrs. Dixon & Morgan of the second part, George Augustus Lingham, Charles Dixon, and John Abbott, assignees of Messrs. Kew, of the third part, William Simpson, assignee of Thomas Lingham, of the fourth part, Thomas Lingham of the fifth part, and Joseph Barber, the plaintiff, of the sixth part (but which was not executed by the said George Augustus Lingham),—reciting the said agreement of the 10th of May, 1824, between the said John Kew and William Kew of the one part, and the said Thomas Lingham of the other part; and reciting the bankruptcy of the said Thomas Lingham, and the appointment of the said William Simpson as assignee as aforesaid; and that the plain-[133]-tiff had contracted with the said Messrs. Dixon & Morgan, and with the said William Simpson, for the purchase of their several and respective rights and interests as thereinbefore recited, of and in the said debt secured by the said deed of mortgage of the 14th of March, 1817, which then amounted to the sum of 5692l. 19s. 11d., and of all interest due and to become due in respect thereof, and of the said securities for securing the same, at or for the price of 500l.,—it was witnessed that the said premises comprised in the said annuity-deeds were (in consideration of 500l. paid by the plaintiff, viz. one moiety thereof to Morgan & Dixon, and the other moiety to William Simpson,) assured in manner therein expressed, by the parties of the first, second, third, fourth, and fifth parts, to the plaintiff for the residue of the said leases granted to the said William Lingham, subject to the annuities

to Messrs. Thackeray and Ellis, and to the said under-leases for securing the same,—upon trust for securing to the plaintiff the principal money secured by the indenture of the 14th of March, 1817, and interest. [A copy of this deed also accompanied the case.]

By an indenture made and dated on the 25th of April, 1839, between the said George Augustus Lingham and Thomas Lingham, described as executors of William Lingham, of the first part, Thomas Turnbull of the second part, and the plaintiff of the third part,—and which recited and recognized, amongst other things, the said agreement of the 10th of May, 1824, and the said payment by the said Thomas Lingham of the said sum of 550l. in part payment for the purchase of the said debt of 5705l. 3s. 8d. and interest, and the indenture of the 19th of June, 1827,—certain premises, being other than those included in the said annuity securities, were conveyed to the plaintiff, as therein mentioned, in consideration of the sum of 960l., part of the mortgage debt secured by the said deed of the 14th of March, 1817, and **[134]** claimed by the plaintiff to be due from the said executors of the said William Lingham to him the plaintiff under and by virtue of the said last mentioned deed, and of the said agreement of the 10th of May, 1824, and deeds of the 25th of May, 1824, and the 19th of June, 1827. And the said indenture contained a proviso that nothing therein contained should be construed, deemed, or taken in any manner to prejudice or otherwise to affect the right of the plaintiff, his executors, administrators, or assigns, to the interest then due and owing on the said mortgage debt or sum of 5705l. 3s. 8d., or to the sum of 4745l. 3s. 8d. (being the balance of the said mortgage debt, after deducting thereout the said purchase money or sum of 960l.), or to the interest thenceforth to become due for the same, or to his or their rights or remedies against the said premises comprised in the said indentures of lease of the 15th of August, 1794, and 9th of January, 1795, or either of them, for the recovery thereof.

The plaintiff continued tenant to John Thackeray under the deed of the 11th of October, 1826, until some time in the year 1830, when his tenancy under that lease was put an end to, on his becoming tenant of the premises included in that lease, together with other portion of the premises comprised in the annuity-deeds, and called Lingham's Warehouses, at the rent of 550l.

There was no written agreement for this new tenancy, nor does it appear who was or were the demising party or parties, or what were the terms of it, except as may be inferred from the facts herein stated, or by the payments of rent hereinafter mentioned.

This rent was regularly paid by the plaintiff until Lady-Day, 1854, to an auctioneer and agent of the name of William Ellis, who received it as agent, during Mr. Thackeray's life, for him and Mr. Ralph Ellis, or his representative, in equal moieties; and the form of the receipts given by him was as follows: -

[135] "Received of Joseph Barber, Esq., the sum of 275l., two quarters' rent due at , for Lingham's Warehouses, Lower Thames Street.

"WILLIAM ELLIS, agent for
"MESSRS. THACKERAY AND ELLIS."

John Thackeray was the last of the cestuis-que-vie mentioned in his annuity deed, and died in May, 1851. The defendants were his executors; and, from the time of his death, that is, for six half years, Mr. William Ellis regularly applied for and received the rent of 550l. (amounting to 1650l.) as agent for them and for the representative of Mr. Ralph Ellis, and accounted for it to them in equal moieties.

By reason of the payments and deductions mentioned in the particulars of set-off, neither the said John Thackeray and Ralph Ellis, nor the representatives of either of them, had ever on any occasion actually received a moiety of the entire amount of rent paid by the plaintiff.

The amount actually paid over by William Ellis in respect of the said six half years mentioned in the plaintiff's particulars is, the sum of 606l. 16s. 9½d., and no more, being the balance of all the rents paid by the plaintiff and by tenants of other parts of the premises included in the said annuity securities. This sum of 606l. 16s. 9½d. was paid by William Ellis to the defendants, and to the representative of Mr. Ralph Ellis, in equal moieties.

The commission charged by William Ellis upon the rents received during the said six half-years amounts to the sum of 108l. 10s. 9d.

The portion of the said sum of 606l. 16s. 9½d. so paid over by the said William Ellis, which the defendants allege is attributable to or derived from the rent paid by the plaintiff, is the sum of 534l. 16s. 7d., and no more, having regard to the proportion of the charges and outgoings which is attributable to the portion of the premises held by the plaintiff. This last statement of [136] amount is not admitted by the plaintiff, but is inserted as explanatory of the case, being the supposed amount, or thereabouts.

The last survivor of the cestuis-que-vie in Ellis's annuity-deed died in 1847.

The plaintiff was not aware until after the last payment of rent, in 1854, that all the cestuis-que-vie in the annuity-deeds were dead. Upon this being discovered, the attorneys for the plaintiff made a written demand on the defendants to refund the rents of the premises in Lower Thames Street, which the plaintiff alleged that the defendants had improperly received since their testator's death; and, such demand not being complied with, this action was commenced.

At the date of the agreement of the 25th of October, 1825, there was an arrear of 166l. 13s. 4d. on account of the annuity granted to the said John Thackeray, and an arrear of the same amount on account of the annuity granted to the said Ralph Ellis.

From the date of the said agreement, until the deaths of the said Ralph Ellis and of the said John Thackeray respectively, the arrears of the said annuities respectively continually increased.

At the time of the death of the said John Thackeray, the arrears of his said annuity,—irrespective of the sums of 342l., 63l. 3s. 7½d., and 90l. 2s. 8d paid by him as aforesaid, and which three sums the defendants allege remained unpaid, but which the plaintiff alleges were satisfied out of the moiety of the rents of the property, in pursuance of the terms of the said agreement of the 25th of October, 1825,—amounted to a sum much larger than the said sum of 1650l. paid by the plaintiff in respect of the said six half-years mentioned in the particulars of demand.

In like manner, at the time of the death of the said John Thackeray, a considerable sum (much exceeding a moiety of the said sum of 1650l.) was due to the repre-[137]-sentative of the said Ralph Ellis, for arrears of his said annuity, irrespective of the said sums of 342l., 63l. 3s. 7½d., and 90l. 2s. 8d. paid by the said Ralph Ellis as aforesaid, and which the defendants allege remained unpaid, but which the plaintiff alleges were satisfied out of the moiety of the rents of the property, in pursuance of the terms of the said agreement of the 25th of October, 1825.

The sums paid to the said John Thackeray and Ralph Ellis and his representative, under their securities, during the period, amounted to 4942l. 13s., and were paid to them in equal moieties.

Mr. William Ellis, the auctioneer, received the rents of the other premises comprised in the annuity-deeds for the defendants and Mr. James Walter Elley Ellis, the representative of Mr. Ralph Ellis; and on their behalf he paid, on account of the premises comprised in the said deeds, including those occupied by the plaintiff, and for which he paid rent as aforesaid, the ground-rent, rents, taxes, tithes, and other charges and outgoings, including some repairs which are specified in the particulars of set-off, and which the defendants claim the right to set off or deduct.

The ground-rents mentioned in the particulars are those reserved by the said original leases of 1794 and 1795. The taxes and rates there mentioned were paid on behalf of the defendants and the said James Walter Elley Ellis, as the premises were let tax and rate free: and the premises in respect of which the said ground-rent, taxes, and rates were paid, were liable to and charged with the same: and the other moneys, for insurance and repairs and otherwise there mentioned, with the exception of the commission, were paid for the necessary protection and maintaining of the premises.

The defendants allege, but the plaintiff does not admit, that the portion of the items comprised in the said particulars of set-off, which arises in respect of the pre-[138]-mises occupied by the plaintiff is, the sum of 1115l. 3s. 5d.

The court was to be at liberty to draw any inferences of fact from the above statement. Either party was to be at liberty to refer to the documents accompanying the case.

The question for the opinion of the court is, whether the plaintiff is entitled to recover back from the defendants the amount of rent paid by him to the said Mr. William Ellis, as the agent of the defendants and Mr. James Walter Elley Ellis,

since the death of the last of the cestuis-que-vie, viz. the sum of 1650l., or any portion thereof.

If the court is of opinion that the plaintiff is entitled to recover in this action, then the verdict is to be entered for such sum as the court shall direct; and, if the court directs that all or any of the payments made by Mr. William Ellis, so far as they are applicable to the premises for which the plaintiff has paid the rent, are to be deducted, then that proportion can be ascertained by the referee already appointed.

If the court thinks the action not maintainable, the verdict now entered is to be set aside, and a verdict entered for the defendants, with costs.

Cleasby (with whom was Hugh Hill, Q. C.), for the plaintiff (*a*)[1]. The first half-year's rent which was paid after **[139]** the death of the last of the cestuis-que-vie, having been paid to the agents of the defendants and J. W. E. Ellis under a mistake of facts,—in ignorance of their right to receive the rent having terminated,—the plaintiff is clearly entitled to recover it back. He was guilty of no laches. The demand of the rent, the person demanding it coming armed with power to distrain if it is not paid, amounting to an assertion on the part of the agent that the state of things upon which the right to demand it was founded continued to exist, it cannot be said that the plaintiff was guilty of laches in making the payments, or that he was bound to make any previous inquiry: *Hasser* v. *Wallis*, 1 Salk. 28. Indeed, it might almost be said that the money was obtained by means of a statement which was untrue: *Polhill* v. *Walter*, 3 B. & Ad. 114; *Crockford* v. *Winter*, 1 Campb. 124. [Crowder, J. The case does not state that the agent made any false representation.] But he regularly demanded the rent; and that amounts to an assertion that he had a right to claim it, and at all events gets rid of the objection that the payments were voluntary. Nor can it be objected here that the action for money had and received will not lie for the purpose of trying the title to land. In Chitty on Contracts, 4th edit. (by Russell), p. 528, it is said: "The title to land or to an incorporeal hereditament cannot be tried in this action: and, accordingly, where rents are received under an adverse holding or possession, or by a person claiming title to land, but having no title, an action for money had and received is not the proper remedy against the party thus wrongfully obtaining such rents: *Lindon* v. *Hooper*, Cowp. 414; *Cunningham* v. *Lau*-**[140]**-*rents*, 1 Bac. Abr. 260; *Clarance* v. *Marshall*, 2 C. & M. 495, 502. But, where a tenant, having paid rent to A., was ejected at the suit of a third person, who afterwards recovered mesne profits from him for the period in respect of which he had paid rent to A., it was held that the tenant might recover back such rent from A. in an action for money had and received, he not having set up any title to the premises at the trial:" *Newsome* v. *Graham*, 10 B. & C. 234, 5 M. & R. 64. Then, it will be said that this is an equitable action; and it will be attempted to be shewn, with reference to the agreement of the 25th of October, 1825, set out in the case, that the defendants had certain equitable rights to the rents beyond the term granted by the annuity-deeds, which afford an answer to this action. But, assuming that the plaintiff is to be taken to have had notice of that agreement, the clear inference from all the subsequent transactions set out in the case is, that that claim must have been long since satisfied. The plaintiff is clearly entitled to recover back all the money paid, without deduction on account of ground-rent or otherwise.

Aspland (with whom was Byles, Serjt.), for the defendants (*a*)[2]. There is nothing

(*a*)[1] The points marked for argument on the part of the plaintiff were as follows:—

"1. That he is entitled to recover back the money (1650l.) paid for rent to the tenant pour autre vie after the death of the cestui que vie (in May, 1851), such money being money paid under a mistake of facts. If the court is of opinion, under the circumstances, that there was not a joint receipt of the whole, and that the defendants only received a moiety, then the claim will be reduced to one-half.

"2. That there is no equitable title under the deeds of 1825 and 1826 which is now available.

"3. If there be any equitable title to the property, that the defendant cannot set it up as an answer to an action for money applied for and obtained in the manner stated."

(*a*)[2] The points marked for argument on the part of the defendants were as follows:—

"The defendants will rely, among other facts, on the fact of the plaintiff claiming

upon the face of the case **[141]** to shew that the defendants, when they received the rent in question, knew that their title to receive it was determined; there was no misrepresentation, no concealment, no fraud, either legal or moral, so as to bring the case within *Crockford* v. *Winter*, *Polhill* v. *Walter*, and that class of cases. This is not the proper form of action, the title to land being in question. It has repeatedly been held that the title to land cannot be tried in an action for money had and received. [Cresswell, J. The legal title was not in dispute here. The defendants shew no title to the land which would justify them in claiming the rent in question from the tenant.] At all events, the plaintiff has been guilty of such laches as to disentitle him to maintain this action. He was bound, before he paid the money, to avail himself of all the means of knowledge he had, to ascertain who were the persons entitled to the rent. The deed of the 11th of October, 1826, under which the plaintiff first became tenant of the premises, recites the agreement of the 25th of October, 1825, which gave Thackeray and Ellis a clear **[142]** equitable charge as against Thomas Lingham and any one claiming under him. The plaintiff cannot, therefore, contend that he had not notice of that agreement, and of the rights of Thackeray and Ellis under it. And, if a man has notice, when he purchases an interest in property, of another's title or right to a charge or incumbrance thereon, he takes it subject to that title or incumbrance. The operation of that agreement was, to create an equitable charge on the premises in lease to William Lingham, for the sums of money thereby agreed to be paid by Thackeray and Ellis for the arrears of the annuities then due, and all the future payments thereof: and the case shews that the sums paid by Thackeray and Ellis in pursuance of the agreement, and the arrears of the annuity remaining unpaid, far exceed the amount of the money sought to be recovered back in this action. In the notes to *Le Neve* v. *Le Neve* (Ambler, 436), in 2 Tudor's Leading cases, 32, et seq., it is said: "No equitable doctrine is better established than that so clearly and forcibly laid down by Lord Hardwicke in the principal case, viz. that the person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a malâ fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat. 'If,' says his Lordship, 'a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, machinatur ad subveniendum: and it is a maxim in our law, that fraus et dolus nemini patrocinari debet. Fraud or mala fides, therefore, is the true ground on which the court is governed in cases of notice.' It may be laid down as a general rule, that a purchaser, with notice of a right in another, is in equity liable, to the same extent, and in the same manner, as the person from whom he made the purchase."

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title under Thomas Lingham (a party to the charging agreement of October, 1825), and also on the fact of the plaintiff being himself a party to the indenture of the 11th of October, 1826, by which he acquired a term in the premises, and which indenture recited and recognised the charging agreement.

"That, if the plaintiff has any right of action, the defendants are at all events entitled, either by way of deduction or set-off, to the benefit of the payments of ground-rent, taxes, rates, and out-goings bonâ fide made by the defendants, mentioned in this case; as the plaintiff had the benefit of those payments, and must have made the same if the defendants had not.

"That, as the sums claimed by the plaintiff were received by the defendants from time to time, bonâ fide, they are entitled to retain the whole, even without reference to the state of the title.

"That, if the plaintiff was not bound to pay, he paid from time to time by his own laches, and therefore cannot recover. But the defendants contend that an equitable right in the defendants to the rents would furnish an answer to the action, and that such equitable right is shewn.

"That, by virtue of the agreement of the 25th of October, 1825, and the payments made by the defendants' testator and the other annuitant, the rents and profits of the premises, until the expiration of the original leases, expiring at Midsummer, 1854, were charged with the sums paid, and with all arrears and growing and future payments of the annuities; that those payments and the arrears of the annuities, are still unsatisfied; and that therefore the money claimed was received to the defendants' own use."

[143] "If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; for, possession is primâ facie seisin, and the purchaser has therefore actual notice of a fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it: *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 440; where Lord Rosslyn says,—'I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined that a purchaser, being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for, it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire" (*a*)[1]. [Cresswell, J. The man was in the occupation himself here, which involves a totally different principle.] "So, likewise, if the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant, which would have led him **[144]** to a knowledge of it: *Daniels* v. *Davison*, 16 Ves. 249, 17 Ves. 433 (*a*)[2]; even although the interest which the tenant may have were posterior to the lease under which he held: *Allen* v. *Anthony*, Meriv. 282." *Allen* v. *Anthony*, is an extremely strong case, inasmuch as it was extending the doctrine of constructive notice to things in which a tenant has not usually an interest, viz. the timber on the estate, and which he claimed under a contract made independent of and posterior to the contract under which he held possession of the estate. So, in Sugden's Concise View, p. 611, it is said, that, "in all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof; for, it was crassa negligentia that he sought not after it (*b*); and, for the same reason, if a purchaser has notice of a deed, he is bound by all its contents" (*c*). It is clear, therefore, that the onus lay on the plaintiff, to shew he had no notice: a person having an incumbrance upon an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase **[145]** of the estate: Sugden's Concise View, 592, citing *Osborn* v. *Lea*, 9 Mod. 96; *Ingram* v. *Thorp*, 7 Hare, 67. At all events, only a small portion of what is claimed can be recovered from the defendants in this case. By the agreement, one half of the rents were to be paid to Ellis. The defendants, therefore, would primâ facie only be liable to the extent of one half of the sums received. And out of this they are entitled to deduct all payments by the agent in respect of the premises, which the plaintiff himself would have been bound to make. [Cresswell, J. The ground-rent was paid to protect your title. You may perhaps fairly contend that as to that you were misled by the plaintiff himself.] The taxes and rates also were a fair charge upon the premises, and ought

(*a*)[1] See *Jones* v. *Smith*, 1 Hare, 60.

(*a*)[2] And see *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583, *Mews* v. *Mallby*, 2 Swanst. 281, *Powell* v. *Dillon*, 2 Ball & B. 416.

(*b*) *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287; *Moore* v. *Bennett*, 2 Ch. Ca. 246; *Ferrars* v. *Cherry*, 2 Vern. 383; *Drapers' Company* v. *Yardley*, 2 Vern. 662; *Mertens* v. *Joliffe*, Ambler, 313; *Bury* v. *Bury*, Sugd. V. & P. App. No. 25, *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; S. P. per Lord Keeper Henley, *Howarth* v. *Powell*, T. Vac. 1758, MS., 1 Eden, 51, nom. *Howorth* v. *Deem*; *Malpas* v. *Ackland*, 3 Russ. 273; *Buckley* v. *Lanauze*, 1 Rep. t. Plunkett, 327; *Davies* v. *Thomas*, 2 You. & Coll. 334; *Webb* v. *Lugar*, 2 You. & Coll. 247; 1 Hare, 59; 1 Phill. 254; 2 Hare, 257; *Nixon* v. *Robinson*, 2 Jones & L. 14.

(*c*) *Tanner* v. *Florence*, 1 Ch. Ca. 259; *Taylor* v. *Stibbert*, 2 Ves. jun. 437; *Hall* v. *Smith*, 14 Ves. 426; *Daniels* v. *Davison*, 16 Ves. 249, -over ruling *Philips* v. *Redhil*, 2 Vern. 160.

to be deducted. The money paid for repairs and for insurance also should reasonably be allowed. The commission perhaps could hardly be insisted upon. [Cresswell, J. Clearly not.]

Cleasby, in reply. The rule undoubtedly is, that an action for money had and received cannot be brought for the purpose of trying the title to land. But it has never yet been held that the plaintiff cannot recover in that form of action, merely because the title to land becomes incidentally involved in the inquiry. The facts stated in this case clearly do not shew that the plaintiff has been guilty of any such laches as to incapacitate himself from recovering all that he can fairly and equitably claim in this action. [Cresswell, J. There is nothing in that point.] The real question turns upon the supposed equitable right under the agreement of the 25th of October, 1825. It must, however, be borne in mind that the plaintiff does not claim under Thomas Lingham, but under the Messrs. Kew and him. Thomas Lingham had no power, even in equity, to charge the property beyond the extent of the money he had paid. **[146]** [Crowder, J. What do you understand by the words "all future and growing payments of the same annuity," in the agreement of 1825?] Those words merely refer to the application of the money. They were never intended to operate a further charge.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court (*a*):—

This was an action for money had and received. Pleas, never indebted, and set-off. The cause was tried before the late Lord Chief Justice Jervis, at the sittings after last Hilary Term, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of the court on a special case, the material parts of which may be thus shortly stated:—

On the 11th of January, 1811, one William Lingham was possessed, under two leases, dated respectively the 15th of August, 1794, and 9th of January, 1795, for two certain terms of years, both of which expired at Midsummer, 1854, of premises in the city of London, of which certain warehouses called Lingham's Warehouses formed part; and, by indenture of that date, in consideration of the sum of 2000*l.*, he granted to John Thackeray an annuity of 222*l.* 4*s.* 5*d.* for the lives of the said John Thackeray, and of one Elizabeth Yarnold, and of one Samuel Thackeray, and for the lives and life of the survivors and survivor of them, payable quarterly, and without deduction on account of any present or future taxes, charges, or impositions whatsoever, except property or income-tax: and, for securing the same, he demised to the said John Thackeray the said premises, including Lingham's Warehouses, for the term **[147]** of forty-three years from the 10th of January, 1811, if the said John Thackeray, Elizabeth Yarnold, and Samuel Thackeray, or the survivors or survivor of them, should so long live. By another indenture, of the 11th of January, 1811, the said William Lingham, in consideration of another sum of 2000*l.*, granted to one Ralph Ellis another similar annuity of 222*l.* 4*s.* 5*d.* during the lives of the said Ralph Ellis and his sons Henry Ellis and Ralph Ellis, and the survivors and survivor of them: and, for securing the same, he demised to the said Ralph Ellis the same premises, including Lingham's Warehouses, for the term of forty-three years from the said 10th of January, 1811, if the said Ralph Ellis and his sons Henry Ellis and Ralph Ellis, or the survivors or survivor of them, should so long live.

In 1827, the premises in those annuity-deeds mentioned were assigned to the plaintiff for the residue of the terms granted to William Lingham, subject to the annuities to Messrs. Thackeray and Ellis, and to the said underleases for securing the same.

In the year 1825, Thackeray and Ellis were let into possession of the premises so underlet to them; and in 1830, the present plaintiff became tenant to them of part of the premises, at the rent of 550*l.*, payable to them in equal moieties. John Thackeray was the last survivor of the cestui-que-vies in his annuity-deed, and died in 1851. The defendants were his executors; and, from the time of his death until the expiration of the leases granted to William Lingham, that is, for six half-years, William Ellis, as their agent, regularly applied for and received the rent (550*l.*) for them and the representative of Ralph Ellis, and accounted for a moiety to each of them, deduct-

(*a*) The judges present at the argument were, Cresswell, J., and Crowder, J.; Williams, J., being indisposed, and Willes, J., sitting at nisi prius.

ing various sums paid on their account. The plaintiff seeks to recover the sums so paid for rent since the death of John Thackeray; and the defendants claim to set off the various sums so paid by their agents for them, [148] if the plaintiff is held to be entitled to recover in this action.

The money paid for rent by the plaintiff was certainly paid under a mistake of facts. The defendants had no right to any such payments: but the defendants say, —first, that, to allow the plaintiff to recover, would be to try the title to the property in an action for money had and received,—secondly, that, according to the facts stated in the case, it would be inequitable to allow the plaintiff to recover the money, and that, the action for money had and received being an equitable action, it is a good defence to shew that the recovery would be against equity,—thirdly, they claim to set off various payments made by them for ground-rent, taxes, &c.

As to the first point, we think that this is not an action to try a disputed title to land: there is no dispute on the subject: it is a simple case of money paid after the title of the defendants' testator expired, the fact of its having so expired not being in any manner disputed.

The second point depends upon the effect of the agreement bearing date the 25th of October, 1825. It appears that shortly after the death of William Lingham, and before his will was proved, the ground rents due from William Lingham in respect of the premises comprised in the annuity-deeds being greatly in arrear, an arrangement was come to for discharging the same, and for other matters, by an agreement bearing date the day last mentioned, between John Thackeray and Ralph Ellis, and Thomas Lingham (the son of William Lingham), George Augustus Lingham, and one Richard Ellis. [His Lordship read the agreement.]

It was contended,—and, we think, rightly contended,—that the plaintiff must be taken to have had notice of this agreement: and the defendants say that the operation of it was, to create an equitable charge on the premises in lease to William Lingham for the sums of money [149] thereby agreed to be paid by Thackeray and Ellis for the arrears of the annuities then due, and all the future and growing payments of the same; and that the sums paid by Thackeray and Ellis in pursuance of the agreement, and the arrears of the annuities now remaining unpaid, far exceed the money sought to be recovered in this action. But it appears to us that the agreement in question had not such an operation as the defendants now ascribe to it. The agreement shews, that, up to that time, Thackeray and Ellis had not been let into possession or into the receipt of the rents and profits of the premises devised to them to secure their annuities. It recited that the ground rent payable by William Lingham was much in arrear, that Thackeray and Ellis each agreed to pay 342*l.* of that rent, and, in order to induce them to do so, Lingham's executors agreed to prove his will, that the rents of the premises should in the first instance be applied to the payment of those sums, and that the leasehold premises should be chargeable with those sums, and that the residue of the rents should be applicable, after payment of ground rent and taxes, to the payment of the annuities granted to Thackeray and Ellis. It then provided for giving possession to Thackeray of such parts of the premises as were in hand, and for the payment to him of the rents of such parts as were in lease. It then provided that the costs of that arrangement (not exceeding 600*l.*) should be paid out of the rents, and should be a charge on the said leasehold estates: and then concluded in these words, —"And that, for the purpose of securing the said several sums of 342*l.* and 342*l.* and the said costs and charges, an underlease or underleases, and not an assignment, by way of mortgage, and at a pepper corn rent, shall at our costs and charges be executed to the said John Thackeray and Ralph Ellis respectively, or to a trustee for them and him respectively, but that the sum to be secured to each [150] of them the said John Thackeray and Ralph Ellis for the said sum of 342*l.* and his share of such costs and charges, shall not exceed in the whole the sum of 942*l.*"

This agreement is not that any further charge on the leasehold estates of William Lingham shall be created, to secure either the arrears or future payments of the annuity; but, for the two sums of 342*l.* and 342*l.*, and costs not exceeding 600*l.*, there was to be a further charge by an underlease at a pepper-corn rent: and it may be taken that such underlease would include the whole of William Lingham's term, save one or two days. But there is no reason to suppose that the sums to be secured by such underlease are still unpaid. This very agreement provided that the rents should

be applied in the first place to the payment of those sums, and the residue only to the payment of the annuities. Now, the rents received before Thackeray's death would far more than cover those sums; there is, therefore, no further equitable charge on the premises, to interfere with the right of the plaintiff to recover in this equitable action.

The remaining question relates to the set-off. If the defendants had been in possession, and had after ejectment been sued for mesne profits, they would have been entitled to an allowance for ground-rent; *Doe* v. *Hare*, 2 C. & M. 145: and we think the same principle would extend to rates and taxes. If, instead of being sued for mesne profits, an action had been brought for use and occupation, we think the same allowances would have been made, in estimating the value of their occupation. On the same principle, in this action, which is to recover back money paid by mistake and without consideration, it is just and equitable to allow a deduction in respect of those payments which if not paid by them might have been claimed from the plaintiff as assignee of the original lease, and occupier of the premises.

To this it may be objected that the defendants cannot **[151]** shew that the money was paid by them at the request, expressed or implied, of the plaintiff. But, from the year 1827, when the plaintiff became assignee of the original leases, he must have known that he was liable to pay the rent due to the ground-landlord: and he must be taken to have known, that, under the agreement of 1825, Thackeray was bound to pay that rent, and rates and taxes, out of the rents received by him: and, as he never took upon himself the payment of the ground-rent for which he was liable as assignee of the leases, or the rates and taxes which he was liable to pay as occupier, he must be taken to have sanctioned the continued payment of them by the parties to whom he paid rent. We are therefore enabled to say that this money was paid at the request of the plaintiff, and must be allowed by way of set-off.

Our judgment, therefore, is, that the plaintiff is entitled to recover in this action the five half-years' rent paid by him after the death of Thackeray; and that the defendants are entitled to set off the ground-rent, rates, and taxes paid by them in respect of the premises occupied by the plaintiff.

Judgment accordingly.

In the Matter of William Vardy Eyre, Gentleman. Palmer *v.* Evans. Nov. 26, 1856.

Upon a rule calling upon an attorney to answer matters, the charge against him being that he had recovered from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed,—it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge, and pay the costs of the application.

Macnamara, on a former day in this term, obtained a rule calling upon William Vardy Eyre, one of the attorneys of this court, to answer the matters contained in certain affidavits, in which it was alleged that he had obtained from the defendant an excessive sum for costs, **[152]** upon an untrue assertion that judgment had been signed and execution issued.

Phipson now shewed cause, upon affidavits which failed to satisfy the court that the alleged extortion had not been practised, but which did satisfy them that Mr. Eyre was not himself personally cognisant of the matter.

Macnamara appeared to support his rule.

Jervis, C. J. Under the circumstances, I do not think this rule can be made absolute. But it seems to me that there has been very improper conduct on the part of some one in Mr. Eyre's office, in extorting from the defendant an excessive sum for costs under the false pretext that something had been done which in fact had not been done. It does not, however, appear to me that this matter came personally to the cognisance of Mr. Eyre. But, inasmuch as it was done in his office, and by a person for whose acts he is responsible, and as he received the money, I think he is so far implicated as to make him responsible. It is our duty to see that the power which the law has placed in the hands of the plaintiff and his attorney, is not made an instrument of extortion and oppression. I think the justice of the case will be answered by

discharging this rule, on Mr. Eyre refunding the amount received by him in excess, and paying the costs of the rule.

The rest of the court concurring,

Rule discharged accordingly (*a*).

[153] COOKE *v.* WILSON AND ANOTHER. Nov. 11, 1856.

[S. C. 26 L. J. C. P. 15; 2 Jur. N. S. 1094; 5 W. R. 24. Dictum applied, *Paice* v. *Walker*, 1870, L. R. 5 Ex. 177.]

A contract for the conveyance of goods from Liverpool to Australia was entered into as follows:—"It is this day mutually agreed between J. & R. W., owners of the ship 'Jessica,' of the first part, and S. J. C. of the other part,"—that the ship should be ready by a given day to take on board certain specified goods, and should proceed therewith "to Geelong, in the colony of Victoria," and there deliver the same: "the rates of freight determined upon by the said parties to this agreement, are as under," &c.,—"one third to be paid in London, on receipt of bills of lading, and the remainder by the Geelong and Melbourne Railway Company, at Geelong:" "goods to be taken on board at Liverpool at ship's expense:" and the agreement was signed,—"J. & R. W., S. J. C.:"—Held, that S. J. C. was personally bound by this contract, and entitled to sue for a breach of it.—Held, also, that the court were bound to take notice that "Geelong, in the colony of Victoria," is a place out of England.—A declaration by S. J. C., after setting out the above contract in hæc verba, averred, that, although the goods were in the care and custody of the defendants for the purpose of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect, and default, certain of them were damaged, &c.:—Held, that the declaration disclosed a breach of duty arising out of the contract, for which the defendants were liable to an action at the plaintiff's suit.

The declaration stated, that, on the first of December, 1855, it was agreed between the plaintiff and the defendants in the words and figures following,—"It is this day mutually agreed between Messrs. J. & R. Wilson, of Liverpool (meaning the defendants), owners of the ship "Jessica" of Liverpool, A1, 858 tons, now at L., of the first part, and Samuel John Cooke (meaning the plaintiff), of London, on behalf of the Geelong and Melbourne Railway Company, of the other part,—That, the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall be ready on the 6th day of December to take in the under-mentioned goods in the M. Dock, four locomotive engines complete, in parts, and cases, including duplicate gear; fourteen railway carriage bodies, and parts thereof, complete; two small iron box waggons; two large covered iron box waggons; fourteen under iron frames of carriages; sixteen cases, more or less, of springs and carriage materials, chiefly iron work; thirty to fifty pairs iron wheels and axles: the cargo not to exceed what the ship can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture: and, being so loaded, should therewith proceed to Geelong, in the **[154]** colony of Victoria, and there deliver, alongside the pier of the Geelong and Melbourne Railway Company, in Corio Bay, the aforesaid goods and locomotives. A period of twenty days is allowed for the discharge of the entire cargo; and the company's cranes and other assistance for the discharge thereof at their pier are to be given. The rates of freight determined upon by the said parties to this agreement, are as under:—a lump sum of 1100*l.* for the four locomotive engines complete, with duplicate gear; 85*s.* per ton of 40 cubic feet for the carriage-bodies and roofs; 65*s.* per ton of 20 cwt. for the iron box waggons, iron under frames, sixteen cases (more or less) of the materials in iron-work and wheels and axles: all with 5 per cent. primage thereon. One third of the total of freight to be paid in London on receipt of bills of lading, and the remainder, viz. two thirds, by the Geelong and Melbourne Railway Company, at the port of Geelong aforesaid. The ship to sail from Liverpool not later than the 25th of January. Demurrage

(*a*) See *Dunkley* v. *Farris*, 11 C. B. 457, where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, and the court set aside the writ and all proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs.

over and above the said period of discharge at 10l. per day. Ship to be free of all dues and charges whilst lying at the company's wharf, Geelong. It is also agreed that the ship shall take the whole of the above packages. Goods to be taken on board at Liverpool at ship's expense. Penalty for non performance of this agreement, 2000l. Dated, London, the 1st of December, 1855. J. & R. Wilson. Samuel John Cooke." Averment, that although afterwards, the said goods, and every part thereof, according to the terms of the agreement, were in the care, custody, and possession of the defendants for the purpose of their being so taken on board as aforesaid, and the defendants took the said goods on board at the said ship's expense: yet, by their wrongful act, neglect, and default in the premises, one of the said locomotive engines, whilst the same was so being taken on board as aforesaid, was suffered to slip **[155]** and fall, and fell, and was and became thereby broken and much injured, and the plaintiff was thereby necessarily put to great expense, and necessarily thereby paid large reasonable sums of money in and about the necessary repairing of the said engine, and in and about procuring, keeping, and paying workmen and others to effect and superintend such repairs, and in and about the sending telegraphic messages to and from divers places, rendered necessary by the premises, and in and about paying wages to, and keeping and maintaining certain workmen who were to have accompanied the said goods on the aforesaid voyage, but who, by reason of the premises, were detained in England, and otherwise incidental to the premises: and, by reason of the premises, also the shipment and dispatch of the said goods was much hindered and delayed, to the great damage of the plaintiff: and the plaintiff said that all things to entitle him to maintain this action had happened before suit: and the plaintiff claimed 200l.

The defendants pleaded,—first, that, at the time when the said locomotive engine in the declaration mentioned was suffered to slip and fall, and did fall, as in the declaration mentioned, the same was not in the care, custody, and possession of the defendants, and was not being taken on board the said ship by the defendants,—secondly, that the said locomotive engine was not suffered to slip and fall, and did not fall, by the wrongful act, neglect, and default of the defendants, as in the declaration mentioned.

They also demurred to the declaration, the ground of demurrer in the margin, being,—"that the declaration does not shew any promise by the defendants to the plaintiff to keep for the purpose mentioned, and take on board, the said goods safely and securely; and that it does not shew any bailment of the same by the plaintiff to the defendants." Joinder.

[156] J. Brown, in support of the demurrer (*a*). The plaintiff was not the proper person to sue. The only concern he has with the accident is, a contract set out in the declaration, in which he appears as a party contracting as agent on behalf of a railway company. For anything that appears, the moment he had signed the contract, his authority as an agent was at an end; for, it cannot be larger than he has himself represented it to be. He could not have been sued for a breach of the contract by the railway company. [Crowder, J. He does not profess to sign "as agent."] In *Tanner* v. *Christian*, 4 Ellis & B. 591, —which will probably be relied on as an authority for the plaintiff, —it sufficiently appeared throughout the agreement that the defendant was to be the acting party. In *Lucas* v. *Beale*, 10 C. B. 739, A., a member of the orchestra of the Italian Opera, "on behalf of the orchestra," signed the following proposal,—"The gentlemen of the orchestra are willing, and hereby pledge themselves, to continue their services, and attend their duties, provided B. will guarantee the payment of thirteen nights due on the 5th ult." B. accepted the proposal by writing in these terms, "B. will accept the proposition made by A. on behalf of the gentlemen of the orchestra, and he will appoint the treasury to be open on the 19th inst. to pay

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(*a*) The points marked for argument on the part of the defendants, were, —

"That the declaration does not shew any cause of action in the plaintiff: That it shews the plaintiff to have been merely an agent for the purpose of effecting a contract for the carriage of goods for parties named: That it does not shew any bailment or trust by the plaintiff to the defendants: That it does not shew any duty by the defendants to the plaintiff to take the goods on board safely: And that it does not shew any interest had by the plaintiff in the goods, or how the damage arose to him."

the thirteen nights due on the 5th ult., and he pledges himself to open the treasury on the 10th and 25th of **[157]** August, to make further payments." A. in his own name brought an action for a breach of this engagement, describing it in his declaration as a contract made with him and the other performers: and the court held that the contract was joint, and that A. could not sue upon it alone. [Cresswell, J. The obvious distinction between that case and the present is, that there the plaintiff professes to sign the agreement for himself and the other performers.] In *Downman* v. *Williams*, 7 Q. B. 103, where an undertaking by an attorney "on behalf of his clients," to pay money, was held not to render the attorney personally liable, Tindal, C. J., in giving the judgment of the court of error, says: "In *Appleton* v. *Binks*, 5 East, 148, 1 J. P. Smith, 361, upon which the most reliance was placed, the only point decided was, that a man who covenanted for himself and his heirs, under his own hand and seal, for the act of another, should be personally liable, though he described himself as agent in the deed,—a very different proposition from that now before us: for, the question before us is more properly this, –if a person enters into a contract in writing, describing himself as agent, and naming his principal, whether the principal shall be bound, provided the agent had authority to enter into the contract on his behalf,—a point which we consider too clear to admit of doubt or argument." [Cresswell, J In the earlier part of the judgment, the Lord Chief Justice says: "The very terms of the letter itself, –'I undertake (on behalf of Messrs. Esdaile & Co.) to pay,' would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another, than as intended to bind the party speaking in the character of a principal; for, upon the latter supposition, there would appear to be no reason whatever for mentioning the name of the principal." Here, there is a reason for naming the principals.] The only reason there could be for mentioning **[158]** the company, could be, for the purpose of shewing that the plaintiff was contracting as agent, and not on his own behalf. Besides, this is not an action brought for a mere breach of the contract to carry the goods from Liverpool to Geelong. It is an action for damage done to the goods in the course of the transit: to enable the plaintiff to maintain which, he is bound to shew that he has some connection with, or interest in the goods, as consignor, consignee, or otherwise: *Dunlop* v. *Lambert*, 6 Clark & Fin. 600; *Coats* v. *Chaplin*, 3 Q. B. 483, 2 Gale & D. 552. In *Marshall* v. *The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, a declaration in case against a railway company, for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost: and it was held, that the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid by the plaintiff; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. Williams, J., there says: "It seems to me that the whole current of authorities, beginning with *Govett* v. *Radnidge*, 3 East, 62, and ending with *Pozzi* v. *Shipton*, 8 Ad. & E. 963, 1 P. & D. 4, establish that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, Writ de Trespass sur le Case, where it is said,—p. 94, D., –'If a smith **[159]** prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for, it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary." In the present case, it would be necessary to shew a contract with the plaintiff. [Cresswell, J The ship owners are to take the goods on board at the ship's expense: and they assume to take them on board by their servants: are they not bound to take care of them?] The defendants do not engage to ship the goods themselves; but merely to pay for putting them on board. Upon the whole, therefore, it is submitted, that the plaintiff is not the proper person to sue upon this agreement, that there was no breach of the contract, inasmuch as it did not extend to the putting the goods on board, that the plaintiff is not shewn to have had any interest in the goods, as trustee, or otherwise,

—and that the special damage is not the gist of the action: and, if it were, that it should have been alleged with more certainty: 2 Wms. Saund. 243 d.

Byles, Serjt., contrà. The plaintiff signs the contract in his own name, and not as agent. It is an universal rule, that, if a man signs a contract in his own name, and there is nothing in the contract that is inconsistent with that construction of it, he is personally responsible for its fulfilment, even although there may be a principal who may be liable also. The rule is so laid down in the notes to *Thomson* v. *Davenport* (9 B. & C. 78, 4 M. & R. 110), in 2 Smith's Leading Cases, 4th edit. 298. This is a contract of charter made by the plaintiff for a foreign principal. It begins: "It is this day mutually agreed between Messrs. J. & R. Wilson (the defendants), **[160]** owners of the ship 'Jessica,' of the first part, and S. J. Cooke (the plaintiff), on behalf of the Geelong and Melbourne Railway Company, of the other part." It may be conceded, that, if that had not been followed by a signature in its present form, there might have been some difficulty in the construction contended for on the part of the plaintiff. The subsequent language, however, removes all ambiguity:—"The rates of freight determined upon by the said parties to this agreement, are as under," &c. "One third of the total freight to be paid in London on receipt of bills of lading," —by the plaintiff, of course,—"and the remainder, viz. two thirds, by the Geelong and Melbourne Railway Company, at the port of Geelong aforesaid." Could the now plaintiff have insisted, if an action had been brought against him for not having the goods ready for shipment, or for non-payment of the stipulated freight, that he was no party to this contract? In *Tanner* v. *Christian*, 4 Ellis & B. 591, a written agreement was expressed to be made "between Christian, for and on behalf of Norris, of the first part, and Tanner of the second part." By it, "Christian, on the part of Norris, agreed to let to Tanner certain premises for a term of years, Tanner paying rent to "Christian, for the use of Norris:" no auction to be held on the premises without the "consent in writing of Christian, on the part of Norris: Tanner to take a lease, and execute a counterpart thereof, when called upon to do so by Christian on the part of Norris." Christian signed the agreement in his own name: Norris did not sign it. In an action by Tanner against Christian for not completing the lease,—it was held, that it sufficiently appeared to be the intention of the parties that Christian should himself contract, and that therefore he was personally liable. The two cases are almost identical. Lord Campbell there says: "It appears that, throughout the whole transaction, from beginning to end, **[161]** Christian is to be the acting party. I think, therefore, that the intention was that he was to carry the contract into effect: and he signs the agreement, not by procuration for Norris, but in his own name; so that, I think, he personally undertakes for its performance. From the authorities cited, particularly *Norton* v. *Herron*, R. & M. 229, it seems to be decided, that, in an agreement worded like this, the person signing it is personally liable. *Lewis* v. *Nicholson*, 18 Q. B. 503," which was decided upon the authority of *Downman* v. *Williams*, 7 Q. B. 103, "does not at all conflict with our decision; for, the defendants in that case were not in any way to act in carrying out the agreement: they were solicitors, who signed a promise for and on behalf of their clients, but were not themselves to do anything." *Leonard* v. *Robinson*, 5 Ellis & B. 125, differs from the present case only in the circumstance of the charterparty not being there stated to have been made by the defendants on behalf of their principals. Lord Campbell there says: "I do not attach much weight to the fact that the alleged principal is a foreigner; for, a part of the contract was to be performed in Memel, where he resides, and none in England, where the defendants reside. But, looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract, they are contracting parties: and they may well become so 'by authority of and as agents for' their employer; that is, he may be made liable to them. That, however, does not alter the effect of the instrument by which they become contracting parties as between themselves and the plaintiff." And Coleridge, J., expresses himself to the same effect, except that that learned judge attaches some weight to the circumstance of the principal being a foreigner. In *Mahony* v. *Kekulé*, 14 C. B. 390, the contract was expressed to be made "between Vacher **[162]** & Tilly, Morlaix, and Mahony;" and the defendant signed it "for Vacher & Tilly, Charles Kekulé:" he, therefore, incurred no personal liability. This action clearly is founded on the contract. The agreement provides that the goods are to be taken on board at the ship's expense: and the declaration alleges that

the defendants had the goods in their possession for the purpose of taking the same on board, and did take them on board; but that, in so doing, they were guilty of the wrongful act which caused the injury complained of. That is a sufficient allegation of a breach of duty arising out of the contract, for which the defendants are liable.

Brown was heard in reply.

CRESSWELL, J. I am of opinion that the plaintiff is entitled to the judgment of the court upon this record. We have been told by Mr. Brown, that, if we decide in favour of the plaintiff, it will be difficult in future for agents to enter into contracts on behalf of their principals, and thus much inconvenience will result to the commercial world. A very simple way of avoiding that inconvenience would be, to sign the document in the names of the contracting parties, "by so and so, as agents," or "by procuration." Primâ facie, when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him. I find no circumstances of that sort in this case. The contract professes to be made between the plaintiff and the defendants. It begins, "It is this day mutually agreed between Messrs. J. & R. Wilson of the first part, and Samuel John Cooke of the other part" It is true, the words "on behalf of the Geelong and Melbourne Railway Company," are added. It seems, at all events, that the Geelong and Melbourne Railway Com **[163]** pany is a company existing abroad: whether there only, we have no means of knowing. The goods are to be delivered pursuant to the contract "in the colony of Victoria," which we may take judicial notice is out of England. But the plaintiff, residing in London, professes to make the contract; and he signs it with his own name. After providing for the shipment and discharge of the goods, the provision in the contract as to freight is as follows, — "The rates of freight determined upon by the said parties to this agreement, are as under." Who are "the said parties to this agreement?" Why, the plaintiff and the defendants. Then the parties stipulate that "one third of the total of freight shall be paid in London on receipt of bills of lading." The performance of that part of the contract is imposed upon the plaintiff; the payment of the remainder of the freight being agreed to be made by the company at the port of Geelong. There is, therefore, ample evidence on the face of the instrument that it is treated as a contract between the plaintiff and the defendants. Then, the defendants contract to carry the goods from Liverpool to Geelong, in the colony of Victoria, and there deliver them alongside the pier of the Geelong and Melbourne Railway Company. And, further, the goods are "to be taken on board," not put, but taken on board, — "at Liverpool, at ship's expense." Whatever care, therefore, was required to be taken to ship the goods safely and securely, was understood and intended to be taken by and at the expense of the defendants. The declaration alleges, that, although the goods, according to the terms of the agreement, were in the care, custody, and possession of the defendants for the purpose of their being so taken on board, and the defendants took them on board at the said ship's expense, through their neglect one of the locomotives was injured, and the plaintiff put to expense in repairing the damage. It appears to me that the duty of **[164]** taking care that the goods were safely shipped necessarily arose out of the contract, and that the defendants are responsible for the consequences of their negligence.

CROWDER, J.(*a*). I also am of opinion that the plaintiff is entitled to our judgment. It is said that the plaintiff is no party to the contract. I find, however, that it is signed by him. I have always understood the law to be, that, if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only. There is nothing upon the face of this agreement distinctly shewing that the plaintiff was contracting as agent for others. On the contrary, there is everything to lead to the conclusion that he was contracting personally. I agree with my Brother Cresswell that it is fairly to be inferred from the agreement that the payment of one third of the stipulated freight was to be made by the plaintiff on receipt of the bills of lading, more especially as we may infer from the whole agreement that the goods were to be shipped for a company having no existence in England. It has been insisted that we cannot take judicial notice that Geelong is not in England. The contract, however, states that place to be "in the colony of Victoria; and we are bound to take judicial notice of the existence of that

(*a*) Williams, J., was indisposed, and Willes, J., was sitting at nisi prius.

colony. The contract, then, being for the transportation of goods from Liverpool to Geelong, in the colony of Victoria, it seems to me that everything leads us to the inevitable conclusion that the person who signs the contracts signs it as a substantial party. The next question is, whether the loss or damage is sufficiently stated to be with reference to that contract. The goods were to be taken on board at Liverpool at the ship's expense. **[165]** The allegation in the declaration is, that, in pursuance of the agreement, they were taken possession of by the defendants for the purpose of being so taken on board, and that, in taking them on board, one of the locomotives was damaged through the defendants' neglect and default. It appears to me that that is clearly a loss from a breach of the duty imposed upon the defendants by their contract, and for which the defendants are responsible. The plaintiff, therefore, is entitled to judgment.

Judgment for the plaintiff (*a*).

[166] DELANEY *v.* FOX. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 5; 2 Jur. N. S. 1233; 5 W. R. 148.]

The 1st sect. of the 1 & 2 Vict. c. 74, enables a landlord whose tenant refuses to give up possession on the tenancy being duly determined by a legal notice to quit, to give him notice, "in the form set forth in the schedule," of his intention to proceed to recover possession under the act; and, provides, that, if the tenant shall not appear at the time and place appointed, and shew reasonable cause why possession should not be given under the provisions of the act, upon proof of the holding and of the determination of the tenancy, &c., and upon proof of the service of the notice, and of the tenant's refusal to quit, the justices may issue their warrant, and give possession to the landlord.—The form of notice given in the schedule begins "I, , [owner, *or* agent to , the owner, *as the case may be*], do hereby give you notice," &c., and intimates that the party giving it will, "on next, the day of , at of the clock of the same day, at , apply to Her Majesty's justices of the peace acting for the district of , in petty sessions assembled, to issue their warrant," &c.—By s. 3, the mere obtaining a warrant is declared to be a trespass, if the person to whom the warrant is granted had not at the time of granting it lawful right to the possession of the premises, although no entry should be made by virtue of the warrant.—And s. 6 enacts, that, where the landlord, at the time of applying for the warrant, had lawful right to the possession of the premises, he shall not be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the act; but that the party aggrieved may bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid. A declaration stated that the plaintiff, after the passing of the act, was tenant to the defendant of certain premises, and that the defendant caused to be served upon her a notice (setting out the notice), which commenced thus, "I, J. D., of Bradford, in the county of York, attorney and agent for and on behalf of Gregory Fox, of, &c., farmer, do hereby give you notice," &c., and informed the plaintiff that "I, as attorney and agent for the said Gregory Fox, shall, on Tuesday, the 1st day of January next, at 11 o'clock of the same day, apply to Her Majesty's justices of the peace acting in and for the borough of Bradford (being, &c.), in petty sessions assembled, to issue their warrant," &c. The declaration then went on to state that the defendant, without the plaintiff having appeared before such justices, or having been heard to shew cause, or had any means or opportunity to shew cause, against the issuing of such warrant as in the notice mentioned, procured to be issued and executed on the plaintiff a certain warrant (setting it out), whereby and under the authority of which proceedings the plaintiff was forcibly ejected and expelled from the premises:—Held, that the notice was informal, for not mentioning the place in the borough of Bradford where the application was to be made; and also, come semble, for omitting to state that J. D., the person giving the notice, was agent to the owner of the premises.—Held, also, that the count, though somewhat informal, was a good count in trespass.—

(*a*) See *Gillett* v. *Offor*, 18 C. B. 905, and the authorities there cited.

The defendant pleaded, that the tenancy was duly determined by notice to quit before the happening of the matters in the count mentioned, and that, at the time of applying for the warrant, he had lawful right to the possession of the premises, which were wrongfully held over by the defendant: Held, that the plea was a good answer to the action,—the 6th section of the statute confining the tenant's remedy, where the landlord has lawful right to the possession, to an action upon the case founded on the special damage arising to him from the irregularity or informality of the proceeding, and no special damage being alleged in the count.—As to the right of a tenant to maintain trespass against his landlord for a forcible expulsion, where the landlord has a legal right to the possession of the premises,—quære!

The first count of the declaration stated that the defendant broke and entered a certain dwelling-house **[167]** and premises of the plaintiff, situate in Ebenezer Street, in the borough of Bradford, in the county of York, and numbered 12 in the said street, and then and there forcibly ejected and expelled the plaintiff therefrom, and had kept her forcibly ejected and expelled therefrom ever since.

Second count, that the plaintiff theretofore, and after the passing of a certain act of parliament made and passed in the year of our Lord 1838, and intituled "An act to facilitate the recovery of possession of tenements after due determination of the tenancy," was tenant to the defendant of a certain dwelling-house and premises, to wit, the dwelling-house and premises in the said first count mentioned: yet the defendant caused to be served on the plaintiff, as such tenant as aforesaid, a written notice in the form, words, and figures following, viz., "I, Joseph Dawson, of Bradford, in the county of York, attorney and agent for and on behalf of Gregory Fox, of Great Horton, in the parish of Bradford aforesaid, farmer, do hereby give you notice, that, unless peaceable possession of the tenement or dwelling-house situate in Ebenezer Street, Bradford aforesaid, which was held of the said Gregory Fox under a tenancy from week to week, which was determined by notice to quit from the said Gregory Fox on the 17th day of December instant, and which tenement or dwelling-house is now held over and detained from the said Gregory Fox, be given to the said Gregory Fox, or to me on his behalf, on or before the expiration of seven clear days from the service of this notice, I, as attorney or agent for the said Gregory Fox, shall on Tuesday, the 1st day of January next, at eleven o'clock of the same day, apply to Her Majesty's justices of the peace acting in and for the borough of Bradford (being the district, division, or place in which the said tenement or dwelling-house is situate,) in petty-sessions assembled, to issue their warrant directing the **[168]** constables of the said district to enter and take possession of the said tenement or dwelling-house, and to eject any person therefrom. Dated this 21st day of December, 1855. S. Dawson. To William Delaney and Ellen Delaney;" and without giving to or serving on the plaintiff any other notice, and without the plaintiff having appeared before any such justices as in the said notice is mentioned, or having been in anywise heard to shew cause, or had any means or opportunity of shewing cause, against the issuing of such warrant as in the said notice is mentioned, procured to be issued, and caused to be executed on the plaintiff, according to the exigency thereof, a certain warrant under the hands and seals of two such justices as aforesaid, in the form words, and figures following, that is to say,—"Landlord and tenant order. Borough of Bradford, in the West Riding of Yorkshire. Whereas, a complaint in writing was made by Joseph Dawson, the legal agent of Gregory Fox, your landlord, before two of Her Majesty's justices of the peace in and for the said borough, that one Ellen Delaney and William Delaney, tenants of a certain tenement, consisting of a tenement or dwelling-house situate in Ebenezer Street, in the township of Bradford, in the said borough, held under a tenancy from week to week, under the rent of 2s. 6d. per week, and which said tenancy was determined by a notice to quit given by the said Gregory Fox on the 7th day of December, 1855; and that, on the 21st day of December, 1855, a notice in writing of the intention of the said Joseph Dawson, as such agent, to apply to recover possession of the said dwelling-house or tenement was duly served upon the said premises, which on this day was duly proved on oath before us: We, two of Her Majesty's justices of the peace in petty sessions assembled, acting in and for the said borough of Bradford, do authorise and command you on any day within thirty clear days **[169]** from the date hereof (except on Sunday, Christmas Day, and Good Friday),

between the hours of nine in the forenoon and four in the afternoon, to enter (by force, if needful), and with or without the aid of the said Joseph Dawson, as such agent, or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said Joseph Dawson, as such agent as aforesaid. Given under our hands and seals, this 1st day of January, 1856. W. M., J. H. To William Leveratt and all other constables and peace officers acting for the borough of Bradford aforesaid:" whereby and by means and under the authority of which proceedings so taken as aforesaid by the defendant, the plaintiff was forcibly ejected and expelled from, and had ever since been kept forcibly ejected and expelled from her said dwelling-house and premises.

Pleas,—first (to the first count), liberum tenementum,—secondly (to the second count), that the said tenancy in the last count mentioned was a tenancy from week to week, so long as the defendant and the plaintiff should respectively please, at a rent of less that 20*l.* per annum, that is to say, at a rent of 2*s.* 6*d.* per week, and upon which no fine was ever reserved or made payable; that the said tenancy was duly determined by due notice to quit, and had ended, before any of the matters or things in the last count mentioned had happened or taken place; and that he, the defendant, before and at the time of the happening and taking place of all and every of the matters and things in the last count mentioned, and at the time of applying for such warrant as is in the last count mentioned, had lawful right to the possession of the said dwelling-house and premises in the last count mentioned, which, at the time of the applying for the said warrant, and at the times when all the **[170]** matters and things in the last count mentioned respectively took place and happened, were wrongfully held over by the plaintiff after the expiration of the said tenancy in the last count mentioned.

The defendant also demurred to the second count, the ground of demurrer stated in the margin being,—"that, upon the face of the second count, all the proceedings appear to have been regular, and that no illegality in those proceedings is shewn on the face of that count." Joinder.

The plaintiff joined and took issue on the pleas, and also demurred to the second plea, the ground of demurrer stated in the margin being,—"that the plea does not answer the count, and shews no right to the possession in the defendant as upon a warrant from justices, and does not justify the grievances complained of." Joinder.

Milward, in support of the plaintiff's demurrer (*a*). The proceedings set out in the second count of the declaration are not in accordance with the requirements of the statute upon which they profess to be founded. The 1st section of 1 & 2 Vict. c. 74, recites that "it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy;" and enacts, that, "when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent **[171]** or at a rent not exceeding the rate of 20*l.* a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof,) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this act,"—not saying or to the like effect,—"signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed by this act; and, if the tenant or occupier shall not thereupon appear, at the time and place appointed, and shew to the

(*a*) The points marked for argument on the part of the plaintiff, were,—"that the second count is good, as the proceedings set out are not in accordance with the requirements of the statute 1 & 2 Vict. c. 74, and the schedule to the act; and that the plea demurred to is bad, as not affording any answer to the charge of irregularities in the proceedings, as complained of."

satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this act, and shall still neglect and refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and, upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands [172] and seals to the constables and peace-officers of the district, division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty days nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent." The notice, therefore, must be in the precise form given in the schedule; and that form requires that the time and the place at which the application to the justices is to be made shall appear. Here, the notice neither mentions the place where the application is to be made, nor does it state that the application is made on behalf of the "owner" of the premises. [Cresswell, J. Do you insist that a landlord who is not the owner of the premises, cannot take advantage of the statute?] No: the landlord would be the owner for that purpose. But it should be shewn upon the face of the document that the party claiming is in that sense the owner. Whether it be material or not, is not the question: the statute requires it. The omission of the place, however, is the more important one. Seeing that it is competent to the justices to hold a petty session where they please, it is obviously necessary that full information of the place of assembly should be given to the tenant. [Cresswell, J. Is not the mention of the town or village enough, without mentioning the sign of the public house?] Bradford is a large place. Would it have been enough to say "in the west riding of the county of York?" [Cresswell, J. Perhaps not.] Is the plaintiff bound to know where the justices hold their petty sessions in the borough of Bradford? The statute evidently intended that she should have full information on the subject. [Cresswell, J. If the statute had intended that the notice should mention more than the town or borough, I should have expected to find the words more precise: they would probably have been [173] thus,—"at , in the parish of , in the borough of ."] It is submitted that the statute is imperative: if the form of the notice which the statute provides is not strictly followed, the whole foundation upon which the proceedings rest, fails.

The second plea raises substantially the same question: if the last count is good, the second plea is no answer to it. It will be contended for the defendant that the second count does not shew any special damage. It, however, shews that the plaintiff was turned out of the house, and that surely is special damage enough.

Prentice, contrà (*a*). The second count is substan-[174]-tially a count in trespass:

(*a*) The points marked for argument on the part of the defendant, were, —

As to the demurrer to the second count, —"That that count does not disclose any cause of action: that the proceedings set forth in that count are regular within the true intent and meaning of the act of parliament in that count mentioned: that, if that count does disclose any defect in the proceedings therein set forth, such defect amounts to a mere informality or irregularity, which would only be actionable, under the 6th section of that statute, in case of special damage, to be set forth on the face of the count, and that the last count discloses no such special damage: that the count is bad, for not alleging that the proceedings set forth therein were taken by the defendant maliciously and without reasonable or probable cause: that, even if the proceedings set forth in that count were not merely informal and irregular, but void, the special count would not be maintainable, but a count in trespass only: that the last count is bad as a count in trespass, as it does not directly allege the plaintiff's possession and the defendant's entry upon that possession, and it is consistent with all that appears in that count that the tenancy may have expired, and that the

it alleges an unlawful entry and expulsion under colour of a warrant: and the plea shews that the defendant had a lawful right to enter. Assuming that all the proceedings before the magistrate were illegal and void, the defendant is still entitled to succeed in this action, inasmuch as, the plaintiff's tenancy having been legally put an end to, he had a right to enter. [Cresswell, J. *Newton* v. *Harland*, 1 Scott, N. R. 474, 1 M. & G. 644. Williams, J. If the court should think that the proceedings were only irregular, there is a good count in case alleging the irregularity. You may treat it either way.] It is submitted that the second count is nothing more than a count in trespass, and that the plea is clearly a good answer to it. A civil action cannot be maintained for a forcible entry. In *Harvey* v. *Brydes*, 14 M. & W. 437, 442, though it became unnecessary to decide the point, Parke, B., said: "The next point was that raised in *Newton* v. *Harland*: and, if it were necessary to decide it, I should have no difficulty in saying, that, where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it **[175]** is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly: even though, in so doing, a breach of the peace was committed." In *Burling* v. *Read*, 11 Q. B. 904, to a declaration in trespass charging that the defendant broke and entered the plaintiff's workshop, while the plaintiff was inhabiting and present in it, and, while the plaintiff was so inhabiting and present, pulled it down, the defendant pleaded pleas asserting that the workshop was the defendant's, and denying that it was the plaintiff's: and it was held, that, on issues joined upon these averments, it was immaterial whether the plaintiff was or was not inhabiting and present at the time of the alleged trespass; and that the defendant was entitled to the verdict, upon proof that he had a right to the soil. Many other authorities might be referred to, to shew that a civil action cannot be maintained for a forcible entry; and that the averment of a vi et armis is a mere formal allegation, and does not amount to an allegation of a forcible entry. The second count alleges that the tenancy was duly determined by a notice to quit, and that the plaintiff wrongfully held over, in defiance of the defendant's lawful right to the possession. It would be strange, indeed, if the defendant should find himself in a worse position by reason of his having obtained the warrant. The mere obtaining a warrant is declared by s. 3 to be a trespass, if the person to whom the warrant is granted had not at the time of granting it lawful right to the possession of the premises, although no entry should be made by virtue of the warrant. Next, it is submitted that the only action that can be brought under this statute is, an action upon the case alleging special damage, pursuant to s. 6, which enacts, "that, where the landlord, at the time of applying for such warrant as aforesaid, had lawful right to the possession of the pre-**[176]**-mises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may if he think fit bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: provided, that, if the special damage so laid be not proved, the

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plaintiff may have been wrongfully holding over, and that the defendant may have had a right of entry upon the plaintiff's possession, so that an action of trespass would not be maintainable."

As to the demurrer to the second plea, "That that plea is good in substance, as shewing that the defendant was entitled to take the proceedings for recovery of possession in the last count mentioned, and also as shewing a right of entry in the defendant on the plaintiff's possession, irrespective of that statute: so that the plaintiff could not sustain the last count as for an informality or irregularity in the proceedings, which the defendant was entitled to take, without shewing special damage: nor as a count in trespass, for proceedings wholly void, the last plea disclosing a right of entry by the defendant on the plaintiff's possession, and the unlawfulness of that possession as against the defendant."

defendant shall be entitled to a verdict, and that, if proved, but assessed by the jury at any sum not exceeding 5s., the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record, that, in his opinion, full costs ought to be allowed." Here, no special damage is alleged. [Williams, J. What sort of special damage do you say is contemplated by the act? Are there costs given?] The justices have power to give costs in all cases. It is difficult to say what the legislature meant by special damage: but they clearly must have meant something more than the mere expulsion from the premises, or there would have been no difficulty in stating it. Then, as to the objection that the form given by the statute has not been strictly complied with. If that objection be well founded, the omission of a single letter would be fatal. It is enough, however, if the notice served substantially follows the form. [Cresswell, J. In some instances, as in cases under the Uniformity of Process Act, 2 W. 4, c. 39, the Registration of Voters Act, 6 & 7 Vict. c. 18, and the recent Bills of Exchange Act, 18 & 19 Vict. c. 67, the parties have been held bound to follow the prescribed forms with extreme closeness and precision.] The notice here given, is it is submitted, a perfect compliance with [177] the form prescribed. The objections to it are, that the defendant is not stated to be the "owner" of the premises: and that the "place" at which the party is to appear to shew cause why the warrant should not issue, is not sufficiently pointed out. The name of the landlord or owner is, however, stated in the notice: and the pleadings shew that Gregory Fox is the owner. Then, as to the place, the party is informed that the application will be made to the justices acting in and for the borough of Bradford, on a given day, and at a given hour. She was bound to know where the petty sessions are held.

Milward, in reply. The plaintiff is entitled to recover on both counts: and the pleas afford no answer. Professing to act upon the statute, the defendant serves the plaintiff with an irregular notice, and causes her to be turned out of the premises, without giving her the means of appearing to shew cause against the issuing of the warrant. If special damage be necessary, it is sufficiently alleged.

Cresswell, J. I am of opinion that the plaintiff is entitled to the judgment of the court upon the second count of the declaration in this case, and that the defendant is entitled to judgment on the demurrer to the second plea. The second count begins with stating that the plaintiff, after the passing of the statute 1 & 2 Vict. c. 74, was tenant to the defendant of certain premises, and, that the defendant caused to be served upon her the notice set out, and without the plaintiff having appeared before such justices, or having been heard to shew cause, or had any means or opportunity to shew cause against the issuing of such warrant as in the notice mentioned, procured to be issued and executed on the plaintiff a certain warrant, which is also set out, whereby and un-[178]der the authority of which proceedings the plaintiff was forcibly ejected and expelled from the premises. Primâ facie that, though somewhat strange and informal, is still a count in trespass, and therefore such as to entitle the plaintiff to judgment thereon. But then comes the second plea, which shews that the landlord had a right to the possession of the premises, and therefore would be entitled to enter. That being so the learned counsel for the plaintiff insists that the second count may be treated as a count in case, and as relying not on the ground of want of title in the defendant to enter, but on the ground of his having proceeded irregularly under the act. Whether or not the plaintiff can so contend, may be open to a little doubt, seeing that in the first part of the count she disputes the defendant's title to the possession. I do not, however, say that it cannot be sustained as a count charging irregularity in the proceedings. But then comes the 6th section of the statute, which says, that, "where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of such premises, neither the landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act," here the defendant has been guilty (we may assume) of an irregularity, the notice not being in the form required by the statute: that, therefore, precludes the plaintiff from recovering in trespass: but the statute goes on, "but the party aggrieved may if he think fit bring an action on the case for such irregularity or informality, in which the damages alleged to be sustained thereby shall be specially laid." Now, I do not find any special damage alleged as arising from the informality of the proceeding: it is not averred that the plaintiff was turned out of the premises,

or was [179] put to any costs, or sustained any other damage by reason of the irregularity. For these reasons, I am of opinion that the plaintiff must have judgment on the demurrer to the second count, and the defendant must have judgment on the demurrer to the second plea.

WILLIAMS, J. I am of the same opinion. Looking at the facts disclosed in the second count and in the second plea, it appears to me that this is one of the cases contemplated by the 6th section of the 1 & 2 Vict. c. 74. Upon the present principles of pleading, it is our duty, where, upon the whole facts disclosed upon the record, it appears that the plaintiff is entitled to maintain the action, to hold him to be so entitled, notwithstanding any mere informality in the mode of alleging the ground of complaint. But, in the present case, it does not appear that the plaintiff is entitled to maintain the action, because the 6th section of the act only gives him a right to bring an action alleging specially the damages he has sustained by reason of any irregularity or informality in the mode of proceeding for obtaining possession of the premises under the authority of the act. No such special damage is alleged here. The terms of the 6th section certainly are somewhat obscure. It does not seem to have occurred to the minds of the legislature that the landlord might be entitled to enter without the aid of a warrant.

CROWDER, J. The first question in this case arises upon the demurrer to the second count of the declaration, and that is as to the validity of the notice there set out. The plaintiff insists that she has disclosed a good cause of action in that count, because she has shewn that she was served with an informal and irregular notice under the statute, and was, without having appeared, or having the means or opportunity of appear-[180]-ing to object, expelled from the premises under a warrant founded upon that informal notice. It seems to me that the notice set out was an informal notice, inasmuch as it omitted to specify the place at which the plaintiff was to appear for the purpose of shewing cause against the issuing of a warrant. It seems to be rather doubtful whether the notice ought also to have alleged in terms that the party giving it was the agent of the owner of the premises: but, on the ground before stated, I think the notice was informal (*a*). Assuming the notice, then, to be informal, the next question is whether there is a good cause of action stated in the second count. I agree that it is not now necessary that the cause of action should be alleged with any precise formality: and I think there is a ground of action sufficiently stated in the second count, and therefore that there should be judgment for the plaintiff on the demurrer to that count. Then comes the demurrer to the second plea. That plea contains the important allegation that the defendant had lawful right to the possession of the premises, the plaintiff's tenancy having been duly determined by a notice to quit, and the plaintiff having wrongfully held over. This renders it necessary to refer to the 6th section of the 1 & 2 Vict. c. 74, which provides, that, where the landlord at the time of applying for the warrant had lawful right to the possession of the [181] premises, he shall not be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of the act; but that the party aggrieved may bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby,—that is, the damage arising from the irregularity or informality,—shall be specially laid. This is an action for the irregularity: it is therefore made specially necessary that the ground of action shall be laid by way of special damage. Now, what damage is alleged in the second count to have arisen from the irregularity in the mode of proceeding? It appears upon the whole record that the plaintiff ought to have been turned out of possession. It is said she had no proper notice to appear. Suppose she had appeared, all that she could have heard would have been, that she had no right to retain possession of the premises, and must be turned out. I therefore think the

(*a*) This doubt is generated by the position in which the word "owner" is found in the former. The first time it is used, it is improperly pleaded within the brackets, as part of the words of direction, instead of being, as it should have been, pleaded outside as part of the substance of the form. This form (as, indeed, are all the forms given in the schedule to this act) is throughout very inaccurately printed in this respect; some of the directory words being placed as part of the body of the notice: so that a notice in literal compliance with the form would clearly be a bad notice.

second plea is a good answer to the count to which it is pleaded, and that the defendant is entitled to judgment on the demurrer thereto.

Judgment for the plaintiff on the demurrer to the second count, and for the defendant on the demurrer to the second plea.

[182] LOVER *v.* DAVIDSON. Nov. 6, 1856.

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition.—A., being in New York, and wishing to publish a song there and in London simultaneously, entered into some agreement for an assignment of the American copyright to a publisher in New York:—Held, that a receipt for the purchase-money was no evidence of the assignment: and, held, that the date on the title-page (as required by the American law) was not conclusive evidence of the time of publication in New York. The author and proprietor of copyright in a song, in the entry at Stationers Hall described his place of abode as "65 Oxford Street," he being in America at the time of publication, and having no place of abode in England, but "65 Oxford Stret," being the address of his publishers:—Held, a sufficient description to satisfy the 5 & 6 Vict. c. 45, s. 13.

This was an action brought by the plaintiff against the defendant for pirating the words and music of a song called "The Low Back'd Car," of which the plaintiff claimed to be entitled to the copyright as author.

The cause was tried before Willes, J., at the sittings in Middlesex after the last term. The facts were as follows:—

"The Low Back'd Car,"—the words, the prelude, and the accompaniment being entirely written and composed by the plaintiff, but the air being an old one, known by the name of "The jolly Plough-boy,"—was first published in this country on the 7th of December, 1846, and was entered in the book at Stationers Hall as of that date, the persons described as the proprietors of the copyright being "Duff & Hodgson, 65 Oxford Street." This entry, however, was amended pursuant to an order of Jervis, C. J., of the 15th of March, 1855, by striking out the names of "Duff & Hodgson," and inserting in lieu thereof the name of "Samuel Lover," leaving the entry in all other respects as it was (*a*)[1]. It appeared, that, when the original entry was made, the plaintiff was residing at New York, having no place of abode in England; and that, prior to the publication of the song in question in England, the plaintiff had sold [183] the copyright, so far as concerned America—to persons of the name of Firth & Hall, music-publishers at New York: but the only evidence of this transaction was, the production by the defendant of a receipt for the purchase-money bearing the signature of the plaintiff; the reception of which was objected to on his behalf.

For the defendant, it was attempted to be shewn that there had been a prior publication of the Low Back'd Car in New York: and, for this purpose, the defendant produced a copy of the song, which had been purchased at the shop of Firth & Hall, in New York, and which purported on the face of it (*a*)[2] to have been published on the 4th of December, 1846, three days before the date of the entry and publication in England. But it turned out that the actual day of publication in New York was, on or after the 7th of December, 1847, the date on the piece of music produced being satisfactorily shewn to be a mistake.

On the part of the defendant, it was insisted, that, to entitle him to maintain the action, the plaintiff must shew that he was the author of the whole piece, including the air: that there had been no sufficient entry at Stationers Hall, the author's true place of abode not being stated; and that the sale of the American copyright operated an extinction of the plaintiff's claim, inasmuch as there could be no partial assignment of copyright.

The learned judge, reserving leave to the defendant to move to enter a verdict for

(*a*)[1] See *Ex parte Davidson*, 18 C. B. 297.

(*a*)[2] The American law requiring the date of the first publication to appear.

him, directed the jury to find for the plaintiff, which they accordingly did, with 40s. damages.

Bovill now moved to enter a verdict for the defendant, [184] pursuant to the leave. 1. There is nothing in the copyright act, 5 & 6 Vict. c. 45, to give the exclusive right of publication to any one except the author of the work,—that is, the whole work,—or to his assignee. Here, the plaintiff was confessedly not the author of the air. [Cresswell, J. What did the defendant pirate?] The whole. [Cresswell, J. I cannot say, as a matter of law, that a jury might not be justified in finding that the publication was new.] There certainly is a case in this court,—*Leader* v. *Purday*, 7 C. B. 4,—where it was held that one who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as the proprietor of the copyright in the whole composition. 2. It appeared, that, prior to the publication of this song in England, the plaintiff had sold the copyright to Messrs. Firth & Hall, of New York. By the law of this country, it seems pretty clear that there cannot be a partial assignment of copyright. In *Jefferys* v. *Boosey*, 4 House of Lords Cases, 815, 992, Lord St. Leonards says (*a*)[1]: "If there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license: but copyright is one and indivisible; or, is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man and another lot to a different man. It is impossible to tell what the incon-[185]-venience would be. You might have a separate transfer of the right of publication in every county in the kingdom. If, however, the right, as I am advising your Lordships, is properly one and indivisible, then let us see what construction can be put upon the assignment from Ricordi to Boosey. The exercise of the right is confined in the assignment to the United Kingdom. Now, by the 41 G. 3, c. 107, copyright is extended to any part of the British Dominions in Europe: and, by the 54 Geo. 3, c. 156, it was further extended to every part of the British dominions. It is quite clear, therefore, that, if in this case there was a copyright, under the law of this country it was a copyright which extended to every portion of the British dominions. Then, as Ricordi limited his assignment to the United Kingdom, and therefore reserved to himself the right as regarded the publication in every other part of the British dominions, even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment: and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all." [Willes, J. Upon this point the whole foundation of your argument fails, there being no evidence of an assignment to Firth & Hall.] The receipt was some evidence. [Willes, J. None whatever.] 3. The entry at Stationers Hall was not a compliance with the statute. By the 13th section of the 5 & 6 Vict. c. 45, the entry is to contain the title of the book, &c., the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright: and s. 24 enacts "that no proprietor of copyright in any book which shall be first published after the passing of this act, shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any [186] infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers Company, of such book, pursuant to this act," &c. Now, the plaintiff admitted that No. 65 Oxford street, never was his place of abode. In fact, he was residing in New York at the time the entry was made (*a*)[2]. The entry, therefore, clearly was no compliance with the act. [Cresswell, J. Mr. Lover had at that time no other place of abode in England. He might, therefore, very properly describe himself as of a place where he might be com-

(*a*)[1] And Jervis, C. J., in *Shepherd* v. *Conquest*, 17 C. B. 437, states that in this many of the judges concurred with the noble lord.

(*a*)[2] By the American law, it appears that the entry of copyright can only be made by a citizen of the United States, or by one who is permanently resident therein. See Curtis on Copyright (American), 141-144.

municated with.] If such a laxity of description be permitted, an important provision of the statute may at all times be easily evaded.

CRESSWELL, J. I am of opinion that there is no ground for a rule in this case: and my reasons sufficiently appear from the observations thrown out during the argument.

The rest of the court concurring,

Rule refused.

[187] EX PARTE ANNE TRENERY. Nov. 21, 1856.

[S. C. 5 W. R. 322.]

The court refused to grant a rule to enable a married woman to execute a conveyance under the 3 & 4 W. 4, c. 74, s. 91, without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent: but required an affidavit shewing that an application had been made to the husband to execute the deed, and that he had refused to do so.

Hawkins moved for a rule to enable Mrs. Anne Trenery, a married woman, who was living apart from her husband, by mutual consent, to convey (under the 3 & 4 W. 4, c. 74, s. 91), her interest in certain property to which she was separately entitled in her own right, without her husband's concurrence. [Cresswell, J. Does your affidavit shew that the husband has been asked to execute the deed, and has refused to do so?] It does not. [Cresswell, J. Then you cannot have a rule. This court so decided in a case of *In re Hester Murphy*, 5 Scott, N. R. 166, S. C. nom. *Ex parte Mirfin*, 4 M. & G. 635.]

Per Curiam. Rule refused (*a*).

[188] SARL AND ANOTHER *v.* BOURDILLON. Nov. 17, 1856.

[S. C. 26 L. J. C. P. 78; 2 Jur. N. S. 1208; 5 W. R. 196. Discussed, *Mahalen* v. *Dublin and Chapelizod Distillery Company*, 1877, I. R. 11 C. L. 91; *Jones* v. *Joyner*, 1900, 82 L. T. 769.]

The defendant went into the plaintiffs' shop, and agreed to purchase certain goods in the aggregate exceeding the value of 10*l*. The several articles, with their respective prices, were entered in the plaintiff's "order book" on the fly leaf at the beginning of which were written the names of the plaintiffs: and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain:—Held, a sufficient signature of the contract by both parties to satisfy the 17th section of the Statute of Frauds.—One of the articles was described as "candlestick, complete." It was proved, that, at the time the goods were selected, it was arranged that a "gallery" should be added to the top of the candlestick for the reception of a "mosquito-shade:" Held, that the memorandum was sufficient, without mentioning the "gallery." At the time of the contract, it was agreed that the goods should be paid for by a cheque on the defendant's brother:—Held, that the omission of that stipulation did not vitiate the memorandum.

This was an action for goods bargained and sold. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in Middlesex after last Easter Term. The facts were as follows: The defendant, who was about to proceed to India, went into the plaintiffs' shop for the purpose of purchasing certain goods. The goods were selected, amongst them being two chamber candlesticks to which galleries were to be fixed for the purpose of holding mosquito-shades. In all other respects,

(*a*) And see *In re Sarah Woodcock*, 1 C. B. 437, *In re Isabella Grierson Perrin*, 14 C. B. 420.

Where the husband is lunatic, of course, it is not necessary that the affidavit should shew that he refuses to concur; but the affidavit must shew that he is lunatic at the time of the application: *Ex parte Thomas*, 1 M. & Scott, 331; *In re Jane Turner*, 3 C. B. 166.

all the articles were complete. A list of the goods purchased was entered in the plaintiffs' order book, the chamber candlesticks being therein described as "candlesticks, complete." This book had the words "Order Book" printed in gold letters outside, and the names "Sarl & Son" written on the fly-leaf at the beginning. At the foot of the entry in question appeared the name and address of the defendant, in his own hand-writing, Capt. Bourdillon, 29 Inverness Terrace, Bayswater." It was part of the bargain, but not so stated in the above note of it, that the goods were to be paid for by a draft on the defendant's brother (not being a banker), at No. 14 Throgmorton Street.

On the part of the defendant, it was insisted that there was no sufficient note or memorandum in writing of the contract to satisfy the 17th section of the Statute of [189] frauds,—first, because the vendors' names did not appear upon the contract, secondly, because it did not contain all the terms of the bargain, no mention being made therein of the galleries which were to be added to the chamber-candlesticks, or of the stipulated terms of payment.

For the plaintiffs it was insisted, that, taking the book, with the words printed on the outside, and the names of the plaintiffs written on the fly-leaf, and the signature of the defendant at the foot of the entry, there was a sufficient compliance with the statute.

The learned judge,—after putting two questions to the jury, viz. first, whether the order was written in the plaintiffs' book before the defendant wrote his name therein; secondly, whether the defendant so wrote his name in the book for the purpose of verifying the order; both of which questions were answered in the affirmative,—reserving leave to move to enter a verdict for the defendant, directed the jury to find for the plaintiffs for the amount claimed.

Byles, Serjt., in Trinity Term last, pursuant to the leave so reserved, moved to enter a verdict for the defendant, or a nonsuit. The 17th section of the 29 Car. 2, c. 3, enacts "that no contract for the sale of any goods, wares, and merchandizes, for the price * of 10l. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." To satisfy that section, the note or memorandum of the contract must contain the signatures of both vendor and vendee. Thus, in *Jacob* v. *Kirk*, 2 M. & Rob. 221, it [190] was held that a memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing in the book, is not a sufficient note in writing to satisfy the statute; and that the defect was not cured by a letter from the vendee, in which the vendor's name did appear, but which letter did not clearly refer to the memorandum. So, in *Champion* v. *Plummer*, 1 N. R. 252, it was held, that a note or memorandum in writing of a contract for the sale of goods, signed by the seller only, is not sufficient. "How," says Sir James Mansfield, C. J., "can that be said to be a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs. There cannot be a contract without two parties; and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." In order to get rid of that difficulty at the trial, the plaintiffs' counsel referred to the outside of the book, on which appeared in gold letters "order book," and to the fly-leaf at the beginning of the book, on which the names "Sarl & Son" were written: and it was insisted, that, coupling these with the entry and the defendant's signature, the names of both the contracting parties sufficiently appeared. That, however, does not answer the objection. The party, when he signs the contract, must see, or have the means and opportunity of seeing or knowing what he signs. If the book in question had been a continuation of a former volume, the vendor's signature in the first clearly could not be coupled with that of the vendee in the second. [Jervis, C. J. Ocular view cannot affect the question. Perhaps no living person ever saw the head of the old roll in the Exchequer.] There is a material [191] difference between a record and a

* See *Harman* v. *Reeve*, 18 C. B. 587.

memorandum of a contract under this statute. [Jervis, C. J. Take the ordinary case of an invoice with a printed heading containing the tradesman's name, where the enumeration of the articles bought is continued on the back; would not the vendee's signature at the end conclude him, though he never saw the face of the paper?] In that case, the vendor has the means, by turning over the paper, of seeing that the same contract that binds him binds the vendor also. Then, it is necessary that all the terms of the bargain should be in writing: *Kenworthy* v. *Schofield*, 2 B. & C. 945, 4 D. & R. 556. "You cannot," as Holroyd, J., says, "call that a memorandum of a bargain, which does not contain the terms of it." Here, too, two of the articles, viz. the chamber-candlesticks, were unfinished; something remained to be done to them. Again, one of the terms of the bargain was, that the goods were to be paid for by a cheque on the defendant's brother; and of that no mention is made in the memorandum. [Willes, J. That was a mere statement as to the mode of payment. Jervis, C. J. There is nothing in that point: but, upon the others, the rule may go.]

E. James, Q. C., and Bennett, on a subsequent day in the same term, shewed cause. The entry in the book was under the circumstances a sufficient memorandum within the 17th section of the statute of frauds. The book contained all that was necessary to constitute a perfect contract,—the name of the vendors (at the beginning), the articles agreed to be purchased and their prices, and the signature of the vendee at the foot of the entry; the latter being placed there, as the jury distinctly found, for the purpose of verifying the order. There is no case precisely in point: but *Allen* v. *Bennett*, 3 Taunt. 169, approaches very near it. It was there held, that an order for goods, written and signed by the seller, in a **[192]** book of the buyer's, but not naming the buyer, might be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the statute. Lawrence, J., in the course of the argument, observed,—"If the plaintiff's name had been in this book, I suppose there would have been no doubt about it: and that brings it to the case of *Champion* v. *Plummer*." And Sir James Mansfield said, in giving judgment: "To be sure, this case at first sight comes near to the case of *Champion* v. *Plummer*, and the objection certainly there was that the memorandum was not signed by the purchaser. That was a note made in what the report calls a common memorandum-book: this book certainly was not like what I at first apprehended it to be, until it was produced: for, I at first thought this had been an order-book, with several orders signed by the persons who ordered them, and I thought, that, where such an order was inserted in a regular order-book, and supposing that the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, were consonant, it would in that case be no great stretch to say that this was a ground for inferring that these entries were made by the authority of the owner of the book, for the purpose of evidencing the sale." It is then said that the mode of payment ought to have formed part of the memorandum. [Jervis, C. J. The court disposed of that when the rule was moved.] Then, as to the candlesticks, —it is contended that the stipulation that they should be fitted with galleries to hold mosquito-shades formed part of the bargain, and that that was not in writing. The entry however, describes the candlesticks as "complete." Some meaning must be given to that word. Assuming that that objection is well founded, the contract is divisible: **[193]** the order was not for a number of articles at a lump price, but each article was priced separately. [Cresswell, J., referred to *Baldey* v. *Parker*, 2 B. & C. 37, 3 D. & R. 220.] The galleries were a mere accessory to the candlesticks. Alterations and additions made in the progress of the manufacture of goods contracted for, need not be in writing: *Hoadly* v. *Maclaine*, 4 M. & Scott, 340, 10 Bingh. 482.

Byles, Serjt., and Karslake, in support of the rule. *Baldey* v. *Parker* is a distinct authority to shew that the contract is not divisible. In *Scott* v. *The Eastern Counties Railway Company*, 12 M. & W. 33, it was held, that, where an order is given for goods, some of which are ready made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready-made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole within the statute of frauds and Lord Tenterden's act (9 G. 4, c. 14, s. 7), as the whole forms one entire contract. "If," says Alderson, B., "a man enters into an entire agreement for goods made and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement. That is the true

object and meaning of the statute." It was proved, that, in the course of the bargain, the defendant ordered galleries to be fixed to the candlesticks. No evidence was given as to the cost of this addition. [Cresswell, J. What is to be the evidence of the contract?] That which passes by parol. [Cresswell, J. Then you would alter it by parol evidence?] It is competent to shew what the contract was, by parol, in order to shew whether it is within the statute or not. Where a price is agreed upon at the time, the memorandum must state the price: *Elmore* v. *Kingscote*, 5 B. & C. 583, 8 D. & R. 343; but the absence of a statement of the price, where none is agreed **[194]** on, does not vitiate the contract: and that must be shewn by parol. [Cresswell, J. Primâ facie the contract would be imperfect if the price were not in it. You are allowed to give parol evidence to negative the mention of the price at the time of the contract, which lets in what the law infers, viz. a reasonable price.] *Kenworthy* v. *Schofield* is a distinct authority to shew that the whole terms of the contract must appear in the memorandum; and *Elmore* v. *Kingscote* shews that parol evidence of what the real terms of the contract were may be given, in order to ascertain whether or not they are all in writing. *Hoadly* v. *Maclaine* was the case of an article to be manufactured, which is a totally different case from this. [Cresswell, J. Do you find any case where there was a memorandum in writing, and all the prices fixed except that of one item of less value than 10*l.*?] None. The vendors' names do not sufficiently appear upon the memorandum, or by express reference, to constitute this a good contract within the statute of frauds: *Boydell* v. *Drummond*, 11 East, 142, commented on in 1 Smith's Leading Cases, 4th edit. 230. The plaintiffs' names did not so appear that the defendant could see them. Then, the mode of payment was a term of the contract which should have been evidenced by writing. If the defendant had tendered a cheque upon his brother, the plaintiffs clearly could not have refused to deliver the goods at once. [Cresswell, J. Do you say, that, if goods are sold at six months' credit, that must appear upon the written memorandum?] Yes. [Cresswell, J. Or, if there had been a course of dealing for a given credit, parol evidence is to be let in to prove that course of dealing?] Yes, for the purpose of shewing that the whole terms of the contract are not in the writing.

Jervis, C. J. There is one point in this case which is deserving of consideration, viz. whether the memorandum **[195]** was sufficient without the mention of the mosquito-shades which were to be added to the candlesticks. The other points, however, may be at once disposed of. The payment by cheque on the defendant's brother was no part of the bargain. We also think that the names of the contracting parties sufficiently appear, to satisfy the statute. The book was the plaintiffs' order-book: their names were written at the beginning of it: and the defendant's name was written under the entry, for the purpose of verifying the bargain.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court:

This case was argued in Trinity Term last before the late Lord Chief Justice, my Brothers Williams and Willes, and myself. The court intimated their opinion at the time as to all the objections but one, as to which they took time to consider. I now proceed to give the result of our deliberation upon the point so reserved:—

In this case, inasmuch as the defendant declined to go to the jury, and insisted that there was no evidence of a memorandum to satisfy the statute of frauds, it may be assumed that the defendant wrote his name in the plaintiffs' book, intending it as a signature to an order to the plaintiffs, whose order-book it was, and whose names were written in the beginning of it in the usual way. This, with the observations made in the course of the argument, disposes of all the objections raised, except that relating to the description of the candlestick, which was one of the articles ordered. It was thus described,—"Candlestick complete;" and it was insisted for the defendant, that, because at the time of giving the order it was arranged that the candlestick to be supplied should be furnished with a gallery to carry a mosquito-**[196]**-shade, therefore the addition of the shade formed a part of the bargain and ought to have been stated in the memorandum.

Upon consideration, we do not feel obliged to yield to this argument. The memorandum states all that was to be done by the person charged, viz. the defendant, and, according to the case of *Egerton* v. *Matthews*, 6 East, 307; 2 J. P. Smith, 339, that is sufficient to satisfy the 17th section of the statute of frauds, though not to make a valid agreement in cases within the 4th section.

Moreover, the difficulty which may arise as to the sufficiency of the precise candlestick supplied to fulfil the contract, is not greater than that of identity which even in an agreement under the 4th section may be left to parol evidence. Thus, in *Spicer* v. *Cooper*, 1 Q. B. 424, it was held, that "sold 14 pockets Kent hops, at 100s.," might be explained to mean 100s. per cwt.; and it was not even argued that the apparent ambiguity as to the price, caused by the omission of any statement of the quantity for which the 100s. was to be paid, rendered the note or memorandum insufficient to satisfy the 17th section.

The rule must therefore be discharged.

Rule discharged.

[197] CARD *v.* CARR AND OTHERS, Trustees of the Guardian Building Society. Nov. 21, 1856.

[S. C. 26 L. J. C. P. 113.]

By one of the rules of a benefit building society, each member was to pay 10s. per share per month, together with certain fines in case of default: and it was provided that "any member not having executed a mortgage to the society as thereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for six consecutive monthly nights, should thereupon cease to be a member of the society, and forfeit all his or her interest therein." By other rules, the general management was vested in twelve directors, a meeting or quorum of whom was to consist of five.—The plaintiff, a member of the society (not having executed a mortgage), neglected for seven successive months to pay his monthly subscription in respect of a share held by him, but afterwards tendered the amount of his subscription, and the fines payable thereon, to two of the directors, who were in attendance for the purpose of receiving payments, and who accepted the same. At the first monthly meeting of the directors after the money was so paid, it was resolved that the plaintiff had on the sixth default ceased to be a member of the society, and forfeited all his interest therein: and it was ordered that his name should be erased, and the money received from him by the two directors be returned to him: Held, that the share was properly forfeited; that the acceptance of the money by the directors under the circumstances did not amount to a waiver of the forfeiture; and that the rule was not unreasonable.

This was an action brought by the plaintiff against the defendants, as trustees of a benefit building society called "The Guardian Building Society," according to the statutes in such case made, to recover the sum of 35*l.* as money had and received by the said society for the use of the plaintiff, and upon accounts stated between the plaintiff and the said society

The defendants pleaded the following pleas,—

First, as to 4*l.* 6*s.* 6*d*, parcel of the money claimed [that the said society, at the time when the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., became due and payable, was, and from thence hitherto had been, and still was, ready to pay the plaintiff the said sum of 4*l.* 6*s.* 6*d.* parcel, &c.; and that, after the time when the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., became due and payable, and before the commencement of this suit, the said society was ready and willing to pay, and then tendered and offered to the plaintiff to pay him the said sum of 4*l.* 6*s.* 6*d.* parcel, &c., to receive which of the said society the plaintiff then wholly refused; and the defendants, on behalf of the said society, brought the said 4*l.* 6*s.* 6*d.* into court, &c.

[198] Secondly, except as to 4*l.* 6*s.* 6*d.*, that the said society never was indebted as alleged.

Thirdly, to the first count, except so far as the same related to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., that, long before and at the time of the accruing of the supposed causes of action in the said first count mentioned, and to which that plea was pleaded, the benefit building society in the declaration mentioned, to wit, the Guardian Building Society and Accumulating Fund, was, and from thence hitherto had been, and still was, a benefit building society established under and by virtue of the act made and passed in the 6 & 7 W. 4 (c. 32), for the regulation of benefit building societies; that, long before and at the said time when, &c., all the rules for the management of the

said society, and under which the said society then was and thereafter was to be governed and guided, had been and were, and from thence hitherto had been and were, duly and according to law, and according to the statute in such case made and provided, entered in a book kept by an officer of the said society appointed for that purpose, and which said book before and at the respective times aforesaid was and still is open at all seasonable times for the inspection of the members of the said society; and long before and at the said time when, &c. all the said rules had been made and transcribed pursuant to the provisions of the statutes in such case made and provided, and also certified by John Tidd Pratt, Esq., the barrister appointed to certify the rules of savings banks and friendly societies, to be in conformity to law, and with the provisions of the said first-mentioned statute: and the said rules and transcripts thereof, so certified as aforesaid, had been and were allowed, deposited, filed, and kept pursuant to the statutes in such case made and provided: and the said rules, before and at the said time when, &c., and from thence hitherto, had been, and still were, in full force: and the said society, [199] before and at the respective times aforesaid, was, and from thence hitherto had been, and still was, entitled to the benefit of the said statutes respectively: That, before and at the said time when, &c., and from thence hitherto, there were and still are, amongst the said rules, certain rules in the words and figures following, that is to say,—

"Time and place of meeting.

"I. That the first meeting of the society shall be held on Friday, the 3rd of October 1845, at the Girls' School Room of the Royal British Institution, Tabernacle Row, City Road, in the parish of St. Luke, and county of Middlesex; and that the said society shall continue afterwards to meet on the first Friday in every succeeding month, at such place as the members may from time to time appoint, until the object of the society shall have been fully accomplished pursuant to these rules; and such meeting shall commence at seven o'clock in the evening precisely.

"Directors.

"VIII. That the entire management of this society shall be vested in twelve directors, six of whom shall retire annually, to be determined by ballot amongst themselves, but who shall be eligible to be re-elected.

"Subscriptions, and mode of payment.

"XXXII. That every person entering this society shall pay the sum of 2s. 6d. per share as entrance money: but the directors shall have full power to increase such entrance money from time to time as they may deem expedient.

"XXXIII. That every member of this society, on the first monthly meeting in October, 1845, shall then commence paying his or her subscription money or sum of 10s. per share for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money of 10s. per share, with all fines which may be due from him or her, at every succeeding [200] general or monthly meeting, until the objects of this society shall have been fully accomplished, such payments to be made between the hours of 7 and half-past 8 o'clock in the evening; and every member neglecting so to pay his or her subscriptions shall be fined for each subscription in arrear agreeably to the table of fines annexed. Any member not having executed a mortgage to the society as hereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for six consecutive monthly nights, shall thereupon cease to be a member of the society, and forfeit all his or her interest therein.

"XXXIV. That, if any member shall be in arrear in respect of his or her subscriptions or fines for more than one general or monthly meeting, every payment afterwards made by such member shall be applied to the liquidation of the whole or the first part of such arrear, as the case may be.

"Members withdrawing.

"LXIV. That any person who shall be desirous of withdrawing from the society any share or shares which shall not have been purchased according to rule 38, shall be allowed to do so, on giving one month's previous notice in writing of such his or her intention to the manager at any general meeting of the society; and the money subscribed in respect of such share or shares shall be repaid to such member, subject

only to the forfeitures next hereafter mentioned, that is to say, if application to withdraw shall be made within the first year from the first meeting thereof, a forfeiture of 1l. 1s. per share in addition to the entrance fee; if within the second year from the said first meeting, a forfeiture of 10s. 6d. per share in addition to the entrance fee; and, if the application to withdraw be made within the third year from the holding the said first meeting, he shall take the net amount of subscriptions [201] paid, exclusive of entrance fee only: that, if the application to withdraw any such share or shares shall be made within the fourth or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the members so desirous of withdrawing, out of the profits which the society shall have realised, such bonus for the withdrawal of each share as they shall from time to time determine.

"LXV. That, if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice, or shall pay 5 per cent. on the amount received in advance, until they become entitled to receive by rotation. Provided always, that the forfeitures hereby imposed shall not extend to widows and children of deceased members.

"LXVI. That, in all cases of the withdrawal of shares from the society, subscriptions in arrear, and all fines incurred previously to any such application, shall be deducted from the amount which the member or members shall be entitled to receive.

"Fines to go to the general fund.

"LXXV. That the fines and all other payments that may be made by any member or members, or otherwise, save and except such fines as the directors may from time to time impose upon and amongst themselves, and on the manager, surveyor, and solicitor, to ensure early attendance, shall be considered as part of the assets of the society, and shall be applied to the increase of the general fund.

"Termination of the said society.

"XCIX. That, when the amount or value of 120l. shall have been realised for each share after all expenses and liabilities of the society have been fully paid and satisfied, the accounts shall be finally audited, printed, and sent to each member in manner hereinbefore mentioned, and this society shall terminate; and the trus-[202]-tees shall, upon the authority in writing of the directors, signed by the chairman, and attested by the manager, deliver up to each member, or his or her legal representative, the title-deeds and other documents which shall have been deposited with them by such member as a security to this society, and shall and will, at his, her, or their request and expense, indorse on his or her mortgage and security a receipt for all the moneys intended to be secured thereby, pursuant to the 6 & 7 W. 4, c. 32, s. 5.

"Reference of disputes to arbitration.

"CII. That the directors for the time being shall determine all disputes which may arise respecting the construction of these rules, or any clauses, matters, or things therein contained, and also of any additions, alterations, or amendments of the same, which shall or may hereafter arise between the trustees, officers, or other members of this society; and the decision of the directors, if satisfactory, shall be final and conclusive; but, if not satisfactory, reference shall be made to arbitration, pursuant to 10 G. 4, c. 56, s. 27: and that, at the first meeting of the directors of this society after the inrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of this society: and that, in case all or any of the said arbitrators so to be appointed shall die or shall refuse or neglect or become incapable to act, the directors shall, at their then next meeting, name and appoint one or more arbitrator or arbitrators as afore said to act in the place of the said arbitrator or arbitrators so dying, or refusing, or neglecting, or being incapable to act as aforesaid; and that, in each case of dispute, the names of the arbitrators shall be written on pieces of paper, and placed in a box or glass, and the three whose names are first drawn by the complaining party, or by some one appointed by him or [203] her, shall be the arbitrators to decide the matters in difference," as by the said rules, reference being thereunto had, will, amongst other things, appear. Averment, that, whilst the said rules were in full force, and before the said time when, &c., to wit, on the 1st of October, 1845, the plaintiff became and was a member of the said society, and the owner or holder of one share

therein; and in respect thereof he the plaintiff from time to time paid to the said society divers subscription moneys and fines which became due and payable from him to the said society for and on account of his said share, pursuant to the said rule in that behalf numbered XXXIII.: That the plaintiff never executed any mortgage to the said society]: That, before the commencement of this suit, the plaintiff continued to neglect the payment of his monthly subscriptions payable by him to the said society in respect of his said share, for six consecutive monthly nights which elapsed before the commencement of this suit, and thereupon, and before the commencement of this suit, the plaintiff ceased to be a member of the said society, and forfeited all his interest therein (including his aforesaid share, and all subscriptions, fines, and payments theretofore made in respect thereof), pursuant to the said rule of the said society in that behalf numbered XXXIII.: And that the money claimed in the first count, except as to the said sum of 4l. 6s. 6d., parcel, &c., consisted entirely of subscription moneys and fines so paid by the plaintiff to the said society as aforesaid, and not of any other or different money.

Fourth plea,—to the first count, except so far as the same related to the said sum of 4l. 6s. 6d., parcel, &c.,—that the matters alleged in so much of the defendants' third plea above pleaded, as commenced with the first word "that" [ante, p. 197] and ended with the words "never executed any mortgage to the said society" **[204]** [ante, p. 203], inclusive of such words, were true in substance and in fact, in manner and form as above alleged, and, to avoid prolixity, the defendants there repeated the same by reference as part of that plea: That, before the accruing of the supposed cause of action in the first count mentioned, and before and at the time of the commencement of this suit, five arbitrators had been and were duly elected and appointed pursuant to the said rule of the said society in that behalf, to wit, the said rule numbered CII.: That none of the said arbitrators were or are beneficially interested, directly or indirectly, in the funds of the said society: That the money claimed in the said first count, except as to the said sum of 4l. 6s. 6d. parcel, &c., consisted entirely of subscription moneys and fines so paid by the plaintiff to the said society as aforesaid, and not of any other or different moneys: That the claim of the plaintiff in the said first count mentioned, except as to the said sum of 4l. 6s. 6d., parcel, &c., before and at the time of the commencement of this suit, was, and still remained, a matter in dispute between the plaintiff and the said society within the true intent and meaning of the said last-mentioned rule numbered CII.; and that the said society, before the commencement of this suit, claimed, and still claimed, to retain the said moneys respectively under and by virtue of the rules of the said society thereinbefore set forth, or some or one of them: and the plaintiff, before and at the time of the commencement of this suit, disputed, and still disputed, such claim: That the said matter so in dispute as aforesaid, and the said claim of the plaintiff in respect thereof, ought to be referred to arbitration pursuant to the said rule numbered CII., and the statute in such case made and provided, and the same ought not to be recovered by action in this court: And that, after the accruing of the supposed causes of action in the said first count mentioned, **[205]** except as to the said sum of 4l. 6s. 6d., parcel, &c., and after the said dispute in respect thereof, and before the commencement of this suit, the said society were ready and willing to refer the same to arbitration pursuant to the said rule numbered CII., and the statute in such case made and provided, whereof the plaintiff then had notice and well knew; but the plaintiff wilfully neglected and refused to join or concur in any such reference, and afterwards commenced this action.

The plaintiff joined issue on the defendants' first, second, and fourth pleas.

To the third plea he replied, that, in the said rules is a rule numbered IV., intituled "Trustees dying, resigning, &c.," and which contains the following words, "Provided always, that, in case of any trustee being removed, and a new one appointed in his stead, such removal shall not operate to his prejudice as a member of this society so long as he shall think proper to conform to the rules thereof; and, upon such trustee or trustees' death, resignation, or removal by the members, all and every deeds, writings, and papers, and other property belonging to this society, in the custody or possession of such deceased, resigned, or removed trustee, shall be demanded by the chairman of the directors for the time being for and on behalf of the continuing and newly appointed trustee or trustees; and, if the same be withheld, or in case of refusal to transfer his estate and interest in any property given as security or mortgaged to this society, by the representatives of any such deceased trustee, or by such

resigned or removed trustee, and the party or parties so withholding or refusing shall have been or shall be a member or members, he or they shall be expelled this society, and shall forfeit all the money he or they shall have paid to this society, and all interest or share of the assets thereof, and shall be compelled by all legal and equitable means to give up, [206] convey, assign, and transfer the same in such manner as the directors shall require,"—by which it appears that the term "interest" in the said rule numbered XXXIII. was not intended to include, and did not and does not include, the subscriptions and moneys paid by the member to the said society.

The defendants, as to the replication to the third plea, admitted that, in the said rules was a rule numbered IV., intituled "Trustees dying, resigning, &c." and which contained the words in that behalf set out in the said replication; and they joined issue upon the residue of the said replication.

The cause came on for trial before Crowder, J., at the second sitting at Westminster in Trinity Term last, when a verdict was found for the plaintiff for 35l., less 4l. 6s. 6d. money brought into court upon the first plea, which was found for the defendants, subject to the opinion of the court on the following case:

The defendants are the trustees of the Guardian Building Society and Accumulating Fund, which is a benefit building society established under and by virtue of the 6 & 7 W. 4, c. 32, intituled "An Act for the regulation of building societies;" and all the rules, orders, and regulations under which the said society is governed have been and are duly and according to law, and the statutes in such case made and provided, certified, inrolled, exhibited, allowed, confirmed, and filed: and the society is entitled to the benefit of the said statute of 6 & 7 W. 4, c. 32, and other the statutes for the regulation of building societies.

The plaintiff was a member of the society to the extent of one share. The share originally belonged to one George Clarke, who transferred it to the plaintiff on the 6th of November, 1847. From the time of the transfer up to and until the month of February, 1851, inclusive, the plaintiff paid his monthly subscription money of 10s. [207] per share: and the whole of such payments by the plaintiff to the said society, from the time of the commencement of the said society to the time of the plaintiff's making default as hereafter mentioned, amounted to 35l.

From the month of March, 1851, and for seven consecutive months, that is, to September, 1851, inclusive, the plaintiff made default in payment of his monthly subscription to the said society in respect of the said share he held therein.

The plaintiff has not executed any mortgage to the said society.

On the 5th of September, 1851, the plaintiff caused to be tendered at the monthly meeting night held on the 5th of September, 1851, his subscriptions for the respective months of March, April, May, June, July, August, and September, and the fines due on account of the non-payment of the said several subscriptions respectively, in the whole amounting to 4l. 6s. 6d.; and the said sum of 4l. 6s. 6d. was received of and from the plaintiff on account of his said subscriptions and fines, by two of the directors of the said building society on the rota for that evening, and attending and acting under the 20th rule of the said society, and being the only directors present; and receipts were signed for the said several subscriptions and fines, and then delivered to the said plaintiff. [The receipts were set out.]

On the 23rd of September, being the first meeting of the directors after the 5th, the receipt of the subscriptions and fines was discussed; and the following resolutions were come to: "Resolved, firstly, that Mr. Card, having allowed his subscription to become six months in arrear, such period expiring at the meeting in August last, did at that meeting cease to be a member of this society, and forfeited all his interests therein; and this court do hereby direct the manager to erase Mr. Card's name from the list of members. Secondly, that the [208] solicitor be directed to wait upon Mr. Card, communicate to him the foregoing resolution, and return to him the 4l. 6s. 6d. taken by the directors at the September meeting; the said directors having informed the board that the money was received in ignorance of the stringency of the rule. Thirdly, that the directors appointed to receive the subscriptions at the October meeting be instructed to refuse to receive any money from Mr. Card, should he attend and offer to pay the subscription on the said share so forfeited as aforesaid."

It was objected on the part of the plaintiff, that these resolutions ought not to be admitted to be read in evidence against him. But they were admitted by the learned judge, after evidence given that the plaintiff was informed that such resolutions had

been made, and that, in pursuance thereof, the solicitor had communicated the same to him, and had tendered to him the sum mentioned in the resolutions; which tender was admitted.

The day after these resolutions passed, Mr. J. Wright, the attorney of the said building society, called on the plaintiff, and stated that the directors on the rota had made a mistake in receiving the said sum of 4l. 6s. 6d., the share having been previously forfeited. The said Mr. Wright, on behalf of the said society, then tendered and offered to pay to the plaintiff the said sum of 4l. 6s. 6d. paid to the said society by the plaintiff; but the plaintiff declined to receive the same.

On the 15th of January, 1853, the plaintiff wrote to the manager of the society, as follows:—

"Sir, Claiming to be a member of the Guardian Building Society, of which you are secretary, it is my intention to establish that claim before the directors of such society at the earliest period. I therefore request you to inform me when next the directors meet, in order that the matter in dispute may be brought before them agreeably to rule 102."

[209] On the 16th of February, 1853, the plaintiff, not having received any answer to that letter, wrote and sent to the manager of the said society the following notice:—

"Take notice, that I, the undersigned, claim to be a member of the Guardian Building Society, of which you are secretary; and, that claim being disputed by the executive of that society, I demand, agreeably to the rules of that society, arbitration to be appointed at the earliest opportunity, in order that I may endeavour to establish my claim to such membership. And take further notice that I also claim and demand the return of all moneys paid by me to such said society; and that I shall be satisfied with the decision which such arbitrators shall come to, either as to my being a member or as to the return of money paid by me as aforesaid; and the result of such decision shall be considered by me as final."

The plaintiff received no answer to this notice; and, on the 3rd of March, 1854, he again wrote to the directors of the society, as follows:—

"I beg once more to call your attention to my case, having frequently made application to Mr. Thomas (the manager) for the investigation of my claim for my restoration as a member of the building society, and having been frequently told by that gentleman that I had forfeited all claim on the society. I now venture, as a last resource, to address you on the subject. A few years ago, I was admitted a member; and, after having paid in a large sum of money, I by accident omitted to pay my subscriptions for six consecutive months; but, on the seventh monthly night, I sent the whole of my subscription, together with the fines, which was accepted by the society; and my messenger was then told to inform me, that, if I again neglected for six consecutive months, I should be erased, and forfeit all claims on the society or **[210]** its funds. A few days after such payment, a gentleman called on me, stating my last money was taken by mistake, that I had been expelled, and that I could have my last money paid returned to me; and, thinking it was not a fair proposition, I declined to make application for the same. My opinion as to the unjust expulsion continues the same; and (if consistent with your rules) I am now satisfied to abide the decision of arbitrators, whether I am or not to be a member, upon the payment of all arrears up to the present time."

On the 7th of April, 1854, the plaintiff received from the manager of the society the following letter:—

"Sir, I am instructed by the directors of the Guardian Building Society to acknowledge the receipt of your letter of the 3rd ultimo, and to refer you to the printed rules on which the society was established and is conducted, and which in their judgment fully answer your application. "JAMES WRIGHT, Manager."

All the letters set forth in this case were written and posted on the days on which they are dated, and were all received in due course of post.

The defendants did not at any time offer to refer the said dispute to arbitration, although the plaintiff was always ready to have the same referred to arbitration, and informed the directors thereof; but they refused the arbitration; and there was no evidence that the plaintiff took any other steps as to the arbitration.

A book containing the rules of the said society accompanied the case, and it was

agreed by both parties that the court should be at liberty to refer to the contents of the said book, as if they were part of the case, and fully set out in it.

The court was to draw such inferences from the facts and documents stated in the case as a jury ought to have drawn.

[211] The question for the opinion of the court was, Whether the plaintiff was entitled to recover the said sum of 35l., less 4l. 6s. 6d., paid by the plaintiff to the said society as his subscription to the said society from the commencement of the said society until the time of his making default, as stated above, or any part thereof.

If the court were of opinion that the plaintiff was entitled to recover the sum of 35l., less 4l. 6s. 6d., or any part thereof, the verdict entered for the plaintiff was to stand for so much as the court might think the plaintiff entitled to recover. If the court were of a contrary opinion, a nonsuit was to be entered.

In the event of the court being of opinion that the plaintiff was entitled to recover anything, the court was to direct how the verdict was to stand upon the several issues joined between the parties.

Edward James, Q. C., for the plaintiff. [Cresswell, J. Is the plaintiff a member of the society or not?] In the first instance, he was improperly expelled: but, once expelled, he was entitled to treat himself as no longer a member. [Cresswell, J. If you insist that he is not a member, where is the evidence of his expulsion? If you say he is a member, how can he sue?] The party does not ipso facto cease to be a member, by virtue of the 33rd rule, by neglect to pay his monthly subscriptions for six consecutive monthly nights. Something must first be done. The directors might waive their right to take advantage of his default: and this they have done, by receiving the money after the forfeiture was incurred. [Cresswell, J. The statement is, that the money was received by the two directors in ignorance of the stringency of the rule. There was evidently no intention on their part to waive the forfeiture, even if they had power to do so.] They were bound to have knowledge of the rule. [Crowder, J. But, could they waive a forfeiture?] The **[212]** general management of the society is vested in the directors. [Atherton. The 26th rule empowers five directors to act: the case states that two only were present when that was done which is relied upon as a waiver of the forfeiture.] The presence of five directors was not essential to the receipt of money: and the waiver of a forfeiture by receipt of the subscriptions clearly would be within the province of those who were entrusted by the directors to receive subscriptions and fines. [Crowder, J., referred to *The British Industry Life Assurance Company, App., Ward, Resp.*, 17 C. B. 644, where it was held that an agent to receive money on behalf of the company, had no authority to waive a forfeiture, or to make a new contract for the company.] That case is hardly consistent with *Wing* v. *Harvey*, 5 De Gex, M'N. & G. 265, before the Lords Justices. A life policy was subject to a condition making it void if the assured went beyond the limits of Europe without licence: an assignee of the policy, on paying the premium to a local agent of the society at the place where the assurance had been effected, informed him that the assured was resident in Canada: the agent stated that this would not avoid the policy, and received the premiums until the assured died: and it was held, that the society were precluded from insisting on the forfeiture. Lord Justice Knight Bruce there says, "If the directors, represented by the defendant, had themselves personally received the premiums which Mr. Lockwood received, with the same knowledge that he had, there certainly would have been a waiver of the forfeiture, and the defence in this case would have been ineffectual. But he was their agent for the purpose of receiving premiums at least on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual notwithstanding Mr. Bennett's departure for Canada, and residence there, —a faith in **[213]** which Mr. Lockwood knowingly acquiesced, and to which he expressly acceded. The premiums thus paid having been transmitted by Mr. Lockwood from time to time to the directors, and retained by them without objection, I think, that, whether Mr. Lockwood informed or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became, and that they are, as between them and the plaintiff, as much bound as if he had paid the premiums directly to themselves, they knowing at the time on each occasion the place of Mr. Bennett's residence. The directors, taking the money, were and are precluded from saying that they received it otherwise than for the purpose and in the faith for which and in which Mr. Wing expressly paid it." [Cresswell, J. He seems to have

considered the office affected with notice.] But he treats that as immaterial. [Cresswell, J. If you introduce into that case the fact which appears here, that the directors, immediately upon being made acquainted with the circumstances, repudiated the payment and their liability, would the Lords Justices have held the society liable?] The facts of the two cases, it is submitted, are as nearly parallel as possible. The directors, who must be assumed to be cognisant of all the facts, do not declare the plaintiff's interest forfeited until they have received the money. It clearly was not competent to them afterwards to elect to treat the omission to pay as a forfeiture: *Hyde* v. *Watts*, 12 M. & W. 254. The case is analogous to those of conditions waived between landlord and tenant: *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401. [Williams, J. That matter was very much discussed in *Doe d. Gatehouse* v. *Rees*, 4 N. C. 384, 6 Scott, 161.] Although the directors could not properly exclude the plaintiff from the society after having so waived the forfeiture, still, as they have assumed to do so, he is entitled to adopt their act of exclusion, and to bring this **[214]** action. The jurisdiction of the court clearly is not ousted by the arbitration clause,—rule 102. Clear and distinct words are necessary for that purpose. If the plaintiff had applied for a mandamus to compel the directors to appoint arbitrators, he would have been met by the objection that he had ceased to be a member of the society. In *Morrison* v. *Glover*, 4 Exch. 430, it was held that a rule of a building society requiring disputes between the society and any member thereof to be referred to arbitration, pursuant to the 10 G. 4, c. 56, s. 27 (incorporated with the 6 & 7 W. 4, c. 32), applies only to matters in dispute between the society and any member as member. The subject was also under discussion in *Cuthill* v. *Kingdom*, 1 Exch. 494. By the 1st section of the 6 & 7 W. 4, c. 32, all fines are to be reasonable. Now, it clearly is not reasonable to provide that a member shall forfeit his rights, where nearly the whole subscription has been paid up, for one default.

Atherton (with whom was Joyce), contrà, was stopped by the court.

Cresswell, J. This appears to me to be a very plain case. By the 33rd rule of the society, it is provided that any member not having executed a mortgage to the society, as thereinafter mentioned, continuing to neglect the payment of his monthly subscriptions for six consecutive monthly nights, shall thereupon cease to be a member of the society, and forfeit all his interest therein. It is said, that that rule does not operate a forfeiture, until there has been a declaration of the forfeiture by a meeting of the directors; and that, before such declaration of forfeiture took place in this case, the forfeiture had been waived by the acceptance of the money. It seems to me, however, that there is no evidence of a waiver. The two directors who received the **[215]** money on the seventh monthly night, had no authority to waive the forfeiture: and the moment the money was handed over to the directors, it was returned, and the transaction repudiated. The defendants are clearly entitled to judgment.

Williams, J. I am of the same opinion. I think there is not the slightest pretence for saying that there is anything unreasonable or contrary to law in the rule in question.

Crowder, J., concurred.

Judgment for the defendants.

In the Matter of Sarah Gardner. Nov. 15, 1856.

Upon a motion to dispense with the husband's concurrence in a deed for the conveyance by the wife of her separate property, the affidavit must contain the addition or description of the husband.

Kingdon, on a former day in this term, moved for a rule to enable Sarah Gardner, a married woman, whose husband had deserted her in the year 1846, and of whose residence or existence she was ignorant, to convey her interest in certain property, without his concurrence.

The affidavit was objected to by the Master, on the ground that it contained no addition or description of the applicant's husband.

The motion was now renewed upon an amended affidavit, and

Granted.

[216] In the Matter of a Plaint in the County-Court of Worcester holden at Stourbridge, between Meredith and Whittingham and Others. Nov. 7, 1856.

A friendly society inrolled its rules in 1832, under the 10 G. 4, c. 57, and shortly afterwards framed new rules, which were never inrolled or certified. In an action in the county-court, by a member against the stewards, for sick pay,—Held, that the society was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63, s. 2; and, consequently, that the county-court had jurisdiction, under the 41st section of that act.

A plaint was levied in the Stourbridge county-court at the suit of Meredith against the stewards of a society called the Seven Stars Friendly Society, under the circumstances stated in the following judgment which was delivered by the judge of that court on the 27th of October last:—

"The plaintiff sought to recover 18s., for three weeks' pay, from the stewards of a society called the Seven Stars Friendly Society, inrolled on the 4th of January, 1832, and certified by the proper officer on the 24th of February in the same year, and again certified by the registrar on the 5th of September last, according to the provisions of the 18 & 19 Vict. c. 63, s. 26.

"On the 18th of December, 1832, the society framed new rules, which have never been inrolled or certified, nor acted upon until recently, and consequently could not be read in evidence.

"The plaintiff claimed for sick pay under the original rules which were certified, and gave evidence of his sickness and compliance with such rules.

"For the defendants it was contended that the original rules were no longer in existence, by reason of their not being acted upon for a long series of years; and *The Queen* v. *Lord Godolphin*, 8 Ad. & E. 338, 3 N. & P. 488; and *Ex parte Norrish*, Jacob, 162, were cited. The cases so relied on are, however, in direct opposition to the defendants' view of the question. If there were any doubt upon the subject, it is removed by s. 27 of the 18 & 19 Vict. c. 63, which directs in what **[217]** manner the old rules may be altered or rescinded. The 2nd section declares that every friendly society held under former acts (now repealed) shall still be subsisting; and the 3rd section provides that the rules of any subsisting society, which have been confirmed or certified under the repealed acts, shall be valid until the same shall be altered by s. 27, before referred to. Now, in this case, the society cannot be subsisting under rules which have never received the sanction of law, but it is still subsisting under those rules which have been duly inrolled and certified.

"For these reasons, I find for the plaintiff, for the sum claimed by him."

R. Kettle now moved for a prohibition, to prohibit the judge of the county-court from further proceeding in the matter of the plaint, on the ground that that court had no jurisdiction, inasmuch as the society in question was not a subsisting friendly society within the meaning of the 2nd section of the statute 18 & 19 Vict. c. 63. The affidavit upon which the motion was founded stated that, in January, 1832, the society was inrolled, and its rules duly certified by the proper officer in February; and that, in December in the same year, those rules were altered; but that the altered rules had never been certified. The question is, whether this did not operate as an abandonment of the old society; the object of the present application being to resolve the doubt suggested by Lord Denman in the case of *The Queen* v. *Godolphin*, 8 Ad. & E. 338, 3 N. & P. 488. In that case, a friendly society inrolled its rules in 1794, under the statute 33 G. 3, c. 54: in 1804, alterations were made in them, but, by a neglect for which the society was not to blame, the altered rules were never inrolled: they were, however, acted upon, and the original ones disused, till 1835, when the omission to inrol **[218]** was for the first time discovered. Upon a motion for a mandamus to justices to hear the complaint of a member who had been expelled in 1836, it was held,—first, that the rules as altered could not legally be acted upon,—secondly, that it was at least doubtful whether the original rules continued in force, and, consequently, that the court could not issue a mandamus to the justices, but must leave the applicant to his remedy in equity. The court, in giving judgment, say: "We are aware of the extreme inconvenience of putting the claimant in the present case to seek his relief in a court of equity: but, with the authority of *Ex parte Norrish*

before us, and the serious doubts (to say no more) which we entertain whether the magistrates have the jurisdiction which the writ would command them to exercise, we should violate our well-established rules if we were to make the rule absolute: and, whatever may be the amount of inconvenience in the particular case, we perhaps do that which is more than proportionably convenient in general, if, by discharging the rule, we cause it to be generally understood that these societies cannot depart from their established rules, or neglect to comply with the statute in the mode of altering or repealing them, without exposing their property to danger, and themselves to great expense, loss, and inconvenience." [Cresswell, J. The 41st section enacts, that, "in all friendly societies established under this act or any of the said repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the **[219]** member or person claiming through or under a member or under the rules of the society, shall be made to the county-court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chancery in respect either of its ordinary or its special or statutory jurisdiction: and the decision of such county-court upon and in relation to such application as aforesaid shall not be subject to any appeal." That seems to me to give the county-court the same powers which Lord Denman thinks the court of equity had.] The word "subsisting" evidently was intended to override the whole clause. [Cresswell, J. Would the alteration of a single rule make the society cease to exist?] The alteration of the rules was an abandonment of the society.

Cresswell, J. I am of opinion that this is a subsisting society. The legislature has left it to the decision of the county-court judge.

The rest of the court concurring,

Rule refused.

[220] Charles Bayntun *v.* The Rev. Henry Bayntun, Clerk. Nov. 20, 1856.

Non-performance of a condition contained in a rule of court, is no ground for an application to rescind it.

On the 13th of April, 1852, the defendant made his promissory note for 1000*l.* payable four months after date to the plaintiff or order, and handed the same over to the plaintiff in trust for the separate use of his (the defendant's) daughter Lucy Ann, the wife of Alexander Sinclair Wiseman. This note was delivered to the plaintiff, accompanied by the following memorandum:—

"Major Charles Bayntun,—In consideration of the natural love and affection I bear to my daughter Lucy Ann Wiseman, I have this day signed and delivered to you, as trustee for my said daughter, my note of hand, dated this day, for the sum of 1000*l.*, payable four months after the date thereof; such note, and the proceeds thereof when received, to be appropriated for the sole and separate use of my said daughter, free from the debts, engagements, and control of her present or any future husband. Dated, this 13th day of April, 1852."

The 1000*l.* note being unpaid, an action was brought upon it on the 7th of December, 1853; and, on the 4th of October, 1854, a judge's order was obtained by consent, for payment of the amount of the bill, with interest from the 16th of August, 1852, and costs; and on the 6th of October judgment was signed, and a fi. fa. issued, which, being returned nulla bona, was followed by a writ of sequestrari facias, under which the Bishop of Salisbury duly sequestered the rents, tithes, and charges, oblations, obventions, fruits, issues, and profits of the rectory and parish church of Bromham, in the county of Wilts.

On the 12th of October, 1854, the defendant by deed conveyed to his son Mortimer Bayntun and one John **[221]** Lister all his estate and effects, upon trust to pay and

secure to the defendant a clear income of 300l. per annum, then to pay annuities of 50l. per annum to each of his five children, and then to apply the surplus trust funds in the discretion of the said trustees to and amongst the defendant's said children.

On the 21st of October, 1854, an order was made by Maule, J., in this cause, as follows:—

"Upon hearing the attorneys or agents on both sides, and by consent, and upon reading the judgment signed herein, dated the 6th of October instant, for 1000l. debt, with interest thereon from the 16th of August, 1853, at the rate of 5l. per centum per annum, and 5l. 7s. 6d. costs; and upon reading the writ of sequestrari facias issued upon the said judgment upon the tithes and income of the defendant as rector of Bromham, in the county of Wilts, amounting annually to 450l. or thereabouts, generally paid over to the said defendant every October; and the said parties, by their respective attorneys, having consented that the gradual payment and satisfaction of the said judgment-debt, by them agreed at 1154l. for principal, interest, and costs, to the date of the said judgment, and its future interest at 4l. per centum per annum from the date of the said judgment, which shall be and remain in full force and effect for securing the due payment of the said 1154l., and that such judgment and writ of sequestrari facias shall be limited to securing the annual payment of 200l. out of its entire annual produce, to the above-named plaintiff, until the whole of the said 1154l., with future interest as aforesaid, shall be fully paid and satisfied: I do order that the sequestrator shall pay over to Mortimer Bayntun and John Liston, the trustees of the said defendant, annually, all surplus receipts beyond the said annual payment to the plaintiff of 200l., —the first payment of 150l. only as agreed to be made and paid to the plaintiff [222] or his attorney by the sequestrator on or before the 31st day of October instant, or so soon afterwards as the same can be received by the sequestrator: And, in consideration of the plaintiff having agreed that such residue of the defendant's rectorial income shall be paid over to the said trustees as aforesaid, I do order that he, the defendant, shall, out of the other sources of his income, pay or cause to be paid to the said plaintiff or his attorney on or before the 20th of January next the further sum of 100l., also on the 30th of July next the further sum of 50l., also on the 30th of October next the further sum of 100l., and the like further sum of 100l. on every then subsequent 30th of January and 30th of October until the said judgment-debt or sum of 1154l., and its future interest at 4l. per cent., shall be fully paid and satisfied: And I further order, that, on the defendant paying to the plaintiff or his attorney 100l. in each succeeding January, the sequestrator is only to pay to the plaintiff 100l. every October, and the residue of all tithes, &c., to the defendant's said trustees."

On the 5th of January, 1855, the above order was made a rule of court.

In November, 1854, a payment of 150l. was made by the sequestrator to the trustees: in November, 1855, a further payment of 250l.; and in April, 1856, a further payment of 100l., in part reduction of the judgment debt, interest, and costs, leaving a balance due thereon of 724l. 10s. or thereabouts.

Upon affidavits disclosing the above facts, and stating that no other payments had been made by or on behalf of the defendant out of other sources of his income other than the income arising from his said parish church and rectory, pursuant to the said rule of court, that the current year's net produce of tithes and other rights from the said rectory and parish church of Bromham, amounting to 400l., was then, or forthwith would be, in [223] the hands of the sequestrator, —and that the sequestrator and his deputy had refused to pay out of the defendant's said rectorial income more moneys than at the rate of 200l. per annum towards satisfying the said judgment.

Piggott, Serjt., on behalf of Lucy Ann Wiseman, now moved for a rule to shew cause why the rule of the 5th of January, 1855, should not be rescinded, or why the sequestrator should not pay over to the plaintiff the year's tithes now due, on the ground that the terms of the rule had not been complied with. He submitted, that, unless the rule were rescinded, the plaintiff's remedy for the recovery of the balance of the judgment debt would be lost. [Williams, J. Why not enforce the order in the usual way?] The defendant has divested himself of all his property. [Cresswell, J. By the terms of the order, the 200l. a year which by the former part was to be paid by the sequestrator, was to be reduced to 100l. provided the defendant paid 100l. a year at certain times. If he failed to pay it, the former part was to be operative, the sequestrator was to pay 200l. a year. How can you ask us to rescind the agreement?] At all events, the applicant is entitled to receive from the sequestrator

the whole surplus profits, unless the conditions imposed by the rule are complied with. [Willes, J. Is not the proper remedy by a second sequestration, under the 1 & 2 Vict. c. 110, s. 18? Cresswell, J. Do you find any instance of an order upon a sequestrator to pay over money which he has not yet received? You do not complain of a violation of duty on his part. This, therefore, is a mere quia timet application. You fear that he will violate that rule, although the conditions have not been complied with. Is that such a rule as we can grant?] The money is due and payable; and it is sworn **[224]** that the sequestrator has declared that he will not pay more than the 200l. a year.

Cresswell, J. I am of opinion that there is no ground for this rule. We cannot rescind the rule of court, because one party has failed to perform a part of it. Neither can we grant the quia timet alternative asked for.

Williams, J. I am of the same opinion. The application in effect seeks to rescind the rule, because it has been violated.

The rest of the court concurring,

Rule refused.

[225] Vorley *v.* Barrett. Nov. 7, 1856.

[S. C. 26 L. J. C. P. 1.]

A., B., and C. respectively drew, accepted, and indorsed a bill for 300l. for the accommodation of D. B., having paid the amount of the bill to the holder at maturity, sued A. (his co-surety) for contribution. A. pleaded, that, after the drawing, acceptance, and indorsement of the bill, and before it became due, D. became bankrupt, and after B. had so paid the bill, he agreed with the assignees of D., that, in consideration of their delivering up to him a certain building agreement then subsisting between him and D., he (B.) would pay them 150l., and would relinquish (amongst other things) all moneys advanced to and for D., to wit, the 300l. so paid in satisfaction and discharge of the bill; that this agreement was fully performed; and that thereby, and without the consent of A., D. and his estate were exonerated from the claim. To this plea, B. replied "on equitable grounds," that the bill was drawn, accepted, and indorsed, and the amount paid by him, as alleged in the plea; that, before the bankruptcy of D., he had advanced him moneys to the amount of 2661l. 6s. 6d. to assist him to build certain houses pursuant to the terms of the building agreement mentioned in the plea, and had sold him timber and materials for the same purpose to the amount of 1512l.; that, D. being so indebted to him in the sums above mentioned, and also in the sum of 300l. so paid by him in discharge of the bill, and in 136l. 17s. 4d. for moneys advanced to him for other purposes, it was agreed between him and the assignees of D. that the building agreement should be delivered up to him to be cancelled on his paying them 150l. in discharge of all claims which they might have on the houses and property comprised in the building agreement, and that he should relinquish all claim on the estate of D. for the moneys advanced by him to D. for the purpose of the erection of the said houses, and for the materials so supplied as aforesaid, but that such agreement did not extend to the 300l. paid in discharge of the bill, nor to the 136l. 17s. 4d.; that, with a view to putting that agreement into writing, the following memorandum was drawn up:—"It is hereby agreed between the assignees and B., as follows: that the building agreement for eighteen houses on land in, &c. be given up to B. to be cancelled, on payment by him to the assignees of 150l. in full for all claims they may have on the property: B. hereby relinquishing all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above-mentioned houses,"—that the memorandum was signed by him (B.) and the solicitors of the assignees in the belief that it was in conformity to the agreement so made as aforesaid; and that the same was worded as aforesaid by mistake and error, so as to include and relinquish his claims against D. and his estate on account of the 300l. paid by him (B.) in discharge of the bill, contrary to the true intention of B. and the assignees when they signed the memorandum: that B. never relinquished or gave up his said last-mentioned claim against D. and his estate, nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the memorandum so executed in error as aforesaid; and that the real and true agree-

ment so made between B. and the assignees as aforesaid, was in all respects performed and fulfilled by the said parties thereto: Held, that the replication disclosed a good answer "on equitable grounds" to the plea, whether the written memorandum did or did not include the claim for the 300*l.*; for, that the defendant, by demurring to the replication, admitted, that, if it did include that claim, it did so by mistake; and, the agreement having been executed, this court was bound to grant the plaintiff the same relief that the plaintiff would have been entitled to in equity, without compelling him to resort to a court of equity to reform it.—A replication "on equitable grounds" may be a good legal as well as equitable answer to a legal plea: but, where the plea is pleaded "on equitable grounds," the replication must also be considered on equitable grounds.

This was an action for money paid, money lent, and money found due from the defendant to the plaintiff on accounts stated

[226] Second plea,—as to 100*l.*, parcel of the money claimed,—that the said sum of 100*l.* was and is the third part of a sum of 300*l.* paid by the plaintiff in satisfaction and discharge of a bill of exchange dated the 10th of January, 1854, drawn by the plaintiff on and accepted by William John Watson, payable to the order of the plaintiff three months after date, and indorsed by the plaintiff, and by the defendant, and one George Kent, respectively, and which bill of exchange the plaintiff and the defendant and the said George Kent respectively so drew and indorsed respectively for the accommodation of and as sureties for the said William John Watson, and which the defendant and the said George Kent so indorsed respectively at the request of the plaintiff: That, after the drawing, acceptance, and indorsement of the said bill as aforesaid, and before the same became due, the said William John Watson became and was a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts; and such proceedings were thereupon had, that certain persons were duly appointed and became and were the assignees of the estate and effects of the said William John Watson as and being such bankrupt as aforesaid: That thereupon afterwards, and after the plaintiff had so paid, satisfied, and discharged the said bill as aforesaid, to wit, by payment of the amount thereof to John Garland, the lawful holder thereof, and before this suit, an account was had and stated by and between the plaintiff and the said assignees, as and being such assignees as aforesaid, and it was, without the defendant's privity or consent, then agreed by and between the plaintiff and the said assignees, as and being such assignees as aforesaid, that, in consideration of the said assignees, as and being such assignees as aforesaid, delivering up to the plaintiff to be cancelled a certain building agreement in writing, which had been before then entered into and was then subsisting, by and between **[227]** the plaintiff and the said William John Watson, the plaintiff should pay to the said assignees, as such assignees as aforesaid, 150*l.*, and would relinquish (amongst other things) all moneys advanced to and for the said William John Watson, to wit, the said money so paid by the plaintiff in satisfaction and discharge of the said bill: That, before this suit, the last-mentioned agreement was fully performed by the said parties thereto respectively, and the said assignees, as and being such assignees as aforesaid, delivered up to the plaintiff to be cancelled the said agreement in writing, and the plaintiff then wholly relinquished and gave up his last-mentioned claim according to the true intent and meaning of the said agreement, and the said claim thereby became and was satisfied and discharged, and the said William John Watson and his estate and effects became and were wholly exonerated therefrom: And that the defendant did not at any time consent to, ratify, or confirm the said agreement.

Replication "on equitable grounds," That, one William John Watson, being in debt to a large amount to several persons, and being in want of a sum of 300*l.* for the purpose of paying certain of his creditors an instalment of their debts, and obtaining time from them to pay the remainder thereof, applied to the plaintiff, the defendant, and the said George Kent, to assist him the said William John Watson in raising the said sum of 300*l.* for the purpose aforesaid; and thereupon the plaintiff, the defendant, and the said George Kent, at the request of the said William John Watson, and for his accommodation, mutually agreed together to assist the said William John Watson, by each of them advancing him or raising for his use the sum of 100*l.*, making 300*l.* in the whole, and to effect the same by becoming parties to a bill of exchange for the sum of 300*l.*, to be negotiated for the purpose of raising the said sum of money

for the use and benefit of the said William John Watson for the [228] purpose first aforesaid, he the said William John Watson providing for the payment of the said bill when it had become due; and, in pursuance of such agreement, and for no other consideration, the defendant afterwards, to wit, in December, 1853, made and drew on the plaintiff a bill of exchange for the sum of 300l. payable at one month after date to the defendant's order, and, in further pursuance of the said agreement, and for no other consideration, the said bill was afterwards accepted by the plaintiff, and indorsed by the defendant to the said George Kent, and by him to one John Garland, who discounted the same for the use and benefit of the said William John Watson, to assist him in raising the said sum of 300l. for the purpose first aforesaid; and, whilst the said John Garland continued the holder of the said bill, and when the same became due, the said William John Watson not being prepared to pay the said bill, as he ought to have done, the said John Garland, at the request of the plaintiff, the defendant, and the said George Kent, agreed to renew the said first-mentioned bill for three months, and, for the purpose of effecting such renewal, and for no other consideration, the plaintiff then drew on the said William John Watson another bill of exchange for 300l., dated the 10th of January, 1854, payable to the plaintiff's order at three months after date, and the said William John Watson accepted the same, and, for the same purpose, and for no other consideration, the plaintiff and the defendant and the said George Kent respectively indorsed the said bill, and delivered the same so indorsed to the said John Garland, who took and accepted the same as and for a renewal of the said first-mentioned bill at one month's date, and for no other consideration: That the said bill of the 10th of January, 1854, was the same as the bill of that date mentioned in the said second plea, and that the drawing and the several indorsements thereof aforesaid were the same drawing and indorsements [229] thereof in the said second plea mentioned, and that the same was not indorsed by the defendant and the said George Kent at the request of the plaintiff, or otherwise than as above mentioned: That, after the said bill of the 10th of January, 1854, became due and was dishonored by the said William John Watson, and after he became bankrupt, the plaintiff was called on and obliged to pay, and did pay, the amount thereof, to wit, 300l., to the said John Garland, as the holder thereof, in discharge of the said bill, as in the said second plea mentioned, whereby the defendant became liable to pay and contribute to the plaintiff one third of the said sum of 300l., the said William John Watson not having paid any part thereof, and being unable to pay the same: That, before the said William John Watson became bankrupt as in the said plea mentioned, the plaintiff had advanced divers large sums of money to and for the said William John Watson, to wit, to the amount of 2661l. 6s. 6d., for the purpose of assisting him to build certain houses and other premises at Holloway, pursuant to the terms of the said building agreement in the said second plea mentioned, and had also sold and supplied to the said William John Watson divers quantities of bricks and other materials for the same purpose, of great value, to wit, of the value of 1512l.; and the said last-mentioned moneys, bricks, and materials had been principally expended and used by the said William John Watson in and about building the said houses and premises at Holloway, pursuant to the terms of the said building agreement: That, before and at the times of making the agreement with the assignees of the said William John Watson thereinafter mentioned, the said William John Watson was indebted to the plaintiff, not only in the amount of the said moneys so advanced and bricks and materials sold and supplied by the plaintiff as aforesaid for the purpose of assisting the said William John Watson to erect and build the said houses and [230] premises at Holloway pursuant to the said building agreement as aforesaid, but also in the said sum of 300l. so paid by the plaintiff in discharge of the said bill as aforesaid, and also in a further sum of money, to wit, 136l. 17s. 4d. for other moneys lent by the plaintiff to the said William John Watson, and paid by the plaintiff to and for the use of the said William John Watson, for other and different purposes than those above mentioned, at his request, and for interest due from him to the plaintiff thereon: That, the said William John Watson being so indebted to the plaintiff, it was agreed between the assignees of the estate and effects of the said William John Watson under his said bankruptcy and the plaintiff, that the said building agreement in the said second plea mentioned should be delivered up to the plaintiff to be cancelled, on payment by the plaintiff to the said assignees of 150l. in full discharge of all claims which they might have on the houses and property comprised in the said

agreement, and that the plaintiff should relinquish all claims on the said bankrupt, or his estate, for the said moneys which had been so advanced by the plaintiff to and for the said bankrupt as aforesaid for the purpose of assisting him to erect and build the said houses and premises at Holloway pursuant to the said building agreement as aforesaid, and for the said bricks and materials which had been so sold and supplied by the plaintiff to the said William John Watson as aforesaid for the purpose aforesaid; but that such agreement did not extend to the said sum of 300l. so paid by the plaintiff in discharge of the said bill as aforesaid, or any part thereof, nor to the said other moneys due to the plaintiff as aforesaid for moneys lent and paid to and for the use of the said William John Watson for other and different purposes as aforesaid, with interest thereon: That the plaintiff and the said assignees, being desirous of putting the said agreement between them into writing, respectively **[231]** employed their respective solicitors for the purpose of preparing a memorandum in writing, to be signed by the plaintiff and by the said assignees, or their solicitors, in conformity with the agreement so come to between them as aforesaid; and that thereupon the respective solicitors of the plaintiff and of the said assignees, being so employed, and with intent to put in writing the agreement so made as aforesaid, drew up and prepared for signature by the said parties a written memorandum of agreement, in the words and figures following,—"In re Watson. Memorandum. It is hereby agreed between the assignees of the above bankrupt and Mr. William Vorley, as follows: that the building agreement for eighteen houses on land in Junction Road be given up to Mr. Vorley to be cancelled, on payment by him to the assignees of 150l. in full for all claims they may have on the property; Mr. Vorley hereby relinquishing all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above-mentioned houses. Dated, 23rd December, 1854:" That the plaintiff on his own behalf, and the said solicitor of the said assignees on their behalf and by their authority, believing that such written memorandum was in conformity to the said agreement which had been so made as aforesaid, and intending to put the same into writing, and no other, respectively signed and delivered to each other the said written memorandum of agreement so prepared: That the said written memorandum of agreement so signed and delivered was and is the alleged agreement between the plaintiff and the said assignees in the said second plea mentioned, and no other; and that the same was worded as aforesaid by mistake and error, so as to include and relinquish the claim of the plaintiff against the said William John Watson and his estate on account of the said 300l. paid by the plaintiff in discharge of the said bill as aforesaid, contrary to the true intention **[232]** and agreement of the plaintiff and the said assignees when they made the said agreement and when they signed and delivered the said written memorandum as aforesaid: That he, the plaintiff, never relinquished or gave up his said last-mentioned claim against the said William John Watson and his estate, nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the said memorandum of agreement so executed in error as aforesaid: And that the real and true agreement so made between the plaintiff and the said assignees as aforesaid, was in all respects performed and fulfilled by the said parties thereto.

To this replication the defendant demurred, the points stated in the margin being, —"that the replication, being pleaded on equitable grounds, must be supported (if at all) on equitable grounds only,—that it was therefore immaterial whether the replication amounted to an argumentative denial or other answer at law to the plea,—that the replication did not shew any equitable ground of answer to the plea, within the meaning of the Common Law Procedure Act, 1854,—that, instead of answering the matters of the plea, the replication was addressed by anticipation to some supposed evidence by which (as it suggested) the defendant would support the plea,—that the inquiry it raised was altogether foreign to the objects and jurisdiction of a court of law,—that it was an attempt to obtain from a court of law the result to be properly obtained only by a suit in equity to reform the contract,—that, if the plaintiff anticipated that the agreement mentioned in the plea would at the trial be supported by written evidence which he would not be allowed to contradict by oral testimony, his proper course would have been to file a bill in equity,—that the replication sought to raise questions and issues in the cause which were altogether collateral and foreign to it, and involved matters beyond its scope,—that the replication **[233]** did not shew circumstances under which even a court of equity would interfere, and that the

replication did not deny the performance of the agreement relied on in the plea, in the sense and according to the meaning therein alleged, nor shew that it was performed by mistake."

Phipson, in support of the demurrer. The question is, whether the replication is a good answer on equitable grounds to the legal defence set up by the plea. The defence is, that the plaintiff has chosen, without the defendant's consent, to settle this claim with the assignees of Watson: in substance, it amounts to a payment by the principal to one of the sureties. The replication can only be treated as an equitable replication. [Willes, J. I do not assent to that. Although pleaded as a replication upon equitable grounds, if it contains a legal answer, it is good at common law.] *Teede* v. *Johnson*, 11 Exch. 840, 25 Law Journ., Exch. 110, is very like the present case. To a declaration on a guarantee by the defendant for payment of goods supplied by the plaintiff to one Jessop, the defendant pleaded, that, after Jessop became indebted to the plaintiffs, Jessop being also indebted to other persons, by an indenture between Jessop of the first part, Edwards and Bishop (one of the plaintiffs), trustees for themselves and the rest of the creditors, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of Jessop, of the third part,—after reciting that Jessop was indebted to the parties thereto of the second and third parts in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full,—it was witnessed that Jessop assigned all his estate and effects to the said trustees, upon trust to pay, rateably **[234]** and without preference, to themselves and their partners, and the parties thereto of the third part, the sums set opposite their names in the schedule; and, in consideration of the assignment, the several creditors parties thereto of the second and third parts released Jessop from all debts which they or their partners might have against Jessop up to the date thereof. To this plea, there was a replication, on equitable grounds, that Bishop executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign or seal the schedule; nor was the debt of the plaintiffs contained therein; and that, if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect. The court of Exchequer held, on demurrer to the replication,—first, that, the release being general in its terms, the execution of the deed by Bishop operated as an extinguishment of the debt due to the plaintiffs,—secondly, that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds. Bramwell, B., in the course of the argument (*a*), intimated that the plaintiffs must make out the replication to be good on equitable, not legal, grounds. [Willes, J. If the plea sets up a defence on equitable grounds, the replication must be equitable too. But, where the plea sets up a defence at law, the replication may be supported whether on legal or equitable grounds.] Here, the replication clearly is not good on legal grounds: it states a verbal agreement between the parties; and then it sets out the actual agreement which they signed. [Willes, J. Does the written agreement preclude the plaintiff from suing **[235]** on the bill? Has he discharged the principal?] Bankruptcy is an answer to that. The whole claim was evidently intended to be covered by the written agreement. Then, the replication is not good on equitable grounds. It is now clearly settled that a pleading, to be good on equitable grounds, must be such as to shew what would in a court of equity be a complete answer to the claim or defence, and would, as such, afford ground for a perpetual injunction granted absolutely and without any conditions: *Mines Royal Societies* v. *Magnay*, 10 Exch. 489, 493; *Teede* v. *Johnson*, 11 Exch. 840; *Wodehouse* v. *Farebrother*, 5 Ellis & B. 277; *Wood* v. *The Copper-Miners' Company*, 17 C. B. 561. There is no case to be found in equity, where there has been an injunction restraining the setting up of an agreement on the ground of mistake, where the party sought to be injoined has not been affected with knowledge. Equity will not reform an agreement, except where there is mutual error or mistake; and then only in a suit between the same parties: Story's Equity Jurisprudence, §§ 133, 140, 141, 155; *Steele* v. *Haddock*, 10 Exch. 643, 24 Law Journ., Exch. 78. Here, there is no mistake as between the plaintiff and the defendant. The plaintiff has entered into an agreement which is a bar to his claim. It is not

(*a*) See 25 Law Journ., Exch. 111.

suggested that the defendant knew of the parol contract, or that there had been any mistake or error; nor is it suggested that there has been any want of good faith.

J. Brown, contra. The demurrer admits that there is a mistake in the agreement; and the argument concedes that the defendant, being a party to the agreement, cannot be allowed to take advantage of the mistake. It is also admitted by the pleadings that the agreement has been fully executed according to the real intention of the [236] parties. But it is said that the plaintiff is bound first to go into equity to reform the agreement. What is the reason why a surety is allowed to set up the discharge of his principal? Because it would be inequitable to allow the creditor under such circumstances to recover against the surety, inasmuch as that would be an indirect way of violating his own engagement. That reason, however, fails here: because it is admitted that there is no equity as between the defendant and Watson. What, then, becomes of the distinction suggested by the other side? The parties who made the mistake are unwilling to take advantage of it: and yet it is insisted that a third person, who is not prejudiced by it, may. It is said that the replication is bad; for, that the case it sets up is not one in which a court of equity would grant unconditional relief. But, what condition could a court of equity impose here? None has been suggested. It would be idle to ask a court of equity to reform the agreement, in the face of the admission on the pleadings that it has been fully performed: per Parke, B., in *Steele* v. *Haddock*. In *Wood* v. *Dwarris*, 11 Exch. 493, to a declaration on a policy of assurance, the defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition, that, if any statement in the proposal was untrue, the policy should be void: and that a particular statement was untrue. To this there was a replication, on equitable grounds, that, before the policy was made, the defendants issued a prospectus containing a statement that all policies effected by them should be indisputable, except in cases of fraud: and that the plaintiff effected the policy on the faith of such representation. The defendants rejoined, that the policy was made on the basis of the proposal, and that there was not, before or at the time of the making of the policy, any promise [237] by the defendants that the policy should be indisputable except in cases of fraud, except that, before the proposal, the defendants issued the prospectus containing such statement. It was held that the rejoinder was bad, and that the replication was, on equitable grounds, a good avoidance of the plea. "It is true," says Pollock, C. B., "that, if a plaintiff seeks to enforce in a court of equity the specific performance of an instrument primâ facie good at law, the defendant cannot set up as a defence that the instrument does not disclose the real contract, which is open to some objection either on the ground of fraud, or usury, or simony, &c., but the defendant must file a cross bill to have the instrument reformed. The reason is, that a court of equity acts upon certain rules peculiar to such a court; but no such rules prevail in a court of law. There are cases in which a court of equity, in reforming an agreement, would require the parties to be placed in statu quo, which a court of law would not do. Therefore I am disposed to hold, that, under the 83rd section of the Common Law Procedure Act, 1854, this replication affords a good equitable defence. It certainly discloses matter which renders it inequitable that the plea should prevail; and I think that we ought to give effect to it, and decide in favour of the party who has the equitable right." That approaches very nearly to the present case. The distinction is well pointed out in *Perez* v. *Oliaga*, 11 Exch. 506. There, to an action for the non performance of an alleged agreement to load a ship for a particular voyage with a guaranteed freight of not less than 5500*l*., the court refused to allow the defendant to plead, by way of equitable defence, that the real contract was, that the ship should earn freight at such a rate per ton, that, if filled, she would obtain 5500*l*.; and that, by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly [238] understood, it was described as an absolute guarantee that the ship should have a freight of 5500*l*. Alderson, B., said: "It is doubtful whether the subject matter of the proposed plea would not be a good defence under a plea denying the contract. It may be so: but, even if it would not, we are of opinion that we ought not to allow the plea for the purpose of determining in this court a question which can only be properly determined in a court of equity. If the defendants have equitable ground for reforming the contract, they should apply to a court of equity, where they would be answered by the statement of the plaintiffs, and the question would be raised upon hearing the evidence on both sides, and the court might perhaps direct an issue.

How can that question be raised by plea in a court of law? This is not the case of an executed contract, as in *Slade* v. *Haddock*, but the plea is set up as an equitable defence to an executory contract, and therefore the question whether it is to be performed depends upon our determining an equitable issue, which we have no power to do." There are many cases in equity where a party is allowed to defend himself on the ground of mistake, without reforming the agreement: see Sugden's Vendors, 10th edit. §§ 18 24. The written agreement, in truth, does not relinquish this remedy against the defendant. The agreement entered into with the assignees was confined to the building contract: the 300*l.* in question has nothing to do with it. The evident intention was, that Mr. Vorley should relinquish by the written agreement all money advanced to the bankrupt "for the above-mentioned purposes." The introduction of the subsequent words "his claim" really makes no difference. And, if there be any ambiguity, it is latent, and may be explained by parol.

Phipson was heard in reply.

[239] CRESSWELL, J. I am of opinion that our judgment in this case must be for the plaintiff. I certainly thought at one time, and still incline to think, there is doubt about the sufficiency of the agreement to protect the defendant. But I think the equitable matter replied is sufficient to get rid of it. It is admitted, that, if the agreement does include the bill in question, it was a mistake, and that the plaintiff should in some way have the means of rectifying it; and the only question is, whether that is to be done here or elsewhere. I apprehend that it was the intention of the legislature, in making these provisions, to give the parties the benefit of an equitable answer or defence, without incurring the expense or inconvenience of going into a court of equity. If, therefore, the case is one in which a court of equity would relieve against the strict letter of the agreement, it is one in which we ought to give the judgment here for the plaintiff. The agreement has been fully performed, and therefore it would be too late to apply to a court of equity to reform it. Besides, the defendant is no party to the agreement. If, therefore, he went to a court of equity, he must drag Watson or his assignees there. I think the cases cited shew, that, where it is sought to enforce an agreement in equity, it is competent to the party against whom performance is sought to be enforced, to shew by oral testimony that there is mistake. So, here, I think the plaintiff ought to be allowed to answer the equitable defence attempted to be set up, by shewing that the agreement was never intended to include this bill.

WILLIAMS, J. I also am of opinion that the plaintiff is entitled to judgment. We should be entirely defeating the intention of the legislature in allowing equitable pleas and replications, if we were to hold this replication bad.

[240] CROWDER, J. I am of the same opinion. I think, that, unless we give judgment for the plaintiff in this case, we shall seriously impair the operation of the equitable pleading clauses of the Common Law Procedure Act, 1854. Nothing could be more unjust and inequitable than to allow such a defence as that attempted to be set up here. It is said, that, if the plaintiff wants to avail himself of the fact that the written agreement does not truly represent the contract between the parties, he should go to a court of equity to get it reformed. The very object of the Common Law Procedure Act in these clauses was, to enable courts of law to administer equitable relief, without driving the parties to the useless and vexatious expense of proceedings in a court of equity. Mr. Phipson does not pretend that the agreement can ultimately be set up as an answer to the action: but only, that, to enable him to make his defence, not only the parties to the agreement themselves, but also the assignees of Watson, must be dragged into a court of equity. It seems pretty clear that the necessity for reforming an agreement in equity exists only in the case of agreements that are executory, and not where they are fully performed and executed.

WILLES, J., had gone to Chambers.

Judgment for the plaintiff.

[241] KELSALL *v.* MARSHALL. Nov. 14, 1856.

[S. C. 26 L. J. C. P. 19; 2 Jur. N. S. 1142; 5 W. R. 114.]

By an act of the council of India, to enable the Union Bank of Calcutta to sue and be sued in the name of their secretary or treasurer, it was, amongst other things, enacted, that all actions, &c. against the company should be brought against the secretary or

treasurer for the time being as the nominal defendant: that a memorial of the names, &c., of the directors, secretary, and treasurer, and of the several persons members and proprietors of the bank, should be inrolled in the manner therein mentioned; and that every judgment, &c., in any action, suit, or proceeding in India against the secretary or treasurer, should (subject to the express provisions of the act) "have the like effect and operation upon and against the property and funds of the bank, as if such judgment, &c., had been made or pronounced against all its members, and as if all the members had been parties before the court to such action, suit, and proceeding, and as if the act had not passed." —The act then provided, that, in case execution upon any judgment in such action, &c., obtained against the secretary or treasurer, should be ineffectual for obtaining satisfaction against the funds of the bank, execution might issue, first, against proprietors for the time being, and, that proving ineffectual, then against persons who were proprietors at the time of the contract: Provided that no such execution should issue against any other person than the actual party to the suit, without leave of the court in which the action was brought:—Held, that there was nothing in the act to prevent a creditor having obtained a judgment against the secretary of the bank in India, from enforcing it by action against a shareholder in this country, the special provisions as to execution merely regulating the mode of procedure in India; and that the non inrolment of a memorial in pursuance of the act, was no answer to an action upon such judgment. It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for argument.

The first count of the declaration stated, that, before and at the several times in that count mentioned, divers persons had formed themselves into a company established at Calcutta, in the presidency of Bengal, in the East Indies, under the name, style, and firm of the Union Bank of Calcutta, for the purpose of carrying on at Calcutta aforesaid the trade and business of bankers; and the said company were before and at the times aforesaid carrying on at Calcutta aforesaid the said trade and business of bankers: That, after the said formation and establishment of the said company, and whilst the same was carrying on the said trade and business of bankers as aforesaid, to wit, on the 2nd of November, 1845, a certain act was made and passed by the president of the council of India in council, with the assent of the governor general of India, relating to and concerning the said last mentioned company, to wit, an act intituled "An Act to enable the Union Bank of Calcutta to sue and be sued in the name of the secretary or of the treasurer of the [242] said company," and numbered and called Act 23, of 1845: in which said act were and are, amongst others, the enactments following, that is to say, "Whereas, by and under a certain deed of partnership or association, or an agreement in writing of that nature, bearing date the 1st of August, 1839, several persons have formed themselves into a certain company or copartnership by the name of 'The Union Bank of Calcutta,' by which said deed or agreement it was and is provided (amongst other things) that the business of the said company should consist in issuing promissory notes payable to bearer on demand at their office in Calcutta, for any sum of not less than 8 company's rupees, and not exceeding 1000 company's rupees, and bills of exchange payable at such time after date or sight as the directors for the time being should fix, to parties who should require the same and deposit the amount of such bills in the said bank, which deposit should bear interest at such rate as the directors should fix; and also in discounting bills and promissory notes not having a longer period to run than four months from the time of discounting the same respectively; and also in lending money on the security of personal property, for any period not exceeding four months, or in cash accounts to persons depositing undoubted security, such accounts to be settled at the end of every three months; and in all other branches of business usually transacted by bankers in Calcutta; and by which said deed or agreement it was and is further provided that the capital stock and fund of the said company should amount to the sum of 1,000,000 of company's rupees, with certain provisoes for increasing the same when and if it should be deemed expedient: And whereas difficulties have arisen and may hereafter arise in recovering debts and moneys due to the said company called the Union Bank of Calcutta, and in maintaining actions for damages done to the said company or to the property of the said Union [243] Bank, since by law all the members for the time being of the said company must be named in every action or suit carried on for such purpose: And whereas it

would be convenient that persons having demands against the said company should be entitled to sue one of the two officers hereinbefore mentioned or described in that behalf,—therefore, for obviating and removing the difficulties aforesaid, it is hereby enacted, that, from and after the passing of this act, all actions, suits, and other proceedings whatsoever at law or in equity for any injury or wrong done to any real or personal property of the said Union Bank, in whomsoever the same may for the time being be vested, whether in the said company or in some person or persons in trust for the said company, or upon or in respect of any present liability or liabilities to the said Union Bank or to any person or persons in trust for the said Union Bank, or upon any bonds, covenants, contracts, or agreements which already have been or hereafter shall be given or entered into with the said company, or to or with any person or persons whomsoever in trust for the said Union Bank, or wherein the said Union Bank is or shall be interested, and also all instruments and petitions to found any adjudication of insolvency in any court for the relief of insolvent debtors, against any person or persons indebted to the said Union Bank, and liable to have been made insolvent by the law now or at any time hereafter in force relating to insolvents in the East Indies, and generally all other proceedings whatsoever, at law or in equity, to be commenced, instituted, or carried on by or on behalf of the said Union Bank, or wherein the said Union Bank is or should be concerned or interested, against any person or persons, body or bodies politic or corporate or others, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members, proprietor or proprietors, of or in the said Union Bank, or not, **[244]** shall and lawfully may be commenced, instituted, presented, and prosecuted or carried on in the name of the person who shall be the secretary, or of the person who shall be the treasurer of the said Union Bank at the time such action, suit, or proceeding shall be commenced or instituted, as the nominal plaintiff or petitioner for or on behalf of the said Union Bank; and all actions, suits, and proceedings at law or in equity, as well for subsisting as future accruing claims, debts, or demands, to be commenced or instituted against the said Union Bank by any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members, proprietor or proprietors, of or in the said Union Bank or not, shall be commenced, instituted, or prosecuted against the said secretary for the time being of the said Union Bank, or the said treasurer for the time being of the said Union Bank, as the nominal defendant, respondent, or defender for and on behalf of the said Union Bank; and the death, removal, resignation, or any other act of such secretary or treasurer, or the bankruptcy or insolvency of such secretary or treasurer, shall not abate or prejudice any action, suit, or other proceeding at law or in equity commenced under this act, but the same may be continued, prosecuted, and carried on or defended in the name of any other the secretary or treasurer for the time being of the said company: And it is hereby further enacted, that the directors of the said Union Bank shall cause a memorial, in the form and to the effect expressed in the schedule to this act, or as near thereto as the circumstances of the case will admit, of the names, residences, and description of the directors, secretary, and treasurer, and of the several persons being members and proprietors of the said Union Bank, to be verified by a declaration in writing to be made before the master in equity **[245]** of Her Majesty's supreme court of judicature at Fort William, in Bengal, by the secretary or some one of the said directors for the time being; and the same shall be inrolled amongst the records of the said supreme court within twelve calendar months next after the passing of this act; and, whenever any new director or directors or secretary or treasurer shall be elected, a like memorial shall be verified and inrolled as aforesaid, specifying in whose place or places he or they shall be appointed, within twelve calendar months after such appointment: And, whenever any person or persons shall cease or discontinue to be a proprietor or proprietors of the said Union Bank, a memorial of his, her, or their names shall be in like manner verified within twelve calendar months after such person or persons shall have so ceased or discontinued to be such proprietor or proprietors, in the form expressed in the said schedule for that purpose; and, when any new proprietor or proprietors shall be admitted into the said Union Bank, a memorial of his, her, or their names shall be in like manner verified and inrolled among the records of the said supreme court of judicature within twelve calendar months afterwards, according to the form in the said schedule: Provided always, that, if any declaration so made

shall be false or untrue in any material particular, the person wilfully making such false declaration shall be guilty of a misdemeanor: And it is hereby further enacted, that, until such memorial as first hereinbefore mentioned shall have been deposited and inrolled as hereinbefore directed, no action or suit shall be brought by the said Union Bank under the authority of this act; and, until the memorial by this act required to be deposited and inrolled, in the event of any person or persons ceasing or discontinuing to be a director, or secretary, or treasurer, or member of the said Union Bank, shall have been deposited and inrolled as hereinbefore mentioned, the per [246]-son or persons whose names shall appear in the said memorial which shall have been made and inrolled, shall be, and are hereby declared to be, liable to all such actions, suits, and executions upon judgment or decree, and other proceedings under this act, in the same manner as if he, she, or they had not ceased or discontinued to be a director, secretary, or treasurer, or proprietor of the said Union Bank: And it is hereby further enacted, that an examined copy of every memorial to be deposited and inrolled pursuant to this act, certified to be a true copy by and under the hand and signature of the keeper of the records and muniments for the time being of the said supreme court of judicature, shall be received in evidence as proof of the contents of such memorial, and proof shall not be required that the person by whom the memorial purports to be verified was at the time of the verification one of the directors of the said Union Bank: And it is hereby further enacted, that all and every judgment and judgments, decree and decrees, order and orders, made or pronounced in any action suit, or proceedings in any court of law or equity within the limits of the territories of the East India Company, against the secretary or treasurer for the time being of the said Union Bank, shall (subject to the express provisions of this act) have the like effect and operation upon and against the property and funds of the said Union Bank, as if such judgment, decree, or order had been made or pronounced against all the members of the said Union Bank, and as if all the members of the said Union Bank had been parties before the court to such action, suit, or proceedings, and as if this act had not passed: Provided always, and it is hereby further enacted, that, in case execution upon any judgment or decree in any such action or suit obtained against the secretary or treasurer of the said Union Bank as defendant or respondent or otherwise, shall have been issued and taken out against the [247] funds and property of the said Union Bank under the provisions of this act, and shall be ineffectual for obtaining full payment and satisfaction for the sum or sums sought to be recovered, then and in such case execution upon any such judgment or decree shall be issued against any other individual proprietor or proprietors of the said Union Bank successively as it may become necessary, to enforce payment and satisfaction of the said judgment or judgments: Provided also that every such secretary or treasurer in whose name any such action or suit shall be commenced, prosecuted, or defended, and every director or member against whom execution upon any judgment or decree obtained in any such action or suit shall be issued as aforesaid, or as hereinafter mentioned, shall always be reimbursed and paid out of the funds or property of the said Union Bank all such loss, damages, costs, and charges as by the event of any such proceedings he or they shall be put unto or become chargeable with; and, if the funds or property of the said Union Bank shall be insufficient to pay the said loss, damages, costs, or charges, then the deficiency shall be made good by the proprietors for the time being of the said Union Bank: Provided also, that, if any such execution against the secretary or treasurer or member or members for the time being of the said Union Bank shall be ineffectual for obtaining payment of the sum or sums sought to be recovered thereby, it shall be lawful for the party or parties so having obtained judgment or decree against the secretary or treasurer for the time being of the said Union Bank, to issue execution against any other person or persons who was or were a member or members thereof at the time the contract or contracts was or were entered into upon which such action or suit was or were instituted; but no such execution shall be issued against any other person than the actual party to the action or suit, without leave first granted in open court by the [248] court in which such action or suit may have been brought or instituted, and which shall be made on notice to the person or persons sought to be charged: Provided also, that nothing herein contained shall render such past members or proprietors liable for payment of any debt or claim for which such action, suit, or proceeding may have been brought, to which they would not have been liable by operation of law, as partners, in case any action or other

proceeding had been originally brought against them for the same: And whereas it is expedient that every member of the said Union Bank against whom any execution shall be issued upon any judgment or decree (under the authority of this act) shall have an easy and expeditious mode of recovering all such losses, damages, costs, and charges as he or she shall be put to or become chargeable with in consequence thereof, it is therefore hereby enacted, that, if any execution upon any judgment or decree obtained in any action, suit, or proceeding under this act shall be issued against any other proprietor or member of the said Union Bank, and such proprietor or member shall not within the space of one month next after the issuing thereof be reimbursed out of the funds or property of the said Union Bank all such moneys, costs, charges, losses, and expenses as he or she shall have paid or been put to or become chargeable with in consequence of such execution having been issued against him or her, it shall be lawful for such member or proprietor to divide such moneys or costs or charges, or so much thereof as he or she shall not have been reimbursed as aforesaid, into as many equal parts or shares as the capital of the said Union Bank shall at the time be divided into, and each and every proprietor for the time being of any share or shares in the said company shall, in proportion to the number of shares he or she may hold in the said Union Bank, pay one or more of such parts or shares upon demand to the member or pro-**[249]** prietor against whom such execution shall have issued, or to his or her executors or administrators, and, upon the neglect or refusal of any proprietor of the said company to pay, upon demand, his or her due and fair proportion of such moneys, costs, and charges, then and in such case it shall be lawful for the proprietor, or such person to whom the same ought to have been paid, to sue for and recover the same in and by an action, suit, or plaint against the proprietor, or the executors or administrators of any proprietor who shall so neglect or refuse as aforesaid, in Her Majesty's supreme court of judicature in Calcutta: And it is hereby further enacted, that this act, and the provisions herein contained, shall extend and be construed to extend to the said company called the Union Bank at all times during the continuance thereof, whether the said Union Bank hath been or be now or shall hereafter be composed of all or of some of the persons who were the original members thereof, or of all or some of those persons together with some other person or persons, or whether the said Union Bank be at the time of passing this act composed altogether of persons who were not original members of the said Union Bank, or whether the said Union Bank shall hereafter be composed of persons who were not original members thereof, or of persons all of whom shall become members subsequently to the passing of this act." The declaration then proceeded to aver, that, afterwards, and before and at the time of the bringing of the action and the recovery of the judgment thereinafter mentioned, the said act became and was, and from thence continually hitherto had been, and still was, the law of and in Calcutta aforesaid, and of and in the said presidency of Bengal, applicable to the said company: That, after the said act had become, and whilst the same was such law as aforesaid, and within twelve calendar months next after the passing of the said act, such a memorial as is in the said act and hereinbefore first mentioned, was duly **[250]** verified and inrolled as directed by the said act; and that afterwards, and before and at the times of the bringing of such action and of the recovery of such judgment as thereinafter mentioned, one John Leslie Russell, who during all the time last aforesaid was resident within the said presidency, and subject to the jurisdiction of Her Majesty's supreme court of judicature at Fort William, in Bengal aforesaid, and to the law of Calcutta, and of the presidency aforesaid, was the secretary of the said company; and the defendant, before and at the respective times last aforesaid, and also before and at the times of the making of the promises by the said company as thereinafter in that count mentioned, was, and from thence respectively hitherto had been, and still was, a member of the said company: and that thereupon, to wit, on the 25th of February, 1848, the plaintiff and William Strettell Kelsall and James Knight Heron (both since deceased) filed their plaint in an action of trespass on the case upon promises, on the common law side of the said supreme court at Fort William, in Bengal aforesaid, and then caused the said John Leslie Russell, as such secretary of the said company, to be summoned, according to the course and practice of the said supreme court, to appear as the nominal defendant for and on behalf of the said company, in the said court, pursuant to the provisions of the said act, to answer the said now plaintiff and the said William Strettell Kelsall and James Knight Heron, since deceased, in the said action: That the said John

Leslie Russell duly appeared in the said court, according to the course and practice thereof, to such summons; and that such proceedings were thereupon had therein and in the said action, that, afterwards, to wit, on the 14th of March, 1848, the now plaintiff, and the said William Strettell Kelsall and James Knight Heron (since deceased), by the consideration and judgment of the said supreme court, recovered [251] against the said John Leslie Russell, as such secretary as aforesaid, as well a certain sum of company's rupees 160,095 and 10 annas, for the damages which the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) had sustained by and on account of the non-performance of certain promises before that time made by the said company to the said now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased), as also the sum of company's rupees 623, 4 annas, and 7 pice, for their costs and charges by the said last-mentioned court there adjudged to the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) with their assent: which said damages, costs, and charges in the whole amounted to company's rupees 160,718, 4 annas, and 7 pice,—whereof the said John Leslie Russell, as the secretary of the said last-mentioned company as aforesaid, and as such defendant as aforesaid, was convicted: That the said promises were made, and the said causes of action of the said now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) in respect thereof arose, within the jurisdiction of the said supreme court; and that the said last-mentioned court, during all the time whilst the said action was depending therein as aforesaid, and continually and at the time of the giving of the said judgment, was duly holden within the jurisdiction thereof, to wit, at Fort William, in Bengal aforesaid: And that the said judgment still remained in full force and effect, and not in anywise satisfied, reversed, or annulled; and that no execution had as yet been obtained of or upon the said judgment; and that the damages, costs, and charges aforesaid in form aforesaid adjudged to the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) were of great value, to wit, of the value of 16,071*l.* 17*s.* 9¾*d.* of lawful money of the United [252] Kingdom and were still due to the plaintiff: Yet that the defendant had not paid the said last-mentioned sum of money, or any part thereof, but the same was wholly unpaid.

The declaration also contained seventeen counts charging the defendant as the drawer of seventeen several bills for sums amounting in the aggregate to 14,500*l.*, dated respectively the 24th of September, 1847, at Calcutta, and drawn upon Messrs. Glyn, Halifax, Mills, & Co., bankers, London, payable respectively six months after sight to the order of one William Henry Abbott, which bills were duly presented and refused acceptance, of which the defendant had notice: and also counts for money lent by the plaintiff and W. S. Kelsall and J. K. Heron to the defendant; for money had and received by the defendant for their use; for interest; and for money found due from the defendant to them upon accounts stated.

The defendant demurred to the first count. He also pleaded to the first count, that no such memorial as in the said act and in the said first count first mentioned, was verified or inrolled in the manner required by the said act, as alleged.

Twelfth plea to the second and subsequent counts, that, before and at the time of the accruing of the alleged several causes of action in the said several counts mentioned, a company was established at Calcutta, in the presidency of Bengal, in the East Indies, under the name and firm of the Union Bank of Calcutta; and that the liability of the said company, and of the several members thereof, in respect of all causes of action against the said company for all claims, debts, and demands, and in respect of all obligations and engagements contracted or incurred by the said company, was, before and at the time of the accruing of the several alleged causes of action in the said counts stated, and from thence hitherto [253] had been, regulated and governed by a certain act made and passed by the president of the council of India in council, with the assent of the governor general of India, to wit, the said act in the first count of the declaration mentioned; in which said act are contained the several clauses and provisions in the said first count set forth, and which for the sake of brevity are here referred to: That afterwards, and before and at the time of the bringing of the action and the recovery of the judgment thereinafter mentioned, the said act became, and from thence continually had been, and then was, the law of and in Calcutta and the said presidency of Bengal applicable to the said company;

and that, after the said act had become and while it was law as aforesaid, and within twelve calendar months next after the passing of the same, such a memorial as in the said act and in the first count of the declaration first mentioned, was duly verified, deposited, and inrolled as directed by the said act; and that afterwards, and before and at the time of the bringing of such action and of the recovery of such judgment as thereinafter mentioned, one John Leslie Russell, who during all that time was resident within the said presidency, and subject to the jurisdiction of Her Majesty's supreme court of judicature at Fort William, in Bengal aforesaid, and to the law of Calcutta and of the presidency aforesaid, was the secretary of the said company: That, on the 25th of February, 1848, the plaintiff and William Strettell Kelsall and James Knight Heron (both since deceased) filed their plaint on the common law side of the said supreme court at Fort William, in Bengal, as in the said first count mentioned; and that such proceedings were then and thereon had as in the said first count mentioned; and afterwards, on the 14th of March, 1848, the plaintiff and the said William Strettell Kelsall and James Knight Heron, since deceased as aforesaid, by the consideration and judgment of the said court recovered **[254]** against the said John Leslie Russell, as such secretary as aforesaid, such sums as in the first count of the declaration in that behalf mentioned: That the causes of action in respect of which such judgment was recovered arose within the jurisdiction of the said court; and that the same were and are the same identical causes of action as those in the said several counts contained; and that they arose against the defendant only in respect of claims and demands against the said company, and by reason of obligations and liabilities incurred by the said company, and not otherwise: That the defendant was sued in this action as a member of the said company, and not otherwise: And that the said judgment was a good, valid, and effectual judgment.

The plaintiff joined in demurrer to the first count, and demurred to the first and twelfth pleas. Joinder.

Phipson (with whom was Montague Smith) for the plaintiff (*a*). 1. This is substantially an action against **[255]** a person who was a party to the judgment in the supreme court of Calcutta. The defendant and his partners have agreed that the secretary or treasurer shall be sued, and that a judgment obtained in an action against either of those persons as the nominal plaintiff, shall have the same effect and operation upon and against the property and funds of the bank, as if such judgment had been pronounced against all the members, and as if all the members had been parties to the action. The distinction between this case and *The Bank of Australasia* v. *Harding*, 9 C. B. 661, and *The Bank of Australasia* v. *Nias*, 16 Q. B. 717, is that here judgment must have been obtained against the bank, and that judgment prove ineffectual; whereas, in the act there in question, there was no such provision. [Cresswell, J. Nor was there any provision that the judgment should have the same effect as if all the members of the bank had been parties to the action.] The act of council in India can have no operation to control the laws of any other country. If the question were now for the first time presented to the court, they could have no difficulty in dealing with it upon principle. The judgment imposes upon the defendant a moral obligation to pay the debt, which moral obligation is a good foundation for an action against him here: *Walker* v. *Witter*, 1 Dougl. 1; *Russell* v. *Smyth*, 9 M. & W. 810, 818. In the

(*a*) The points marked for argument on the part of the plaintiff, were,—

"1. That the defendant, having been a partner in the Calcutta Bank at the time when the causes of action accrued upon which the judgment was obtained in India, and from that time to the present, is liable in this country upon an implied promise to pay the sum for which such judgment was recovered, in the same manner in which he would have been liable had it been obtained against himself individually:

"2. That the first plea is bad, on the ground that the act does not disable a creditor from suing the bank in the name of the secretary before the filing of a memorial under the act: but that the act only prevents the bank from bringing an action in the name of the secretary until such memorial has been filed: and, further, that the matter of the first plea should have been pleaded to the original action, and was no bar to the present claim:

"3. That the twelfth plea was bad, on the ground that the provisions of the act do not prevent the plaintiff from suing the defendant personally in England in respect of causes of action against the company of which he was a member."

last-mentioned case, Lord Abinger says: "The action (*a*)[1] may be sustained on the ground of morality and justice. The maxim of the English law is, to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of [256] substantial justice. Foreign judgments are enforced in these courts, because the parties liable are bound in duty to satisfy them." And Parke, B., says: "Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." The provisions in the Indian act for facilitating the enforcing of the judgment, are modes of procedure only, and do not in any way interfere with the question of contract, or with the plaintiff's right to sue upon the judgment in this country. The construction of a contract is governed by the law of the place where it is entered into; the mode of enforcing it, by that of the place where it is sought to be enforced. "The distinction," says Tindal, C. J., in *Huber* v. *Steiner*, 2 Scott, 304, 326, 2 N. C. 202, 210, "between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by our English courts of law, is well known and established, viz. that so much of the law as affects the rights and merit of the contract, all that relates 'ad litis decisionem,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates 'ad litis ordinationem,' is taken from the 'lex fori' of that country where the action is brought" (*a*)[2]. The cases of *Needham* v. *Law*, 11 M. & W. 400, and *Webb* v. *Taylor*, 1 D. & L. 676, shew that the shareholders are the real defendants in these actions: the bringing the suit in the name of the secretary or treasurer is mere matter of form. And there is more reason that it should be so, where the action is against a foreign corporation. Lord Campbell, in giving judgment in *The Bank of Australasia* v. *Nias*, 16 Q. B. 733, says: "The colonial legislature, we think, clearly had authority to pass an act [257] regulating the procedure by which the contracts of the bank should be enforced in the courts of the colony. Nor is there anything at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process, and, being a party to the record, the recovery had been personally against him. The act imposes no new liability upon him, but only regulates the mode in which that liability shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony cannot be obtained out of the colony; and, unless the judgment may be made the foundation of an action, it could not in any manner be rendered available in this country. In recompence for the advantages conferred upon the company by the act, it anxiously provides that the rights of the creditors of the company shall not be prejudiced by it." The same principles governed the decision in this court. Wilde, C. J., says: The statute provides "that one member, holding a principal office in the company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial act, the defendant would have been liable in respect of the demand for which he is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment." The act [258] makes it imperative to sue the secretary or treasurer in India: *Steward* v. *Greaves*, 10 M. & W. 711.

2. Then, is the plaintiff's right of suing upon the judgment at all affected by the provisions in the colonial act for enforcing it by execution against the shareholders? Those enactments, it is submitted, provide merely for the mode of regulating the procedure on the judgment in the colony, and cannot in any way interfere with or alter the legal effect and operation of the judgment in a foreign country. [Cresswell, J. Are you not compelled to resort to the act to maintain the action?] We could not

(*a*)[1] Against a defendant resident in this country, for costs awarded against him, after appearance, by a decreet of the court of session in Scotland, in a suit for a divorce.

(*a*)[2] And see *Trimbey* v. *Vignier*, 1 M. & Scott, 695, 1 N. C. 151.

maintain an action against a stranger in India without the act. [Cresswell, J. Then it will probably be urged, on the other side, that you must take the whole act, including the mode of procedure to enforce the judgment. Could you sue upon the judgment in Calcutta?] No. But the implied assumpsit raised by the judgment is not affected by any local stipulations for the mode of enforcing it there. In *Hall* v. *Odber*, 11 East, 118, a foreign judgment recovered by the plaintiff, with a stay of execution for six months, was held to be good evidence in support of an account stated. Lord Ellenborough said: "The judgment is for a sum certain found to be due from the defendant to the plaintiff, with interest thereon from a certain day past; but with a stay of execution till the further order of the court: and this at first struck me as an incomplete judgment, on which no action could be maintained here. But we have been pressed with the course of proceedings in our own courts, where upon judgment recovered and a stay of execution upon the allowance of a writ of error, an action lies nevertheless upon such judgment in the meantime; and applications are continually made to the equitable jurisdiction of the court, to stay proceedings in such actions pending the writ of error." The distinction, therefore, is one of mere procedure. The judgment in the colonial [259] court is not the less a judgment, because of the local regulations as to enforcing it by execution there.

3. Then, as to the twelfth plea,—if it means that the simple contract debt is merged in the judgment, the cases of *The Bank of Australasia* v. *Nias*, and *The Bank of Australasia* v. *Harding* are conclusive to shew that it is not. [Byles, Serjt., intimated that he did not intend to insist that it was.] The act of the Indian legislature can have no operation out of the Indian territory. [Cresswell, J. It will probably be contended that the defendant never consented to be placed in jeopardy by the recovery of a judgment against the secretary or treasurer, except under certain circumstances, and in a particular manner.] That argument goes to the very root of the decision in the two cases referred to, and is distinctly met by the judgment.

Byles, Serjt. (with whom was John Gray), for the defendant (*a*). There is a material difference between the [260] cases of *The Bank of Australasia* v. *Nias* and *The Bank of Australasia* v. *Harding* and the present case. In those cases, nothing was left to be done except the payment of the money: whereas, here, two steps are to be taken before the now defendant could have execution issued against him in the colony,—first, an ineffectual execution against the funds and property of the bank,—secondly, the leave of the court in which the action was brought must be obtained: and for these he has paid a valuable consideration. Under the Australasian Bank act, it was provided "that execution upon any decree or judgment in any such action, suit, &c., obtained against the chairman for the time being of the bank, might be issued against and levied upon the goods and chattels, &c., of any member or members whatsoever

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(*a*) The points marked for argument on the part of the defendant, were,—

"1. That the first count is bad, and discloses no cause of action, or right to proceed against the defendant in the English courts:

"2. That the judgment is a judgment against the secretary, and not against each individual member; and that, if it were, execution could at once and of course be taken out against a shareholder in Bengal; whereas, it is clear that execution could only be had against such shareholder under the special clauses of the act in question:

"3. That it was not competent to the plaintiff to adopt part of the act and reject the rest; that there was no judgment in existence against the bank, or any person representing it, except by force of the act (the said John Leslie Russell being otherwise a stranger both to the bank and the cause of action); and that, consequently, the plaintiff could not put in force his judgment, except under the circumstances and in the manner directed by the act:

"4. That the first plea was good, and the verifying and inrolling such memorial was a necessary condition precedent to the said John Leslie Russell being made the nominal defendant for the bank; and that this memorial was the only evidence admissible of the person sued being such secretary:

"5. That the twelfth plea was good, shewing that the plaintiff had already recovered a judgment for the same causes of action, under which he would or might have his remedy, in the manner prescribed by the act, against the defendant and the other shareholders in the bank; and that the plaintiff could not have another action against the defendant in respect thereof."

of the said bank for the time being, in like manner and not otherwise than as if such decree or judgment had been obtained against such member or members personally." By the act now under consideration, it is enacted that "every judgment made or pronounced in any action, &c., within the limits of the territories of the East India Company, against the secretary or treasurer for the time being of the said Union Bank, shall (subject to the express provisions of this act) have the like effect and operation upon and against the property and funds of the said Union Bank, as if such judgment had been made or pronounced against all the members of the said Union Bank, and as if all the members of the said [261] Union Bank had been parties before the court to such action," &c. [Cresswell, J. I find nothing subsequently limiting the remedy to the funds of the bank: I think that enactment must be read as if the words "subject to the express provisions of this act" had not been there.] It is enough to say that the judgment has some effect against the property and funds of the bank. There are, however, subsequent provisions a compliance with which on the part of the judgment-creditor is a condition precedent to his right to have recourse to individual shareholders. Execution is, in the first place, to issue against the assets of the company. That remedy failing, execution is to go against members for the time being; and then, and not till then, execution against those who were members at the time of the contract. But the judgment creditor cannot have execution against shareholders of either degree, except on motion made in open court, upon which motion the party sought to be charged may be heard to urge any defence he may have against it. Suppose the case of a man no party to the contract,—are the provisions of this act, which make him liable upon a contract he never entered into, mere matter of procedure? He is to be liable upon a final judgment only. The court will look, not at the form, but at the real nature and substance of the judgment. This is not in substance a final judgment, the true test of which is, where nothing remains but to pay: it is a mere interlocutory judgment. No case can be found where an action has been held to lie in the courts of this country upon a foreign judgment, where no action would have lain upon it in the country where it was obtained. It is clear that the present defendant could not have been sued upon this judgment in the supreme court at Calcutta. if he could, what becomes of all the provisions so studiously introduced into the act for his protection? The plaintiff is obliged here to rely upon the Indian act to make the defendant liable. If so, he [262] cannot take one part, and reject the rest. It may be conceded that the provisions as to execution in form seem to relate to procedure. But the question is, whether they are not substantially part of the contract between these parties. Story, in his Conflict of Laws, after noticing in a previous section the distinction, often disregarded, between the obligation and the nature of the contract, says in § 267,—"Suppose a contract by the law of one country to involve no personal obligation (as was supposed to be the law of France in a particular case which came in judgment,—*Melan* v. *Fitzjames* (*a*), 1 B. & P. 138), but merely to confer a right to proceed in rem; such a contract would be held everywhere to involve no personal obligation whatsoever. Suppose, by the law of a particular country, a mortgage for money borrowed should, in the absence of any express contract to repay, be limited to a mere re-payment thereof out of the land, a foreign court would refuse to entertain a suit giving to it a personal obligation. Suppose a contract for the payment of the debt of a third person, in a country where the law subjected such a contract to the tacit condition that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere accessorial and secondary character; and it would not be enforced in a foreign country, except after a compliance with the requisitions of the local law." That doctrine is very applicable here: the provisions as to the liability of the shareholders in the first and the second degree, after exhausting the remedies against the assets of the bank, are in substance incidents and ingredients in the contract. In *Steward* v. *Greaves*, 10 M. & W. 711, 720, Parke, B., says: "At common law, all the goods of the contracting parties and their persons would be liable to immediate execution: by the statute, the goods of the [263] company are liable, and the members for the time being at the period of execution, in the first instance, and afterwards those who were so at the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple contract debts for six years, to

(*a*) Overruled in *Imlay* v. *Ellefsen*, 2 East, 453.

specialties for twenty: in the statutory mode of proceeding, the members who have ceased to be such for three years are exempt from debts of every description. Thus, the liability created by the statute is very different from that which would exist without it; and it cannot be supposed that the legislature meant to leave it to the option of any creditor, whether the members of the company should be subject to one species of liability or the other; still less that a creditor should have the power of depriving them of the statutory protection which is given to each after having ceased for three years to be a partner. The framers of the act had in view the convenience of the public, and thereby provided a more convenient remedy to creditors than at common law; but they had also in view the benefit of the members of the company, by restricting their personal liability." As to the plea, it cannot be contended that the judgment operates as a merger. But it is submitted that a good defence is presented by that part of the plea which sets out the act of the Indian legislature, and alleges that the plaintiff has availed himself of the act. It amounts to a contract between the parties that these bills should be satisfied in a particular manner.

Phipson, in reply. The only operation of the act is, the mode in which a creditor of the bank shall recover in India. It is mere mode of procedure, and not matter of contract at all. The defendant could not have pleaded or set up in India, in answer to a motion for leave to issue execution, any matter which would have been an **[264]** answer to the action itself. It is even doubtful whether the defendant could be heard at all: the words relied on upon his behalf applying only to a case where it is sought to enforce the judgment against one who was a proprietor at the time of the contract. Then it is said that this is not a final judgment. But, why not? It is an absolute and conclusive judgment: and it is not the less final because particular remedies for its enforcement in India are provided by the act. Suppose the act had provided that a judgment against the secretary should operate against goods only, would that have been binding here? No execution by ca. sa. could be issued against the person in New South Wales; yet the court held that an action might be brought upon the judgment here, and so the creditor might get here a remedy not open to him there. The modes of proceeding to obtain the fruits of the judgment, do not affect the nature of the judgment.

Cresswell, J. I was at first disposed to pay the ingenious argument urged on the part of the defendant the compliment of taking time to consider before pronouncing judgment in this case. But, my Brother Crowder entertaining no doubt, it appears to us that we ought to dispose of it at once. We think the case is governed by the two cases in the court of Queen's Bench and in this court, of *The Bank of Australasia* v. *Nias*, 16 Q. B. 717, and *The Bank of Australasia* v. *Harding*, 9 C. B. 661. It has been suggested that there is a distinction between those cases and the present, by reason of the provision in the act of the Indian legislature as to the mode of enforcing against the members of the company a judgment obtained against the secretary, viz. by execution against individual proprietors, issued by leave of the court after an ineffectual attempt to obtain satisfaction against the funds of the company. But it seems to me that those provisions do not in any degree affect the right of the **[265]** judgment-creditor to pursue his remedy upon the judgment in the manner provided by the law of this country. It has been further urged, that, when the shareholders or proprietors agreed to be bound by a judgment against the secretary or treasurer, they must be taken to have assented to be bound by a judgment which was to be enforced only in the manner provided by the act. But the answer to that is, that the parties must have known that the act of the Indian legislature could have no operation in this country. They consent, therefore, to be sued in the name of the secretary or treasurer, and to be bound by a judgment obtained against him, as if they themselves had been parties to the suit,—leaving all the consequences to follow which ordinarily flow from a judgment. It seems to me, therefore, that the case substantially falls within the principle laid down in the two I have mentioned, and that the plaintiff is entitled to judgment on the demurrer to the first count of the declaration. Then, as to the counts upon the bills of exchange, the argument applies with still greater force. The defendant cannot be permitted to introduce into the contract upon the bills a condition like that suggested. Upon the whole, therefore, the plaintiff is entitled to the judgment of the court.

Crowder, J. I am entirely of the same opinion. It seems to me, that, in order to determine this case, we have only to consider what is the operation of the colonial

act. That clearly must be confined to suits commenced and prosecuted in India, and can have no operation whatever out of that territory. I agree with my Brother Cresswell that this case is entirely disposed of by the two cases of *The Bank of Australasia* v. *Nias*, and *The Bank of Australasia* v. *Harding*. There is nothing at all inconvenient or inconsistent with natural justice in this conclusion. The parties are bound by the [266] terms of the act of the Indian legislature in all proceedings in that country. But the defendant was bound to know that he was open to the operation of the law of this country in a suit here upon that which was done by his agent there. Upon the whole, therefore, the declaration must be held good, and the plea bad, and consequently the plaintiff must have judgment on both demurrers.

Judgment for the plaintiff.

Phipson, on a former day in this term, obtained a rule nisi for a writ in the nature of a mandamus (*a*) directed to the Chief Justice and other judges of the supreme court of judicature at Fort William, in Bengal, for the examination of H. W. Abbott and others, witnesses on the part of the plaintiff, resident at Calcutta and elsewhere within the jurisdiction of the said supreme court, and for a postponement of the trial until the return of the said writ, the costs to be costs in the cause.

John Gray, for the defendant, objected that the rule had been moved prematurely, and that the plaintiff should have waited until after the argument of the demurrers.

Cresswell, J. That is no answer.

Rule absolute.

[267] Snead *v.* Watkins. Nov. 21, 1856.

[S. C. 26 L. J. C. P. 57. See *Gordon* v. *Silber*, 1870, 25 Q. B. D. 493.]

Goods brought by a guest to an inn are subject to the innkeeper's lien, though they may turn out to be the property of a third person.—One H., who had formerly been clerk to the plaintiff, an attorney, was subpœnaed as a witness in an action brought by his late employer to recover the amount of a bill of costs. H. put up at a public house of entertainment at Westminster kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, H. became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against H.:—Held, that the claim of lien was valid.

This was an action for the conversion of a blue bag and a letter-book. Pleas, not guilty, and that the goods were not the goods of the plaintiff.

The cause was tried before Wightman, J., at the last Summer Assizes at Oxford. The agreed facts were as follows:—

The plaintiff, an attorney, had brought an action against one Kedge to recover the amount of a bill of costs. One Hulme had been clerk to the plaintiff during the time the bill was incurred, but had left his service before the trial. He was subpœnaed to attend as a witness for the plaintiff at Westminster, and took with him the plaintiff's letter-book and index, in a blue bag.

The witness Hulme, when in London as a witness, put up at the White Hart, Millbank Row, kept by the defendant, and took with him there the blue bag, with the book and index in it, and incurred a bill with the defendant of 2*l.* 15*s.* 8*d.*, made up of 1*l.* 7*s.* 6*d.* money advanced to Hulme, as he said, for witnesses, 19*s.* 2*d.*, for refreshments and beer, and 9*s.* for lodging money from the 25th of April till the 7th of May.

The plaintiff gave Hulme 1*l.* 6*s.* before he left Gloucester, and 2*l.* more before the cause was tried. The trial took place on the 28th of April. On the costs being taxed, Hulme was allowed 5*l.* 15*s.* for his expenses as a witness; and the difference was paid to him by the plaintiff's agent.

Hulme did not return to Gloucester: and the defendant claimed to retain the

(*a*) Under 13 G. 3, c. 63, s. 44.

book, index, and bag, on the [268] ground of a lien upon them for his bill against Hulme during the time he was at his house.

On the 2nd of June, the defendant wrote to the plaintiff, stating that Hulme had left his bill unpaid, and that he had applied for it in vain: and that he then held Mr. Snead's large letter-book, which he would forward to him on receiving the amount of the bill.

A demand and refusal (on the ground of lien) were admitted.

In the blue bag there was a cap belonging to Hulme, but which was not claimed by the plaintiff.

The cases of *Turrill* v. *Crawley*, 13 Q. B. 197, 24 Law Journ., Q. B. 155, and *Broadwood* v. *Granara*, 10 Exch. 417, 24 Law Journ., Exch. 1, were cited.

Under the direction of the learned judge, a verdict was taken for the plaintiff for 1s., the defendant giving up the articles claimed in the declaration, and the plaintiff undertaking, in the event of the court deciding in his (the defendant's) favour, to pay the defendant 1l. 8s. 2d., the amount of his bill less the 1l. 7s. 6d. for money advanced to Hulme: and leave was reserved to the defendant to move for a nonsuit, or that a verdict might be entered for him.

Huddlestone, on a former day in this term, accordingly obtained a rule calling upon the plaintiff to shew cause why the verdict found for him on the second issue should not be set aside, and a verdict entered for the defendant, on the ground that, upon the facts admitted, the defendant had a lien on the goods of the plaintiff sought to be recovered in this action. He submitted that the right of the innkeeper is co-extensive with the obligation which the law casts upon him to receive the guest and any goods he may bring with him to the inn: and he adverted to the distinction taken by Parke, B., in *Broadwood* v. *Granara*,—the case of a piano-forte [269] lent to a professional pianist whilst staying as a guest at an inn, the innkeeper well knowing it to be the plaintiff's property, where the learned judge said: "It is not necessary to advert to the decisions on the subject of an inn keeper's lien, because this is not the case of goods brought by a guest to an inn in that sense in which the inn-keeper has a lien upon them: but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is, to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse, he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive the piano-forte." *Yorke* v. *Grenaugh*, 2 Lord Raym. 866, and *Turrill* v. *Crawley*, 13 Q. B. 197, shew that the innkeeper's lien is not limited to goods which are the property of the guest (*a*)[1].

W. H. Cooke now shewed cause. It is not denied that the defendant in this case was in the position of an ordinary innkeeper: the case of *Thompson* v. *Lacy*, 3 B. & Ald. 283, establishes that. An innkeeper is not bound to receive all goods which a guest may wish to bring into the inn: *Broadwood* v. *Granara*. To entitle the inn-[270]-keeper to a lien, it is essential that the possession of the goods be uninterrupted. Hence, it is that a livery-stable keeper has no lien for the keep of a horse placed at livery in his stables: *Orchard* v. *Rackstraw*, 9 C. B. 698,—the horse being at all times at the use and command of the owner (*a*)[2]. If the guest goes away, leaving goods behind him, and they are stolen the innkeeper is not liable. So, if the innkeeper once waives the lien, and treats the demand as a debt, he cannot afterwards resume his claim of lien. In the present case, the letter-book was brought for the purposes of the trial to Westminster Hall. Besides, the defendant's letter clearly shews that the lien was abandoned, and that the claim was treated as a mere matter of debt.

(*a*)[1] And see *Beedle* v. *Morris*, Cro. Jac. 224, *Robinson* v. *Walter*, Popham, 127, 2 Rolle's Abridgment, Inns (A.), pl. 25, *Johnson* v. *Hill*, 3 Stark. N. P. C. 172.

(*a*)[2] An innkeeper has a lien for the standing of a horse,—The case of an *Hostler*, Yelv. 66,—if placed in his stable by a guest: *Binns* v. *Pigot*, 9 C. & P. 208. See *Smith* v. *Dearlove*, 6 C. B. 132.

[Crowder, J. Have you any authority for saying that the innkeeper waives his lien by demanding the debt?] In *Jones* v. *Thurlow*, 8 Mod. 172, the counsel say that, "by the custom of the realm, if a man lie in an inn one night, the innkeeper may detain his horses until he is paid for the expenses; but, if he give him credit for that time, and let him depart without payment, then he has waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expense: for, this custom is founded on the hardship of the innkeeper's case to sue for every little debt, or on a greater hardship, that he may not know where to find him who was his guest, after he has gone; therefore, when he has waived that privilege which the law gives him, he must rely on his other agreement." [Crowder, J. That does not shew that a demand of the debt waives the lien. Cresswell, J. There might be some force in the argument, if, in consequence of a promise to pay, the guest has been [271] allowed to go away.] The main question undoubtedly is, as to the liability of goods of a third party. All the cases upon the subject have occurred with reference to horses and carriages, in respect of which some charge is incurred by the innkeeper in feeding and taking care of them. In *Turrill* v. *Crawley*, the carriage, which had been brought to the inn by the guest, had been hired by her for a term: and it was held, that the lien, having once attached, would continue notwithstanding that the term for which it was hired was determined. Coleridge, J., says: "The question is, whether the innkeeper has the same lien on a carriage as on a horse. Surely he has the same lien in either case, and on the same principle. Most of the decisions are with respect to horses. This is obviously explainable by reference to the mode of travelling in former times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them. It would be absurd to say that an innkeeper might receive a guest, but refuse to receive his carriage. An innkeeper must now have room for the carriages of his guests: and he is entitled to charge for the keep and care of them. He is, consequently, entitled to a lien for the keep and care of a carriage in like manner as for the keep and care of a horse." And Wightman, J., says: "The innkeeper may charge for the standing of a carriage as well as for the meat of a horse; and his lien is as good in the one case as the other." In *Stirt* v. *Drungold*, 3 Bulst. 289, it was held that the innkeeper had a lien on the horse for his meat: but some question was made whether he might retain the saddle and bridle as well as the horse. The distinction between living and inanimate chattels is especially noticed in *Yorke* v. *Grenaugh*, 2 Lord Raym. 866, by three of the judges, who, referring to *Stirt* v. *Drungold*, held, that, "if a man set his horse at an inn, though he lodge in [272] another place, that makes him a guest, and the inn-keeper is obliged to receive him: for, the innkeeper gains by the horse, and therefore that makes the owner a guest, though he was absent. Contrà, of goods left there by a man, because the innkeeper has no advantage of them" (*a*). The distinction is also recognised in *Gelley* v. *Clerk*, Cro. Jac. 188, where it was held, that, if a guest leave his goods with an innkeeper, saying that he will return in three days, and before his return his goods are stolen, he cannot maintain an action on the custom of the realm; for, at the time the goods were stolen, he was not a guest, and therefore, as the innkeeper could not gain a profit, he shall not be liable to suffer loss, without a special undertaking. The innkeeper's lien extends only to those things with which a man ordinarily travels. The whole circumstances of this case negative the existence of a lien.

Huddlestone was not required to support his rule.

Cresswell, J. We are all (*b*) of opinion that this is a clear case of lien, and that it is very distinguishable from *Broadwood* v. *Granara*, 10 Exch. 417. The bag was brought by the guest to the defendant's house, with some things of his own in it, in the ordinary way. The defendant could have no suspicion that it contained property belonging to any third person. As to the argument that the defendant lost his lien by letting the guest go without paying his bill,—the short answer to that is, that the innkeeper never wants to assert his right of lien until the customer goes off without paying. The rule must be made absolute.

Rule absolute.

(*a*) But see *Smith* v. *Dearlove*, 6 C. B. 132.

[272] (*b*) The judges present were,—Cresswell, J., Williams, J., Crowder, J., and Willes, J.

[273] MATHER *v.* LORD MAIDSTONE. Nov. 24, 1856.

[S. C. 26 L. J. C. P. 58; 3 Jur. N. S. 112; 5 W. R. 163. For previous proceedings see 18 C. B. 273.]

To a count upon a bill of exchange, by indorsee against acceptor, the defendant pleaded, that he accepted the bill declared on and delivered it to the plaintiff in renewal of a former bill which purported to bear his acceptance, but which he subsequently discovered to be a forgery, of which he gave the plaintiff notice; that there never was any consideration for the drawing or indorsements of the bill, save as aforesaid; and that the plaintiff never gave value or consideration for same, save as aforesaid.—Replication,—that, when the bill alleged to be forged became due, the plaintiff, then being the lawful holder thereof for value, caused the same to be presented to the defendant for payment; that the defendant did not pay it, whereupon the plaintiff gave notice of the dishonour to the drawer and indorser: that the plaintiff, when he gave up that bill, had no notice or any reason to believe that it was forged; and that the defendant saw and inspected the bill, and did not allege that it was a forgery until after the lapse of thirty days.—Rejoinder, that the defendant did not discover that his signature to the first bill had been forged, until after the lapse of the time mentioned in the replication:—Held, that, upon these pleadings, the proper questions to be tried, were,—whether the bill first mentioned was a forgery,—and whether the plaintiff was the bonâ fide holder thereof for value; and that the onus of proving consideration lay upon the plaintiff.

This was an action by indorsee against the acceptor of a bill of exchange. The declaration stated, that the Honourable Francis Charles Lawley, on the 17th of March, 1855, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him, the said Honourable Francis Charles Lawley, or his order, 1000*l*., three months after date, for value received; that the defendant accepted the said bill, and the said Honourable Francis Charles Lawley indorsed the same to one Edward Rawson Clark, who indorsed the same to the plaintiff; but that the defendant did not pay the same.

Plea, that, before the date of the said bill of exchange in the declaration mentioned, the defendant had accepted two bills of exchange for the accommodation of the Honourable Francis Villiers, each of the said bills being drawn by the said Francis Villiers, and indorsed by the said Edward Rawson Clark, and being respectively for the amount of 1000*l*., and respectively payable three months after the respective dates thereof; that, after he, the defendant, had so accepted the said two bills of exchange, and before the date of the said bill of exchange in the declaration mentioned, he, the defendant, received and had **[274]** notice that a bill of exchange drawn by the said Francis Villiers, indorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, for the sum of 1000*l*., payable three months after date, had become due and payable, and he, the defendant, was required to pay the same to the plaintiff, who then was the holder of the last-mentioned bill of exchange: that thereupon the defendant, believing that the last-mentioned bill of exchange was one of the said two bills of exchange so accepted by him for the accommodation of the said Francis Villiers as aforesaid, paid to the plaintiff 100*l*. for interest thereon, and accepted the said bill of exchange in the declaration mentioned, in consideration of his supposed liability to the plaintiff upon the said bill whereof he the defendant had notice as aforesaid, and by way of renewal thereof, and for no other consideration whatever: that the said Honourable Francis Charles Lawley drew and indorsed the said bill, and the said Edward Rawson Clark indorsed the said bill of exchange in the declaration mentioned, for and on account of the said bill of exchange whereof he the defendant had notice as aforesaid, and by way of renewal thereof, and not otherwise, nor for any other consideration whatever: that the said bill of exchange whereof he had notice as aforesaid was not either of the bills accepted by him for the accommodation of the said Francis Villiers as aforesaid, and was not accepted by him, the defendant, nor by his authority, but that his name had been written on the said bill without his knowledge, consent, or authority, and that he first discovered that the said bill was not accepted by him, or by his authority, after he had accepted the said bill of exchange in the declaration mentioned, and after the same had been delivered to the

plaintiff: and that he, the defendant, then, and within a reasonable time, gave the plaintiff notice that the said bill of exchange whereof he, the defendant, had notice as aforesaid, was [275] not accepted by him, nor by his authority, and that he had accepted the said bill of exchange in the declaration mentioned under the mistaken belief as aforesaid, and then demanded the same of and from the plaintiff to be delivered up to him the defendant, but the plaintiff refused to deliver up the same: and so the defendant said that he accepted the said bill of exchange in the declaration mentioned under the mistaken belief that the said bill of exchange whereof he had notice as aforesaid, was accepted by him, the defendant, and that he was liable to pay the amount of the same; and that he never received any consideration for the acceptance of the said bill of exchange in the declaration mentioned, or for the payment of the same, or of any part thereof, save as aforesaid; and that there never was any considera tion for the drawing or indorsements of the said bill of exchange, save as aforesaid: and that the plaintiff never gave any value or consideration for the same, or for any part thereof, save as aforesaid.

The plaintiff joined issue upon the above plea: and, for a second replication thereto, said,—that, when the said bill of exchange drawn by the said Francis Villiers, and indorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, in the said plea mentioned, became due and payable according to the tenor and effect thereof, the plaintiff, then being the lawful holder thereof for value, and the same having been and being drawn payable to order, and indorsed in blank by the payee thereof and by the said Edward Rawson Clark respectively, caused the same to be presented to the defendant for payment thereof: but the defendant did not pay the same: whereupon the plaintiff then, and in due time in that behalf, gave due notice to the said Francis Villiers and Edward Rawson Clark respectively of such presentment and dishonor of the last-mentioned bill: that he, the plaintiff, had not at any [276] of such times, or at the time when the last-mentioned bill was given up by the plaintiff to or for the defendant as thereinafter mentioned, any notice, nor did he know or believe, nor had he reason to believe, that the signature of the defendant's name upon the last-mentioned bill, purporting to be his acceptance of the same, was not the defendant's genuine signature and acceptance, or that the defendant was not liable thereon as the acceptor of the last-mentioned bill: that, after the said present ment of the last mentioned bill for payment as aforesaid, and before the same was given up to or for the defendant as thereinafter mentioned, and whilst the plaintiff was the lawful holder thereof, the defendant, at his request, and by the sufferance and permission of the plaintiff, inspected the last-mentioned bill, then having the supposed acceptance of the defendant thereon, and the defendant received and took the same into his hands for that purpose, and did not say or suggest that the said supposed acceptance was a forgery, or that his name had been written on the last mentioned bill without his knowledge, consent, or authority, or that he was not liable thereon as the acceptor thereof; but complained to the plaintiff that the said Edward Rawson Clark had not renewed the last-mentioned bill before it became due, and then informed the plaintiff that he the defendant had before then given the said Edward Rawson Clark another acceptance and a cheque for 100l. for the purpose of renewing the same: that the said conduct and behaviour of the defendant on the occasion aforesaid, and his conduct next thereinafter mentioned, respectively, confirmed the plaintiff in his, the plaintiff's, belief that the acceptance of the said bill in this replication first aforesaid was the genuine signature and acceptance of the defendant, and that he was liable thereon as the acceptor of the last-mentioned bill, and induced the plaintiff to act, and the plaintiff did accordingly and in con-[277]-sequence thereof act, as thereinafter alleged: that, after the lapse of eight days after the defendant had so inspected the last-mentioned bill, the defendant, by and through the said Edward Rawson Clark, his, the defendant's, agent in that behalf, and in consideration of the delivery up to him of the said last mentioned bill as thereinafter mentioned, delivered to the plaintiff the said bill in the declaration mentioned, so drawn, accepted, and indorsed as therein and herein alleged, and paid to the plaintiff the sum of 60l.; and the plaintiff thereupon, at the request of the defendant, by the said Edward Rawson Clark, his agent in that behalf, then delivered to the said Edward Rawson Clark, as and being such agent as aforesaid, who then, as such agent as aforesaid, took and received respectively for and on behalf of the defendant the said bill of exchange in that replication first above mentioned: and that the said bill of exchange so given up by the plaintiff to or for

the defendant as aforesaid has never been returned by the defendant or otherwise howsoever to the plaintiff, and the defendant did not give the plaintiff notice, nor did the plaintiff receive notice, nor did he know or believe, nor had he reason to believe, that the last-mentioned bill was not accepted by him the defendant, or by his authority, until thirty days had elapsed after the same had been so as aforesaid delivered to and received by the said Edward Rawson Clark, as such agent as aforesaid.

The defendant joined issue upon the second replication; and, for a second rejoinder, said,—that he did not discover that the signature of his name upon the said bill of exchange so given up by the plaintiff for the defendant as aforesaid, was not his, the defendant's, signature, until the expiration of the said period of thirty days in the second replication mentioned; and that then, when he first discovered the same, he forthwith gave notice thereof to the plaintiff, and then offered to return to the [278] plaintiff the last-mentioned bill of exchange, and then tendered the same to the plaintiff, but the plaintiff refused to receive the same; and that, from the time of his, the defendant's, first discovering that the said signature was not his, the defendant's signature, hitherto, he the defendant had always been ready and willing to return to the plaintiff the last-mentioned bill of exchange, whereof the plaintiff had always during that period had notice: and that, at the time when he offered to return the last-mentioned bill of exchange to the plaintiff as aforesaid, and tendered the same as aforesaid, and from thence hitherto, the plaintiff might and could have enforced payment of the last-mentioned bill against the said Francis Villiers and Edward Rawson Clark, or any other party to the said bill, and recovered from them the amount thereof, as fully and effectually as he the plaintiff could have enforced payment or recovered the amount thereof at the time when the plaintiff first gave up the last mentioned bill for the defendant as aforesaid, or any time between that period and the time when the defendant offered to return and tendered the last-mentioned bill of exchange to the plaintiff; and that the plaintiff did not lose, nor was he deprived of, any remedy upon the last-mentioned bill, nor was he nor had he been in any way prejudiced by reason of his having given up the last mentioned bill of exchange for the defendant as aforesaid, otherwise than as in the said replication and herein appeared. Issue thereon.

The cause was tried before Pollock, C. B., at the last assizes at Guildford. It appeared that Lord Maidstone had, in the year 1852, accepted two bills for 1000*l.* each for the accommodation of Mr. Villiers, which bills had been renewed several times, but, according to the defendant's evidence, ultimately paid: that the bill declared on had been accepted by the defendant, and delivered by him to one Clark, —who acted as a sort of go-between, [279] but whether as the agent of the plaintiff or of the defendant did not very distinctly appear,—upon the faith of a representation that there was a bill outstanding and about to become due, for the like amount, drawn by Villiers and accepted by the defendant, in the hands of the plaintiff; that the bill in lieu of which the defendant so accepted the bill declared on was shewn to the defendant by the plaintiff's attorney, and ultimately given up to the defendant, and was kept by him for about a month without any objection, but at the end of that time was pronounced by him to be a forgery.

Several witnesses who were acquainted with the defendant's handwriting distinctly swore that the acceptance on that bill was not the defendant's.

On the part of the plaintiff, evidence was offered to shew that he had given value for the bill of which the bill alleged to be a forgery was one of a series of renewals; but there was considerable confusion as to the identity of the several bills, which ultimately led the jury to discredit the plaintiff's testimony.

The plaintiff's attorney also proved, that, when the bill which was alleged to be forged was first shewn to the defendant, he took it up and looked at it, but never suggested that it was not his genuine acceptance; and he further proved, that, on the dishonor of the supposed forged bill, notice of that fact was duly given to the drawer and indorser.

The Lord Chief Baron reported to the court, that, "in leaving the case to the jury, he told them, that the action was brought upon a genuine acceptance of Lord Maidstone's, and the defence was that it had been given to pay or take up a forged bill; that, although the forgery would have been a ground of defence to an action on the forged bill, it was no defence to an action on the bill with which the forged bill was paid or taken up, if the plaintiff was a bonâ fide holder for value; and that the jury

[280] must find that the defendant had been defrauded out of the bill, and that the plaintiff had not given value, and was not the bonâ fide holder."

The jury found that the defendant had been defrauded, and that the plaintiff had not given value for the bill; and accordingly they returned a verdict for the defendant.

Montagu Chambers, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the learned judge had misdirected the jury in telling them, that, to entitle the plaintiff to recover, it was incumbent on him to prove that he gave value for the forged bill,—such question not being in issue or raised by the pleadings, and also on the ground that the verdict was against the evidence.

There being some misapprehension as to how the matter really was left by the Lord Chief Baron, Cresswell, J., on a subsequent day conferred with his Lordship, who stated that the only question at the trial was, as to the consideration given for the bill declared on; for, that, if the plaintiff was not the bonâ fide holder of the forged bill, there was no consideration for this bill.

E. James, Q. C., Ballantine, Serjt., and Holl, shewed cause. [Cresswell, J. The way in which the Lord Chief Baron puts it seems to get rid of the difficulty. If the plaintiff was not the bonâ fide holder for value of the forged bill, he could not be the bonâ fide holder for value of the bill declared on: and that is distinctly put in issue by the replication, which alleges that the plaintiff was "the lawful holder thereof for value." Lush (for the plaintiff). It is only that which is material that is in issue. The giving up of the forged bill may be a sufficient consideration for the renewed bill. Cresswell, J. **[281]** The Lord Chief Baron seems to think that a mistake which the plaintiff fell into in giving his evidence, led to a misapprehension of the real facts, and that there ought to be a new trial.] The defendant's case was substantially this,—The bill declared on was dated the 17th of March, 1855. That was a genuine bill; but it was accepted by the defendant, and handed over by him (through Clark) to the plaintiff in substitution for a bill which Clark represented to be a genuine acceptance at three months from the 16th of December, 1854, and which consequently would become due on the 19th of March, 1855, but which turned out to be a forgery. The plaintiff, in substance says,—I was the bonâ fide holder for value of that bill, and by your laches I have lost my remedy against the drawer and indorser, and that gives me a remedy against you on the substituted bill. When this case was before the court on demurrer, 18 C. B. 273,—Jervis, C. J., said: "As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity; and, when the bill is presented, if the acceptor pays it, the money cannot be recovered back, if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery. Can it make any difference, that, instead of paying money for the bill, he takes the bill, examines it, and gives another acceptance in lieu of it?" And Cresswell, J., said: "A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and it afterwards turned out to be a forgery; he cannot afterwards be permitted to say that he paid the money under a mistake. I apprehend the same result must follow, if, in lieu of money, a fresh acceptance is given; and particularly where the party has retained the instrument in his hands so long as the defendant has done in this case. From the circumstances disclosed on this re**[282]**cord, the law will infer a loss to the plaintiff." No complaint is made of that decision upon the then state of the record. But the important question here is, what was the substantial issue the parties went down to try? The material allegations on the part of the plaintiff are, that he was the lawful holder for value, and had no notice or knowledge at the time of giving up the bill to the defendant that the signature thereto purporting to be the defendant's was not his genuine signature. The plaintiff attempted to prove that he was the holder for value of the forged bill. That was the real and substantial issue to be tried; and as to that the proof failed. The bill being tainted, the onus of proving value given for it clearly lay on the plaintiff: *Bailey* v. *Bidwell*, 13 M. & W. 73, 2 D. & L. 245; *Berry* v. *Alderman*, 14 C. B. 95. [Cockburn, C. J. The plaintiff will contend that the bill declared on is not tainted.] The same principle equally applies: the plaintiff is substantially suing upon the forged acceptance. Besides, as the plaintiff thought fit to take upon himself the burthen of proving that he was a bonâ fide holder for value, the learned judge was well warranted in assuming that that was the true issue between the parties; and it is not competent to

the plaintiff now to dispute it: *Martin* v. *The Great Northern Railway Company*, 16 C. B. 179.

Montagu Chambers, Q. C., and Lush, in support of the rule. The Lord Chief Baron clearly misdirected the jury, in so putting it to them as to cast the burthen of proof upon the wrong party. The statement in the replication, that the plaintiff was the lawful holder for value of the bill of the 16th of December, 1854, was wholly immaterial. It was not an affirmative allegation which the plaintiff was called upon or bound to prove. The real issue was, whether the plaintiff had not, when he gave up the bill which is alleged to have been forged, a **[283]** remedy against Villiers and Clark upon it, which remedy he lost by the defendant's conduct. If he had, the judgment of this court upon the demurrer is conclusive of the question. In *Cocks* v. *Masterman*, 9 B. & C. 902, 4 M. & R. 676, a bill purporting to have been accepted by A. was presented to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount, but, on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money. In giving the judgment of the court, Bayley, J., says: "We give no opinion upon the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that, if he receive the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit; and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege." Then, as to the consideration, -but for the mistake which the plaintiff made in describing one of the series of bills with the defendant's acceptance which had passed through his hands, the jury could have had no difficulty in coming to the conclusion that he had given full value for the bill (whichever it was) of which he took upon himself to shew that he was the bonâ fide holder. He ought, therefore, to have an opportunity of correcting that blunder before another jury.

[284] Cockburn, C. J. I am of opinion that this rule must be discharged. In the first place, I think there was no misdirection on the part of the Lord Chief Baron. The plaintiff brings his action upon a bill of exchange alleged to have been drawn by one Lawley upon and accepted by the defendant, and indorsed by Lawley to Clark, and by Clark to the plaintiff. The defendant admits the acceptance, but says that there was no consideration for that acceptance but the giving up to him by the plaintiff of another bill which purported to bear his acceptance, and which he believed at the time to be his genuine acceptance, but which he afterwards discovered to be a forgery, whereof he immediately, and within a reasonable time, gave the plaintiff notice. The plaintiff, in answer to that, replies, that, when the forged bill became due, he, then being the lawful holder thereof for value, and having no notice or knowledge that it was a forgery, caused the same to be presented; that the defendant inspected the last-mentioned bill, and, instead of declining to pay the bill on the ground that it was forged, informed the plaintiff that he had given Clark another acceptance in renewal of it; that the defendant's conduct confirmed the plaintiff in his belief that the acceptance was genuine; and that the plaintiff had no notice that the bill was a forgery, until after the lapse of thirty days after he had delivered it up to the defendant,—whereby the plaintiff was delayed in his remedy against the drawer and indorser, and which delay he relies on as an answer to the defendant's plea. The plaintiff thus raises the question whether or not he was the bonâ fide holder for value of the first bill; which was left, and, as I think, properly left, to the jury. It is said that the Lord Chief Baron ought to have told the jury that the onus lay upon the defendant to prove that the plaintiff was not the bonâ fide holder for value, and not upon the plaintiff to prove that he was, for that the circumstances at all events raised a presumption in the plaintiff's favour that he was a **[285]** holder for value. I do not think the principle contended for on the part of the plaintiff has any application here. Such a presumption can only arise in the case of a genuine instrument. If once you shew a bill tainted with illegality or fraud, the presumption of bona fides which

ordinarily arises from the indorsement ceases. A fortiori where you shew that the instrument is forged. I therefore think that the Lord Chief Baron was quite right in holding that the onus lay on the plaintiff, and that he was bound to prove the allegation in his replication that he was the holder of the bill for value.

Then, as to the evidence,—I cannot say that the jury were not perfectly warranted in finding as they did. The plaintiff, having notice that the bill the giving up of which formed the consideration for the defendant's acceptance of the bill declared on, was a forgery, ought to have come prepared with a full and complete explanation of the circumstances under which he became possessed of it. He had ample opportunity to give such explanation: and I think the jury were justified in presuming strongly against him when he failed to make it out. It is suggested that he fell into a mistake. There is no affidavit of that: the application is simply on the ground that the verdict was against the evidence, not of surprise. It being admitted, then, that the plaintiff fell into a grievous mistake, I cannot see how it can be contended that the jury, upon the evidence as it stands, were not warranted in coming to the conclusion they came to: and the application not being in a form to enable us to give the plaintiff relief on any other ground, I think we should not be justified in sending the cause down again.

Cresswell, J. I am entirely of the same opinion. First, as to the direction of the Lord Chief Baron to the jury, —it is said that he was wrong in leaving it to them to inquire whether the bill which was given up as the [286] consideration for the renewed bill,—the bill declared on, —came to the hands of the plaintiff as a bonâ fide holder for value. Upon the pleadings I think that question certainly did arise. The plea in substance states that there was no consideration for the defendant's acceptance of the bill declared on, by reason of the fact of the bill in substitution for which it was given being a forgery. The plaintiff, in substance, replies that the defendant had consideration for his acceptance; for, that he, the plaintiff, was the bonâ fide holder for value of that bill, and delivered it up to the defendant in exchange for the bill declared on, and that the defendant kept it, so that the plaintiff lost his remedy against the drawer and indorser. I think it is impossible to say that upon that replication the question whether or not the plaintiff was the bonâ fide holder for value was not in issue. The true question is, as to what was the evidence necessary to sustain the affirmative of that issue. There was undisputable evidence that the bill of the 16th of December, 1854, was a forgery. Did that cast upon the plaintiff the onus of proving that he was the bonâ fide holder for value? Take the old case of indorsee against acceptor, with a plea of the general issue. At the trial the plaintiff would produce the bill, which would be primâ facie evidence of value. The defendant then shews fraud. This casts upon the plaintiff the necessity of proving that he was a bonâ fide holder for value,—the bill being tainted. Is not the bill as much tainted by shewing that a felony has been committed with respect to it, so as to call upon the holder to prove consideration? Mr. Lush has argued very ingeniously that the defendant, by doing that which is tantamount to paying the bill, has materially altered the position of the plaintiff. It does not, however, appear to me that the plaintiff's position is at all altered with reference to this issue. With regard to the case of *Cocks* v. *Masterman*, and that [287] class, it is to be observed that it was taken for granted that the parties were bonâ fide holders for value. Payment could have no other effect than to raise a presumption of the genuineness of the bill. As to the evidence, I entirely concur with the Lord Chief Justice in thinking that there is no ground, framed as this motion is, for sending the cause down to a new trial.

Crowder, J. I am of the same opinion. As to the first point, I think there clearly was no misdirection on the part of the learned judge. The real question to be decided by the jury upon these pleadings was, whether or not the plaintiff was the bonâ fide holder for value of the forged bill. The defence set up by the plea is, that the bill declared on was accepted by the defendant for the purpose of renewing a former bill which was represented to bear his signature as acceptor, but which he subsequently discovered to have been forged. To this the plaintiff replies, though true it is that that former bill was forged, you had consideration for the giving of the bill declared on, by my giving up the forged bill, of which I was the bonâ fide holder for value, and my remedies thereon against the drawer and indorser. When this case was before the court upon demurrer, the question was whether the defendant was not estopped by his conduct in not at once repudiating the forged bill, from setting up

this defence. According to Mr. Lush's argument to-day, the plea would have been bad for not negativing that the plaintiff was a bonâ fide holder for value. The court suggested, on the first argument, that the replication was bad for not averring that the plaintiff was the bonâ fide holder for value: and the replication was amended accordingly. The real question, therefore, the parties went down to try was, whether or not the plaintiff was the bonâ fide holder for value of that forged bill. It is now said that the Lord Chief Baron misdirected the jury: for that he [288] should have told them to find for the plaintiff unless they were of opinion that the defendant had established the fact of the forgery of the bill of the 16th of December, 1854, and that the plaintiff was not the bonâ fide holder for value. I am, however, of opinion that the direction of the Lord Chief Baron was perfectly right. I entirely agree with my Brother Cresswell as to the rule of law in the case of a bill tainted with fraud or illegality: and the rule applies with equal force to the case of a bill which is forged. No implication arises in favour of the holder of a forged bill. If he attempts to take the benefit of it as a valid instrument, it lies on him to establish his right to maintain an action upon it, by shewing that he took it bonâ fide and for value.

As to the evidence, I own I should have been inclined to agree with the Lord Chief Baron that there ought to have been a new trial, if the plaintiff had shewn by affidavit that he had fallen into a mistake in giving his evidence. He has not, however, done so: and, upon the evidence as it stands, I cannot see that the jury came to a wrong conclusion.

Rule discharged.

[289] PROSSER, Administrator of Robert Sloley, Deceased, *v.* WAGNER AND ANOTHER. Nov. 26, 1856.

[S. C. 26 L. J. C. P. 81; 5 W. R. 146. See *M'Dougal* v. *O'Shaughnessy*, 1868, I. R. 2 C. L. 162; *Hewson* v. *Shelley*, [1913] 2 Ch. 401.]

Semble, that payment of a debt to an administrator to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing.—The court refused to stay the proceedings in an action at the suit of an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed executrix, had intimated her intention to bring to this country to prove.

This was an action brought by the plaintiff, as administrator of Robert Sloley, deceased, to recover a sum of 330*l.* for money alleged to have been received by the defendant in the lifetime of the intestate, and also for money received after his death; with a count in trover. Pleas to the indebitatus counts, never indebted, and payment; and to the count in trover, not guilty, and that the goods were not the property of the plaintiff.

Upon affidavits stating, that Sloley had formerly resided in Calcutta, but returned to England, and died in London on or about the 26th of June last; and shewing, from statements made by him a short time before his death, and from letters since received from his wife in Calcutta, that he had left a will there, whereof he had appointed his wife and one Braddon executrix and executor; and that the widow intended to come to this country to prove the same,

Phipson, on a former day in this term, moved for leave to add a plea to the effect that Sloley had made a will, and appointed executors, and that they had not renounced probate thereof; or that the proceedings in this suit might be stayed until the will should be proved. It is true, it was held in *Allen* v. *Dundas*, 3 T. R. 125, that a probate, as long as it remains unrepealed, cannot be impeached in the temporal courts: and that payment of money to an executor who had obtained probate of a forged will, was a discharge to the debtor of the intestate, notwithstanding the probate was afterwards declared null, and administration was granted to the intestate's next of kin. But letters of administration stand upon a different footing: the grant of probate is a judicial act of a [290] court having competent jurisdiction; the taking out administration is the act of the party. [Willes, J. Could you not have pleaded ne unques administrator?] That seems doubtful. [Willes, J. There was a case of the sort in the Exchequer recently, where the plea is set out in extenso.] *Stokes* v.

Bate, 5 B. & C. 491, 8 D. & R. 247, is to the same effect. In Com. Dig. Administrator (B. 10), it is said: "If administration be granted upon the concealment of a will, and afterwards the will appears, all mesne acts by the administrator are void: Pl. Com. 280; *Abram* v. *Cunningham*, 2 Lev. 182 (*a*): though the executor refuse, and do not prove the will when it is produced; for, the administration was void, and cannot be of effect by the refusal of the executor afterwards: vide Show. 411." [Williams, J. Suppose the executors set up the will, and the ecclesiastical court granted letters of administration, could you raise the point, and try the validity of the will by a jury?] Probably not. In *Houslow's case*, 9 Co. Rep. 40 b., 41 a., it is said: "It is worth observation for the reason of the principal case, how probate of wills and granting of administrations shall be tried, if they are traversed or denied in the King's courts; and, therefore, if issue be joined in the King's courts, that the ordinary did not commit administration to the plaintiff, &c., or that the will is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted as of one who died intestate, made a will, &c., in none of these cases it shall be tried or certified by the ordinary, as in the case of excommengement, but it shall be tried by jury, because these two cases of probate of wills, and constituting administrators, originally did not belong to the conusance of ecclesiastical judges, but were given them of later times; and therefore nothing but the probate, and **[291]** granting of administration, which were given them, belong to their jurisdiction; but the trial of them is not given to them, but is left to the trial of the common law." [Williams, J. If you object to the letters of administration, must you not go to the proper court to get them recalled?] In Com. Dig. Administrator (B. 1), it is said, that, "if a man make a will and an executor, administration granted before probate, or refusal, is void, if the will be afterwards proved; though it was concealed, and not known at the time of administration granted." Buller, J., in *Allen* v. *Dundas*, says: "This case was compared to a probate of a supposed will of a living person; but, in such a case, the ecclesiastical court has no jurisdiction, and the probate can have no effect. Their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." The statute 31 Ed. 3, c. 11, only gives the ordinary jurisdiction to grant letters of administration in cases of intestacy. It appearing, therefore, in this case, that there is a will, the court will stay the proceedings until it is properly proved. In Williams on Executors, 4th edit., p. 488, treating of the effect of revocation of probate or letters of administration, the learned author says: "The first important distinction on this subject, is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation, shall be of no validity: as, if administration be granted on the concealment of a will and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; nor can they, although the executor should refuse to act, be made good by rela **[292]**-tion,"—citing *Abram* v. *Cunningham*. A payment to the administrator here would clearly be no answer to an action at the suit of the executrix when she has proved the will.

Cresswell, J. I think there is no pretence whatever for granting the first part of the rule. But, as to the rest, the rule may go for a stay of the proceedings, upon the defendant's bringing 330*l.* into court within a week.

Williams, J. I think the proposed plea would clearly be a bad one: and I am surprised that any effort should be made to have it added. The fact of the existence of a will can only be ascertained by probate.

Collier, Q. C., now shewed cause. There is no ground whatever for this application. The affidavits in opposition to the rule disclose circumstances which render it extremely unlikely that any person will be rash enough to prove the will, if any exists. It appears that the plaintiff was a judgment creditor of the deceased, Sloley, to the amount of 6440*l.*; that, some time in the year 1856, Sloley absconded from Calcutta with property belonging to the plaintiff of the value of 2000*l.*; that, in June last, the plaintiff followed him to England, and traced him to the house of the defendant

(*a*) S. C. 1 Freem. 445, 1 Vent. 363, 2 Mod. 146, T. Jones, 72, 3 Keb. 725.

Wagner (whose wife, through the defendant, as her trustee, carried on the business of a boarding and lodging-house keeper in Charlotte-street, Fitzroy-square), where he found that Sloley had died a few hours before: that, on Sloley's decease, the defendant Wagner took possession of his effects, consisting, as the deponent believed, of upwards of 300l., besides several gold watches and other articles of jewellery, which Wagner shewed to the plaintiff, but refused to deliver up to him in consequence of his not then having obtained letters of administration; and that, [293] after the plaintiff had obtained letters of administration, viz. on the 12th of September last, he again demanded the property of the defendant Wagner, who again refused to give it up to him. It is perfectly clear, that, if the defendants pay and deliver up the property in question to the administrator, they cannot be called upon to pay over again. The authorities upon the subject are distinct. In Williams on Executors, p. 492, it is said: "It must be observed, that, whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a bonâ fide payment to the executor or administrator of a debt due to the estate will be a legal discharge to a debtor. With respect to payments to an administrator, in a case as early as the time of Charles the Second, the administrator of the lessee paid rent to the administrator of the lessor: the latter administration was repealed, and granted to D., who sued at law, as well for the rent paid to the former administrator of the lessor, as for rent since due, and got a verdict and judgment against the administrator of the lessee for the same; but the defendant was relieved in equity as to the rent paid, because he had paid it to the visible administrator. *Stevens* v. *Langley*, Finch, 40. And in a modern case it was held that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the ecclesiastical court (citing *Allen* v. *Dundas*); on the principle, that, if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it," referring to *Woodley* v. *Clarke*, 5 B. & Ald. 746, *Phillips* v. *Biron*, 1 Stra. 509, *Digby* v. *Wray*, Bac. Abr. Executors (F. 3), pl. 13, and *Ex parte Jolliffe*, 5 Beavan, 163. [Williams, [294] J. There might be some ground for asking the court to stay the proceedings, if it were shewn that the defendants were about to take steps for setting aside the letters of administration.] There is no suggestion of that sort; neither is the defendants' liability, or the extent of it, disputed. Suppose the plaintiff is wrong, he may be responsible to the executors when the will is proved: but that is no concern of the defendants'. [Cockburn, C. J. I think we had better hear upon what ground it is that Mr. Phipson hopes to support his rule.]

Phipson. The ground upon which the defendants insist that the proceedings in this action ought to be stayed is, that they cannot safely part with the property after the intimation they have received from Sloley's widow that there is a will, and that she means to prove it. In *Allen* v. *Dundas*, the payment was made in ignorance of the existence of a will. [Crowder, J. When the rule was granted, I certainly was under the impression that the defendants could not discharge themselves by payment to the administrator. But that is not so. You cannot gainsay the letters of administration: you cannot plead the will: therefore you are excused.] No case has gone the length of holding that a party who has notice of a will, and of the executor's intention to prove it, is justified in yielding to a demand by one claiming under void letters of administration. [Cockburn, C. J. I think it is very unlikely that the widow will prove the will, when she finds that there is a creditor whose demand will swallow up the whole of the assets.] The defendants ought not to be placed in jeopardy.

Cockburn, C. J. I am of opinion that this rule must be discharged. If the effect of a recovery in this action would have been to leave the defendants still liable to the executrix in case she should prove the will, there [295] might have been some ground for seeking the aid of the court. But I am satisfied that a payment to the administrator would be a discharge. I therefore see no reason why we should interfere to prevent the administrator from proceeding with the action.

Williams, J. I also am of opinion that the rule should be discharged: indeed, it ought never to have been granted. I thought at the time that there was an intention on the part of the defendants to get the letters of administration recalled, and that it might be convenient to grant a short delay for that purpose. But, upon further consideration, I entertain grave doubts whether we should be justified in staying

the proceedings, even if such a state of facts could be shewn. Where letters of administration have been improperly obtained or improvidently granted, the proper and only course is, to go to the ecclesiastical court to get them revoked.

The rest of the court concurring,

Rule discharged, with costs.

[296] PRICKETT *v.* BADGER. Nov. 20, 1856.

[S. C. 26 L. J. C. P. 33; 3 Jur. N. S. 66; 5 W. R. 117. Distinguished, *Green* v. *Mules*, 1861, 30 L. J. C. P. 345. See *Green* v. *Lucas*, 1875, 31 L. T. 733, 734; 33 L. T. 584; *Taplin* v. *Barrett*, 1889, 6 T. L. R. 30; *M'Leod* v. *Artola*, 1889; 6 T. L. R. 68.]

Where an agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority.—In such a case, a contract to pay what is reasonable is implied by the law: it is not a question for the jury. Semble, per Willes, J., that, under such circumstances, the proper measure of damages would be the entire amount of the commission agreed for.

This was an action for work and labour, and for money alleged to be due upon an account stated. Plea, never indebted. The writ was issued on the 4th of June, 1856.

The particulars of demand were as follows:—

"To attending you in Southampton Buildings, receiving instructions to dispose of by private contract about 14 acres of freehold land in the Seven Sisters Road, Holloway, Middlesex, at 650l. per acre; meeting you on the ground, when you pointed out the same; making plan to a large scale; attending applicants with particulars and terms; and ultimately forwarding you an offer that we had received of 700l. per acre,—commission, as agreed, at 1l. 10s. per cent. . . . . £143 5 0"

The cause was tried before the Lord Chief Baron, at the last Assizes at Guildford. The facts were as follows:—The plaintiff was a house and estate-agent. The defendant is lord of the manor of Highbury. In the month of July, 1852, the defendant called upon the plaintiff, and, according to the plaintiff's evidence, representing that he had an interest in a piece of land containing about fourteen acres, parcel of the manor, proposed to the plaintiff to look out for a purchaser at the price of about 650l. per acre. The plaintiff agreed to do so, at the same time telling the defendant that his terms would be a commission of 1½ per cent. upon the amount of purchase-money. The plaintiff immediately set about preparing **[297]** a plan and advertisements, wrote letters to and had communications with several persons, and ultimately, in November in that year, received an offer of 675l. per acre from the Birkbeck Land Society. The defendant then for the first time informed the plaintiff that he had no interest in the land, but that it belonged to one Wagstaffe; and Wagstaffe at first stated that he himself had not completed the purchase of the land, and afterwards declined to sell it to the Birkbeck Land Society: and, in January, 1853, the plaintiff was desired by Wagstaffe, to take no further steps in the matter. On cross examination, the plaintiff admitted that he had been informed by Wagstaffe in September, 1852, that he had an interest in the land, and that it could not be sold without him.

At the close of the plaintiff's case, it was submitted on the part of the defendant that the action was wrong in form; for that the plaintiff's own evidence shewed that the only contract (if any) between the parties was, a special contract for a commission of 1½ per cent. on his accomplishing a sale of the land, as stated in the particulars; and that the action should have been a special action for wrongfully withdrawing the authority to sell

The Lord Chief Baron overruled the objection, holding that it was competent to

the plaintiff to sue upon a quantum meruit: and he likened the case to that of a man, who, having a house which he is desirous of letting or selling, places it in the hands of several house-agents; in which case, he said, that, though the successful agent alone would be entitled to claim commission, the others would clearly be entitled to something for their trouble.

The defendant and Wagstaffe were then called. The former stated, that, though he had told the plaintiff that the land in question was for sale at about 600l. or 700l. per acre, he never asserted that it was his, or that he had any interest in it, and never employed him to offer it for sale: that the land had never been sold: and that no [298] demand in respect of commission or otherwise was ever made upon him by the plaintiff until the year 1855. And Wagstaffe stated that neither the plaintiff nor any one else had any authority from him to offer the land for sale.

In leaving the case to the jury, the Lord Chief Baron told them, that, though the plaintiff was not, under the circumstances, entitled to the 1½ per cent. commission, he was still entitled to recover a reasonable remuneration for his services.

The jury returned a verdict for the plaintiff, damages 50l.: and his Lordship directed the judgment and execution to be stayed until the fifth day of the ensuing term.

Montagu Chambers, Q. C., on a former day in this term, obtained a rule nisi for a new trial on the ground of misdirection, and also that the verdict was against the evidence. He submitted that the action was misconceived: that the only contract alleged, and attempted to be proved was, a special contract for a commission of 1½ per cent. conditional on the sale being effected through the plaintiff's agency: and he referred to *Moffatt* v. *Laurie*, 15 C. B. 583. There, the declaration stated that A., being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between them that the plaintiff should lay out the said land for building purposes, viz. that he should make all the necessary surveys, plans, &c., and that the plaintiff undertook the whole of the above on the following conditions, that he make A. no charge whatever for the above services, but that, in the event of any of the land being disposed of for building purposes, the plaintiff should be appointed architect on A.'s behalf to see that the construction of the works was substantial, &c., and that parties building on the land should pay the plaintiff 1½ per cent. on the outlay, providing they did not employ the plaintiff as [299] their architect: but that, in the event of A. or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, on the understanding that he or they remunerate the plaintiff for the time, trouble, and expense he had been put to in making the said preparations. It then averred that the plaintiff made the necessary surveys, plans, &c., and incurred expenses therein: and that the said land was not, nor was any part thereof, disposed of for building purposes according to the said agreement, although a reasonable time for such disposal of the same had elapsed: and that, after the death of A., the defendants, as his executors, dispensed with the further services of the plaintiff in respect of the said contract, and wholly released and discharged him from any further performance of the same, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any part of it, for building purposes: and that thereupon there became and was due and payable to the plaintiff from the defendants, as executors, a large sum for his trouble in preparing the surveys, plans, &c. And it was held, that the declaration shewed no cause of action, inasmuch as the event on the happening of which alone the plaintiff was to be entitled to remuneration for his services, viz. the disposal of the land for building purposes, had not happened. [Willes, J. referred to *De Bernardy* v. *Harding*, 8 Exch. 822, and Cresswell, J., to *Simpson* v. *Lamb*, 17 C. B. 603.]

Shee, Serjt., and Hawkins, on a subsequent day, shewed cause. The direction of the Lord Chief Baron was in strict conformity with the authorities, and particularly with those in this court. There is no pretence for saying, that, because no sale was effected, therefore the plaintiff is to recover nothing: and there was abundant evidence of valuable services rendered, in preparing a [300] plan and advertisements, entering upon negotiations with persons willing to become purchasers, and the like. If in *Simpson* v. *Lamb* it had appeared that the agent had incurred expense or bestowed labour in endeavouring to effect a sale, the judgment of the court shews that he would have been held entitled to recover for that, notwithstanding the action was in form brought for a wrongful revocation of the authority to sell. So in *De Bernardy* v. *Harding*, the

defendant being about to erect seats for viewing a public funeral, entered into an agreement with the plaintiff, a foreign agent, to make the scheme known abroad, and dispose of tickets for the seats. The plaintiff was to be paid for his work and expenses by a per centage on the tickets which he sold. After the plaintiff had incurred certain expenses, but before he sold any tickets, the defendant desired him not to dispose of them, as he would sell them himself. The plaintiff accordingly sent all applicants for tickets to him, and after the funeral delivered to the defendant a bill for work done and expenses incurred. The defendant paid the expenses, but refused to pay for the work. And it was held by the court of Exchequer, that it was a question for the jury whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that the plaintiff should be paid for the work actually done, as upon a quantum meruit. "Where one party," says Alderson, B., "has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract, and sue on a quantum meruit for the work actually done." In *Planché* v. *Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, the defendants engaged the plaintiff to write a treatise for a periodical publication: the plaintiff commenced the treatise, but, before he had completed it, the defendants abandoned **[301]** the work: and it was held, that the plaintiff might sue for compensation, without tendering or delivering the treatise. Neither *Moffatt* v. *Lawrie*, which was cited on the application for this rule, nor the previous case of *Moffatt* v. *Dickson*, 13 C. B. 543, at all militates against the ruling in this case. The simple question here is, what implied contract arises, where a special contract for the payment of a given commission on effecting a sale, is improperly rescinded after something has been done towards performance of it by the agent. Clearly, the contract implied by the law, under these circumstances is, a contract to pay a reasonable remuneration for the services actually rendered. [Crowder, J. All the work done here was done under the special contract.] The fact of its having been done with a view to the special contract does not prevent the plaintiff from recovering as upon an implied contract. [Willes, J. I have just sent to ask the Lord Chief Baron if he was satisfied with the verdict; and he tells me that he was not.] The verdict was entirely in conformity with his Lordship's direction: and he certainly evinced no dissatisfaction with it at the time it was delivered. [Crowder, J. It does not strike one as being very likely that a man would make such a contract as this in respect of land in which he had no interest.] There was evidence both ways: and, the jury (a special jury) having thought the balance in favour of the plaintiff, the court will not disturb their verdict, merely because the learned judge would have been equally satisfied had it been the other way.

Montagu Chambers, Q. C., and Hance, in support of the rule. This was a clear case of misdirection. The learned judge distinctly told the jury that they might, if they thought proper, give the plaintiff a reasonable remuneration for the work done, instead of telling them, as he ought to have done, that the plaintiff's only remedy **[302]** was, by an action for wrongfully revoking the authority given by the special contract, as was said in *Simpson* v. *Lamb*, 17 C. B. 603. [Willes, J. We may amend the declaration now, if necessary: see *Walker* v. *Barthett*, 18 C. B. 858.] An amendment of that sort would be placing the defendant in a different and less advantageous position than he was in at the trial. The general rule is, that, where there is a special contract, no action will lie as upon an implied contract arising out of the same transaction. In 2 Smith's Leading Cases, 15, it is said: "There is a numerous class of cases which establish the general proposition, that, while a special contract remains open, i.e. unperformed, the party whose part of it is unperformed cannot sue in indebitatus assumpsit to recover a compensation for what he has done, until the whole is completed. This principle is affirmed and acted on in *Cutter* v. *Powell*: it was also the ground of the decision in *Hulle* v. *Heightman*, 2 East, 145." Here, the plaintiff stipulates for a large remuneration in a given event, taking his chance of obtaining that or nothing. [Crowder, J. He obtained an offer from one who was willing to purchase the land at a higher price than the plaintiff expressed his willingness to take. What more could he do?] The offer was not obtained until after the plaintiff had had notice that the land was Wagstaffe's. The work done, therefore, was done in endeavouring to obtain a purchaser for Wagstaffe. The case strongly resembles *Cutter* v. *Powell*, where it was held, that, if a sailor hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the

voyage, and before the arrival of the ship he dies, no wages can be claimed either on contract or on a quantum meruit. [Williams, J. It did not appear there that the performance of the contract was prevented by the tortious act of the defendant.] But, in *Hulle* v. **[303]** *Heightman*, it did not appear that the plaintiff was prevented from performing the contract by the tortious act of the defendant. In the notes to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 4th edit., 19, it is further said,—"In *Read* v. *Rann*, 10 B. & C. 439, recognised in *Broad* v. *Thomas*, 7 Bingh. 99, 4 M. & P. 732, the doctrine of *Cutter* v. *Powell*, *Hulle* v. *Heightman*, and *Sinclair* v. *Bowles*, 9 B. & C. 92, 4 M. & R. 1, was again acted upon. In that case, a ship-broker brought an action for commission for procuring a charterer for the defendant's ship. It was proved to be a custom in the city, that, in such cases, if the bargain was perfected, the commission was 5 per cent., but, if the bargain went off, nothing was payable; and here it had gone off. The plaintiff was nonsuited. 'The claim of the plaintiff,' says Parke, J., 'rests on the custom, not on a quantum meruit. The custom pre-supposes a special contract, and, if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases, a special contract not executed may give rise to a claim in the nature of a quantum meruit, ex. gr. where a special contract has been made for goods, and goods sent not according to the contract have been retained by the party, there a claim for the value on a quantum valebant may be supported. But then, from the circumstances a new contract may be implied.'" Here, there was no rescinding of the contract by the defendant. The matter went off because the real owner of the land (Wagstaffe) refused to sell it. [Crowder, J. Does it matter by what sort of default it was that the plaintiff was prevented from receiving the stipulated remuneration?] It might be that the defendant was responsible in a special action for damage resulting to the plaintiff from his false representation that he had authority to sell the land,—*Pothill* v. *Walter*, 3 B. & Ad. 114. At all events, it should have been left to the jury to say whether or not the special contract had been **[304]** rescinded. [Crowder, J. Is that so? And, if it were, how could the jury help inferring a contract, under the circumstances, to pay for the plaintiff's services so much as they were reasonably worth. Willes, J., referred to *Sanders* v. *Vanzeller*, 2 Gale & D. 244.]

Williams, J.(*a*). I am of opinion that there was no misdirection in this case. But I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named, he was to receive a commission of 1½ per cent.; and that the plaintiff bestowed his labour in endeavouring to find, and did find, a purchaser at that price: but that the negotiation failed because the defendant was not prepared to come forward as vendor: and that so the plaintiff was prevented from earning the stipulated commission. If the jury believed these facts to be established, then, according to *Planché* v. *Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, and other authorities in conformity therewith, the plaintiff was entitled to abandon the special contract, and resort to an action founded upon the promise which the law would infer from such a state of facts. That was evidently the view taken by the Lord Chief Baron at the trial. It has been contended that that is erroneous, and that it should have been left to the jury to say whether there was any such implied contract. I think it was not a question for the jury at all. It is true that the court of Exchequer in *De Bernardy* v. *Harding*, 8 Exch. 822, appear to have treated it as a matter for the consideration of the jury: but the decision there is quite consistent with *Planché* v. *Colburn*: and Alderson, B., distinctly states and approves of the principle of that case. For these reasons, I am of opinion that the direc-**[305]**-tion of the Lord Chief Baron was quite right, and that there was nothing to leave to the jury. I am anxious it should not be supposed that the court intends to lay it down as a general rule, that, where an agent is employed to sell property, and his authority is revoked before anything has been done under it, he is at liberty to resort to the common counts for his work and labour in endeavouring to find a purchaser. In such a case, nothing more appearing, if the plaintiff attempted to rely on the quantum meruit, he would probably be met by the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing. But no such answer was or could be set up here, because the plaintiff had actually succeeded in finding a person who was willing to become a purchaser at a price exceeding the price demanded, and was only pre-

(*a*) Cresswell, J., had gone to chambers.

vented from carrying out the negotiation by the defendant's inability to convey. With regard to the second branch of the rule, as the Lord Chief Baron has expressed himself not satisfied with the verdict, the cause must go down again, the costs to abide the event.

CROWDER, J. I also think there was no misdirection in this case. The defendant having declined, from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, the Lord Chief Baron ruled, that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labour. In this I am of opinion he was quite right. His ruling is perfectly consistent with the law as laid down in the notes to the case of *Cutter* v. *Powell*, in 2 Smith's Lead-[306]-ing Cases, 1. At p. 16 the learned editors say,—"It is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything which he had done under it previously to the rescision: this, it is apprehended, is established by *Withers* v. *Reynolds*, 2 B. & Ad. 882, *Planché* v. *Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, *Franklin* v. *Miller*, 4 Ad. & E. 599, and other cases." Again, at p. 31, it is said,—"It being, therefore, established, that, where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind; such act or such refusal being equivalent to a consent to the rescision: the remaining part of the proposition above stated, is, that, upon such a rescision, he has a right, if he have done anything under the contract, to sue immediately for compensation on a quantum meruit. That he should do so, is consistent with reason and justice; for, it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done, by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must therefore be entitled to sue upon a quantum meruit, founded on a promise implied by law on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action immediately. This point is decided by *Planché* v. *Colburn*." It is insisted on [307] the present occasion, that the Lord Chief Baron should have left it to the jury whether under the circumstances a contract for reasonable remuneration was to be implied. It seems to me, however, that that is a question of law, and not a question for the jury. It would be idle to put it to the jury to imply what of necessity they must imply. In *De Bernardy* v. *Harding*, it is true, something is said by Alderson, B., as to leaving it to the jury: but the decision does not turn on that. Here, it seems to me, that, under the circumstances proved, a contract was implied by law to pay the plaintiff a reasonable remuneration for his labour, and consequently the direction was correct. I agree with my Brother Williams that the ordinary rule as to employing an agent to let or to sell for a certain commission, where the authority is revoked before anything has been done under it, does not apply to the present case. As, however, the learned judge who tried the cause is dissatisfied with the result, it must go down again.

WILLES, J. I am of the same opinion. The form in which the objection was presented at the trial was, that the declaration should have been framed specially for a wrongful withdrawal of the authority to sell. That, however is an erroneous notion. There are many instances in the books which might be cited to shew, that, under circumstances like these, the plaintiff may maintain an action upon the money counts. In the case of goods shipped from abroad, to be paid for in three months from arrival, under ordinary circumstances the goods must be paid for though they never arrive: but, if the shipper by his wrongful act prevents their arrival, the buyer is not bound to pay for them. I entirely agree with my learned Brothers as to the substance of the case. It is quite clear that the plaintiff was entitled to some remuneration. In pursuance of the retainer, he proceeded to find a purchaser for the land: and it was only the [308] defendant's disinclination or inability to proceed that prevented the

sale being completed. The plaintiff would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount. The learned judge being dissatisfied with the verdict, there must be a new trial, upon the terms suggested.

Rule absolute for a new trial, the costs to abide the event (*a*)[1].

BIRD AND ANOTHER *v.* MALZY. Nov. 24, 1856.

[See *Rew* v. *Hutchins*, 1861, 10 C. B. N. S. 837.]

The court will not allow interrogatories, under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents.—Discovery of documents under s. 50.

This was an action against the defendant for not delivering according to contract a large quantity of iron shipped by him in this country at different times between the months of January and June last, for the purpose of being conveyed for the plaintiffs to certain ports in the Baltic. The complaint on the part of the plaintiffs was, that the iron so shipped was deficient in quantity and quality. By the terms of the contract, the iron was to be carried at the plaintiffs' risk. The plaintiffs furnished the form of the bills of lading on the occasion of each shipment, effected and paid the insurance and freight; and the price of each cargo of iron was payable and paid by the plaintiffs upon receipt of the bill of lading for such cargo duly signed by the captain.

Upon affidavits setting forth the above facts, and also **[309]** stating, that the deponent believed, that, in order to be duly prepared for the trial of the cause, it was necessary that he should obtain information as to how and by whom, and when and under whose superintendence the iron was unloaded at the said several ports, and when and where and by whom it was first weighed and examined, and whether the whole or any and what part of the freight was paid to the captains or owners of the said ships according to the tenor of the several bills of lading, together with such other information respecting the iron, and the discharging thereof, as was required from the plaintiffs by the proposed interrogatories; that the defendant had no means of obtaining the information he sought, otherwise than from the plaintiffs themselves; that he believed he would derive material benefit in the cause from the discovery sought; that it was not sought for the purpose of delay; that the deponent was informed and believed that the plaintiffs had agents or servants at each of the ports in the Baltic to which the iron, the subject of the contract upon which the action was brought, was to be conveyed, and that the iron was received by such agents or servants upon its arrival at such ports respectively, and that the defendant had no agents or servants at any of the said ports, and had nothing to do with the iron upon or after its arrival at the said ports, or after its shipment; and that the deponent believed that the plaintiffs had in their possession or power certain letters, certificates, and other documents which they received from their said agents or servants at or soon after the discharge of the said cargos of iron at the said ports respectively, which letters, certificates, and documents related respectively to the said cargos, and to the discharge, conveyance, weighing, and examination thereof on their arrival respectively at the said ports, and that he believed that the said letters, certificates, and other documents would upon inspection furnish valuable and material information and evidence in **[310]** support of the defendant's case, and would materially assist him in preparing for trial,—

Garth moved for a rule under the 51st section (*a*)[2] of the Common Law Procedure

(*a*)[1] See the Common Law Procedure Act, 1854, s. 44. "When a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order."

(*a*)[2] Which enacts, that, "in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the court or a judge may at any other

Act, 1854 (17 & 18 Vict. c. 125), calling upon the plaintiffs to shew cause why the defendant should not be at liberty to deliver to them, or to their attorney, interrogatories in writing, and why the plaintiffs should not within ten days answer the questions in writing, by affidavit, pursuant to the act,—Or, under s. 50, why the plaintiffs should not answer on affidavit stating what documents they or either of them had in their possession or power relating to the matters in dispute in this cause, or what they respectively knew as to the custody the same or any of the same were in, and whether they or either of them objected to the production of such as were in their possession or power, and, if so, on what grounds. [Cockburn, C. J. As to the first branch of the motion, is not all you seek within the knowledge of your own agent? The vessels were selected by **[311]** you. The master, who is your agent, must know as much of the matter as any body.] If we knew the names of the persons who unloaded and received the cargos, we might apply for a commission to examine them. [Cockburn, C. J. Have you asked for their names?] No. In allowing interrogatories under the 51st section of this act, the courts are guided by the rules which govern courts of equity in giving discovery. Now, the objects of courts of equity in compelling discovery, are thus stated in Wigram on Discovery, 2nd edit. p. 2, —"A bill in equity generally requires, and the court enforces, the answer of the defendant or party complained of upon oath. An answer is thus required and enforced with a view to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it, and to avoid expense." *Greenhough* v. *Gaskell*, 1 Mylne & K. 99, 100, shews how extensive is the jurisdiction which courts of equity exercise in this respect. The Lord Chancellor (Lord Brougham) there says: "We are here to consider not the case which has frequently arisen in courts of equity, and more than once since I came into this court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different times, been a matter of controversy. And in two cases before Lord Lyndhurst, —*Hughes* v. *Biddulph*, 4 Russ. 190, and *Vent* v. *Pacey*, 4 Russ. 193, —and one since I sat here,— *Bolton* v. *The Corporation of Liverpool*, 1 Mylne & K. 88, —the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no general privilege or protection: he is bound to disclose all he knows and believes and thinks respecting his own case; and the authorities, therefore, are, that he must disclose also the cases he has laid before **[312]** counsel for their opinion, unconnected with the suit itself." As to the latter branch of the rule, —the discovery of documents,— the defendant is clearly within the 50th section (*a*).

COCKBURN, C. J. As regards the first branch of the application, I am of opinion

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time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly."

(*a*) Which enacts that "upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds,) to the production of such as are in his or their possession or power: and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just."

that there should be no rule. It appears to me that the whole of the information which the defendant professes to seek by the proposed interrogatories, might in all probability have been obtained from the masters of the vessels in which the iron was shipped, and who were the agents of the defendant himself. It does not appear that any steps have been taken to obtain it from those sources, or that, failing these, any application has been made to the plaintiffs to furnish the defendant with the names of their agents abroad. As to the second branch, however, it seems reasonable that the rule should go; but, in order that there may be no unnecessary delay, I think cause should be shewn at Chambers.

[313] CROWDER, J. The defendant evidently had agents at the ports of discharge, viz. the masters of the vessels. I think no sufficient ground is shewn for the first part of the motion, the object of which seems rather to obtain a knowledge of the plaintiffs' evidence than anything else. That cannot be allowed. As to that part of the rule, however, which is founded upon the 50th section of the statute, I think the rule should go.

CRESSWELL, J. I am of the same opinion. The rule must be drawn up to shew cause to-morrow, and then it may be enlarged for cause to be shewn at Chambers.

Rule accordingly (*a*).

[314] IN THE MATTER OF THE ACKNOWLEDGMENT OF JULIA, THE WIFE OF SAMUEL BRADFORD VAUGHAN. Nov. 20, 1856.

The affidavit verifying the certificate of acknowledgment of a deed by a married woman before special commissioners under the 3 & 4 W. 4, c. 74, ought to shew clearly that the persons who purported to have taken the acknowledgment were the commissioners named in the commission. The court allowed a defect in that respect to be supplied by affidavit.

A special commission was directed to Arthur Seddon, Frederick George Moule, and Hiller Goodman, all of Melbourne, in the colony of Australia, or any two of them, to take the acknowledgment of Julia the wife of Samuel Bradford Vaughan, pursuant to the statute 3 & 4 W. 4, c. 74. The acknowledgment was taken, and the certificate signed by Seddon and Moule; and Moule made the usual affidavit of verification, stating that the acknowledgment was made by Mrs. Vaughan, and the certificate signed by Seddon and himself (omitting to state their residences, as required by the rule of Hilary Term 1834), the commissioners in the certificate mentioned, at Melbourne.

An objection having been taken, that there was nothing in the affidavit to identify the persons signing the certificate with the persons named as commissioners,

Phipson, on a former day in this term, moved for a rule or order directing the proper officer under the statute to receive and file the commission, the certificate of the taking of the acknowledgment, the affidavit of verification, and notarial certificate. He referred to *In re Alice Shaw*, 3 M. & G. 236, 3 Scott, 647, and *In re Partridge*, 17 C. B. 18.

The Court doubted whether there was sufficient in the affidavit verifying the certificate, to shew that the persons who purported to have taken the acknowledg-**[315]**-ment were two of the commissioners named in the commission, and required an affidavit to identify them.

Phipson now produced an affidavit of one Charles Henry Seddon, of New Bond Street, in the county of Middlesex, which stated that the deponent had known Arthur Seddon, of Melbourne (who was the deponent's cousin), for the space of twenty years, and was well acquainted with his manner and character of handwriting, having frequently seen him write and sign his name; that he (deponent) had looked at the parchment writing or certificate marked "B.," thereunto annexed, and purporting to be signed at the foot or end thereof by one Frederick George Moule and the said Arthur Seddon respectively; and that he believed and had no doubt that the name "Arthur Seddon" so set and subscribed to the aforesaid parchment writing or certificate marked "B." was of the proper handwriting of the said Arthur Seddon.

He also produced an affidavit verifying the signature of Moule to the certificate and affidavit of verification.

(*a*) The rule afterwards came on before Willes, J., and was discharged.

Per Curiam. We think that the documents may be received and filed, but with the affidavits now produced annexed thereto.

Fiat.

[316] WALLIS AND ANOTHER *v.* HIRSCH AND OTHERS. Nov. 25, 1856.

[S. C. 26 L. J. C. P. 72. Distinguished, *Hirsch* v. *Im Thurn*, 1858, 4 C. B. N. S. 575. Discussed, *Alexander* v. *Mendl*, 1870, 22 L. T. 609. Distinguished, *Minifie* v. *Railway Passengers' Assurance Company*, 1881, 44 L. T. 555.]

By a contract for the sale of a cargo of linseed cake (paid for on receipt of the shipping documents), it was provided that "any dispute as to quality, or as regards any question arising out of the contract, should be settled by arbitration in the usual manner, and that the contract should not be void on that account."—An action having been brought by the buyers to recover back the money paid, on the ground that the cargo was not of the description represented, but a mere spurious imitation of linseed cake,—Quære, whether the case was one in which the court had power to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), with a view to compel a reference? But,—Held, that, there being a bonâ fide suggestion of fraud, the case was not one in which they would in the exercise of their discretion enforce the reference.

On the 18th of July last, the plaintiffs contracted with the defendants for the purchase of a quantity of linseed cake. The bought-note was as follows:—

"London, 18th July, 1856.

"Bought this day, for Messrs. H. & A. Wallis, of Messrs. Hirsch, Strother, & Co., a cargo consisting of about eighty to one hundred tons thin oblong Belgian linseed cake, as per sample sealed and in brokers' possession, at 10*l.* per ton, including cost, freight, and insurance to any safe port on the East coast, at buyers' option. To be shipped from Brussels between the 1st of October and 15th of November next, and paid for on handing shipping documents, by cash, less two months' interest. All short weight on delivery beyond 1 per cent. to be made good by sellers. Any dispute as to quality, or as regards any question arising out of this contract, to be settled by arbitration in the usual manner: this contract not to be void on that account.

"EDWARDS & EASTLEY, Brokers."

In October last, the plaintiffs paid to the defendants 1077*l.* 6*s.* 9*d.* in exchange for the shipping documents of a cargo of linseed cakes, which the defendants represented to consist of cakes of the quality described in the above contract. Finding them, however, to be of a very inferior description, the plaintiffs declined to receive the linseed cakes, and brought an action to recover back the money they had paid.

[317] The defendants took out a summons calling upon the plaintiffs to shew cause why the proceedings should not be stayed, under the 11th section (*a*) of the

(*a*) Which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may

Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), on the ground that the parties had, after the passing of the act, by contract in writing, agreed to refer the difference between them to arbitration, and no sufficient reason existed why such matter should not be so referred. This summons was heard before Willes, J., and the learned judge referred the parties to the court.

Bovill, Q. C., now moved for a rule to the same effect. He submitted that this was a case precisely within the [318] contemplation of the statute, and that the jurisdiction of the court was not to be ousted by a mere suggestion of fraud. He referred to *Russell* v. *Pellegrini*, 28 Law Times, 121, where a charterparty contained a clause, that, if any difference of opinion should arise between the parties, either in principle or detail, the same should be referred to arbitration; and, an action having been brought upon that charterparty by the ship-owner for the agreed freight, and a cross-action by the charterer for damages alleged to have been occasioned by the unseaworthiness of the vessel, the court made absolute a rule for a stay of the proceedings, under this section. Lord Campbell there said: "This is in my opinion a most salutary enactment (*a*). At one time the courts had great horror of arbitration; and it was even doubted whether such a clause as this in an agreement was not altogether illegal. When there is a cause of actions the courts cannot be ousted of their jurisdiction: but I cannot see any reason why parties should not be allowed to settle their disputes in the manner which they consider most convenient, and why they may not agree that there shall be no cause of action until an arbitration has taken place. It is now settled by *Agrra* v. *Scott*, 8 Exch. 487, that they may do so; and this enactment has for its object to give the parties the full benefit which they might expect from such an agreement to refer." And Coleridge, J., says: "In the present case, there was an agreement to refer all differences of opinion, either in principle or detail. Who can doubt that a dispute as to a claim for freight on the one hand, or as to a claim for damages on account of the unseaworthiness of the vessel on the other, would be within the meaning of the clause?" [Cockburn, C. J. It certainly strikes me, that, where the parties have agreed, that, in case of any difference arising, [319] it shall be referred, he who objects to the reference taking place, should shew good grounds for the objection, — something to make the reference inequitable or inconvenient.

Honyman shewed cause in the first instance, upon an affirmation by one of the plaintiffs, which stated, that, some time after the contract was entered into, the plaintiffs were applied to by Edwards & Eastley, the brokers who made the contract, and requested to accept other and inferior linseed cakes under the contract, at a proportionate reduction in price: that they refused to consent, and said that inferior linseed cakes would be wholly useless to them, inferior cakes not being saleable in the district in which they carried on their business: that, in October last, the defendants offered to deliver to the plaintiffs shipping documents of a cargo which the defendants represented to consist of linseed cakes of the quality described in the contract: that, relying upon such representation of the defendants, the plaintiffs paid them 1077*l.* 6*s.* 9*d.*, being the amount of the invoice delivered by the defendants in respect of the goods comprised in the said shipping documents: that, upon the ship's arrival, the plaintiffs discovered that the greater portion of the cargo consisted of very inferior goods, not linseed cakes at all, but a spurious imitation thereof: that, under these circumstances, the plaintiffs brought an action to recover back the money so paid by them in exchange for the shipping documents, offering to return the goods: and that they (the plaintiffs) believed that, at the time the defendants so invoiced the goods to them, and represented them to be in accordance with the contract, they knew that the same were an inferior article, and were in fact the very goods which the plaintiffs had refused to receive.

[320] This is not a case in which the court has the power under the 11th section of the act to coerce the plaintiffs into a reference: and, if it were a case in which the court had a discretion, they would not under the circumstances exercise it in the defendant's favour. This is not a mere dispute as to the quality of the article contracted for: nor is it a dispute regarding any question arising out of the contract. The clause in question was introduced for the purpose of obviating the difficulty which

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seem fit: Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

(*a*) It is understood to have been his lordship's own creation.

occurred in *Wicks* v. *Shilcock*, 17 C. B. 619. Here, the plaintiffs are suing in respect of something altogether apart from the contract. They complain of fraud: they say, not only that the article tendered to them does not satisfy the contract, but is a spurious imitation of the thing contracted for: but also that it is the very article which had already been offered to them at a reduced price, and rejected by them. [Crowder, J. Are we to take it upon your affidavit that there is such gross fraud here that the subject matter of the action is not within the contract at all?] Even if it be a matter arising out of the contract, this is not a case for the exercise of the discretion given by the 11th section. It is, in truth, not a matter which the parties have agreed to refer. [Crowder, J. It would be an easy mode to get rid of a contract to refer, to say that you intend to impute fraud.] Fraud is hardly a matter which the court would feel disposed to refer to two brokers, each of whom, it is well known, assumes that he is the agent of the party naming him. It is evidently much more convenient that such a question should be submitted to a jury.

Bovill, Q. C., in support of the motion. Any dispute as to the quality of the linseed cake clearly was a matter which was intended to be the subject of a reference. The only ground upon which the plaintiffs seek to evade [321] this part of their contract is, that the quality of the article was bad, and that the defendants knew it. Surely that is no sufficient reason why the case should be taken out of this most useful enactment.

Cockburn, C. J. I think we should be extremely reluctant to interfere to prevent the full benefit of the enactment in question, where the parties have in writing agreed expressly that the differences between them shall be submitted to arbitration. But, at the same time, as the act of parliament has given us a discretion to enforce the reference or not as we may deem it expedient, it is incumbent on us to look at all the circumstances, in order to see whether or not the party objecting to the reference has made out a case to warrant us in limiting the operation of the agreement to refer. In this case I think the objection is well founded. It cannot be supposed that the parties contemplated to refer a case of fraud. The plaintiffs never could have imagined that the defendants would have attempted to palm off upon them something altogether foreign to the contract. The affidavits suggest that the plaintiffs bonâ fide believe that a gross fraud has been attempted to be practised upon them. The question is not one of mere difference of quality; but whether the thing delivered is not a spurious article, and one which had already been tendered, and rejected. I must say I do not think that is at all a fit question for a reference to two brokers. It ought to be submitted to a jury. I therefore think this is a case in which we may very safely, in the exercise of the discretion given us by the act, refuse the rule.

Williams, J. I am of the same opinion. The plaintiffs have by their affirmation pledged themselves that this action is founded on fraud. I doubt whether [322] the terms of this contract, large as they are, were ever intended to meet such a case as that. And, if it be a matter for the exercise of our discretion, I am clearly of opinion that the tribunal proposed is not the proper one to entertain it.

Crowder, J. It is unnecessary to decide whether or not the 11th section of the Common Law Procedure Act, 1854, contemplated such a case as this. I agree with my Lord and my Brother Williams, that, in the exercise of our discretion under that section, we may properly decline to grant this application. The affidavit, which is bonâ fide made, shews that the question to be tried is entirely one of fraud, and therefore that a jury will be the fittest tribunal to which to submit it.

Willes, J. I am of the same opinion. It may possibly turn out at the trial that a question may arise which would have been better disposed of by arbitrators. But there is some ground for saying that a question is likely to arise which a jury would be more competent to deal with. Brokers would naturally shrink from a charge of fraud made against a person in the market. The rule must be refused; but, as the case comes here by a sort of arrangement that the summons before me should be treated as a rule nisi, the costs of the application should be costs in the cause.

Rule refused.

[323] In the Matter of the Acknowledgment of Sarah, the Wife of William Chandler. Nov. 25, 1856.

[S. C. 5 W. R. 122. See *In re Coldwell*, 1875, L. R. 10 C. P. 668.]

The court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed by the proper officer pursuant to the 3 & 4 W. 4, c. 74, s. 85, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not shew where the affidavit was sworn.

A special commission was directed to Washington H. Huling, P. T. Clarke, and Don A. Pease, to take the acknowledgment of Sarah, the wife of William Chandler, at Sylvania Township, Lucas County, Ohio. The acknowledgment was taken before the three commissioners, and all of them signed the certificate. The affidavit verifying the certificate was made by Washington H. Huling, who stated that "to the best of his knowledge and belief the said P. T. Clarke and Don A. Pease are not in any manner interested in the transaction giving occasion for such acknowledgment," &c. The jurat was as follows: -"Sworn and subscribed before me and in my presence, this 4th day of October, in the year of our Lord 1856. (Signed) P. T. Clarke, justice of the peace of Sylvania Township, Lucas County, Ohio."

The notarial certificate stated that the affidavit was sworn on the 4th of October, 1856, at Sylvania, Lucas County, Ohio, and that P. T. Clarke was a justice of the peace, and duly qualified to administer oaths.

The case had been twice before Cresswell, J., at Chambers, upon an application that the officer under the 3 & 4 W. 4, c. 74, might be directed to receive and file the documents: but the learned judge declined to make an order.

Atkinson, Serjt., now moved for the direction of the court. The objections taken were two,—first, that the affidavit of verification merely stated that "Clarke and Pease were not interested in the transaction," which meant that they were not jointly interested, and would **[324]** be perfectly true if each of them was separately interested, —secondly, that the affidavit was defective, inasmuch as the jurat did not shew where it was sworn. The first objection clearly is not one to which the court would be disposed to yield. And, as to the second, the place of residence of the functionary before whom the affidavit is sworn, is given; and, at all events, all difficulty is removed by the notarial certificate, which would be filed with the affidavit, and which states when, where, and before whom the affidavit was made.

Per Curiam. We think there is not sufficient weight in either of the objections, to justify us in refusing to permit the documents to be filed.

Fiat (*a*).

End of Michaelmas Term.

[325] Cases Argued and Decided in the Court of Common Pleas, at the Sittings in Banco after Michaelmas Term, in the Twentieth Year of the Reign of Victoria.

The Judges present were,—Cresswell, J., Williams, J., and Crowder, J.

Minor *v.* The London and North-Western Railway Company. Dec. 2, 1856.

[S. C. 26 L. J. C. P. 39; 2 Jur. N. S. 1168; 5 W. R. 122. Referred to, *La Bourgoyne*, [1899] P. 6; [1899] A. C. 431.]

A railway company does not "carry on business" (within the meaning of the 9 & 10 Vict. c. 95, s. 128,) at a receiving-house or booking office kept by an agent for the receipt and booking of parcels and packages for all the railways generally.

This was an action charging the defendants as common carriers of goods for hire

(*a*) See *In re Ollerton*, 15 C. B. 796.

from London to Bradford, for the loss of a box of artificial flowers belonging to the plaintiff, which had been delivered to and received by the defendants for the purpose of being carried by them from London to Bradford.

At the trial before Jervis, C. J., at the sittings in Middlesex after last Trinity Term, the jury returned a verdict for the plaintiff with 5l. damages, the defendants delivering up to the plaintiff the box of flowers in court, which was proved to be of the value of 8l. 14s.

Upon an affidavit stating that the goods the subject [326] matter of this action were booked to and for the defendants and delivered to them at the receiving-house of Messrs. Pickford & Co., who then were the agents of the defendants, at their booking-office in Union-street, Southwark, and within the district of the Southwark county-court of Surrey, and such delivery was the delivery mentioned in the declaration, and proved at the trial; that the defendants neglected to deliver at Bradford, in Yorkshire, which is within the jurisdiction of the Bradford county-court of Yorkshire, and that the non-delivery of the said goods at Bradford was the breach laid in the declaration in respect of which the damages were recovered; and that the defendants do not, and never did either reside or carry on business within the jurisdiction of either the said Southwark county-court or the Bradford county-court.

Horn, in Michaelmas Term last, obtained a rule calling on the defendants to shew cause why the plaintiff should not recover his costs of the action, pursuant to the 15 & 16 Vict. c. 54, s. 4. He submitted that the whole cause of action did not arise within the jurisdiction in which the defendants carried on their business, for that the "cause of action" consists of the contract and the breach: *Wilde* v. *Sheridan*, 21 Law Journ., Q. B. 260.

Bovill, Q. C., and Giffard, shewed cause, upon an affidavit of a clerk to Messrs. Pickford & Co., stating that, at the time the cause of action arose, he was in the employ of Pickford & Co., at their office in Union Street, Southwark; that Pickford & Co. acted as the agents for the defendants in respect of goods conveyed by their luggage-trains, and that public notice of that fact appeared in the office in Union Street; that the company carried on their business as carriers at the said office in Union Street, Southwark, though not the whole of [327] their business, they having several other places where they also carried on business: that the said office in Union Street was one of the receiving houses of the company as carriers, where they received goods to be carried by their luggage trains; that, whilst the deponent was acting as such clerk in Union Street, he was in the daily habit of receiving goods for the defendants there to be conveyed on the defendants' lines of railway, and of giving receipts to the senders of the goods for and on behalf of the company, and that many letters, notices, and other papers directed to or intended for the company were during that time left at the said office in Union Street, and received by the deponent and the other clerks there for and on behalf of the company; that the box of goods in question in this action was received and a receipt for the same given by another clerk of Pickford & Co. for and on behalf of the company, and that the box was in due course forwarded from the said office to another place where the defendants also carried on their business as carriers; that the said Union Street office of the said Pickford & Co., and where the defendants carried on their business, was within the district and jurisdiction of the Southwark county-court of Surrey; and that the contract which formed the subject of the action for the carriage of the said box to Bradford, was made at the said office in Union Street upon the occasion of its being received there by the said clerk as aforesaid.

The only question is, whether the defendants carried on their business in Union Street, Southwark: 9 & 10 Vict. c. 95, s. 60. Now, they can only carry on business by means of agents; and it is sworn that the office in Union Street is one of the places where their business is carried on through the agency of Pickford & Co.: and the plaintiff recovered upon the footing that the delivery of the box at that place was a delivery to the company. [Cockburn, C. J. Is the office in Union Street the office [328] of the company? And are the people employed there the servants of the company?] No doubt, the office is one where Pickford & Co. receive goods for all the railway companies; it is not a place where goods are received exclusively for the defendants' railway; nor are the persons employed there the servants, in the ordinary sense, of the company. But it is a place where the business of the company is carried on by Pickford & Co. as their agents: and the notice required by the carriers' act,

11 G. 4 & 1 W. 4, c. 68, is stuck up there. A corporation "dwells" at the place where its business is carried on: *Taylor* v. *The Crowland Gas and Coke Company*, 10 Exch. 288, n., 24 Law J., Exch. 233. [Crowder, J. That does not advance your argument much. Where does this company carry on its business?] At Euston Square, in Union Street, Southwark, and at every other place where goods are received for them by their agents. [Williams, J. Would service of a summons or an order upon the company at the place in question be good service?] It is submitted that it would; service at "the place of business" being by the rules sufficient (*a*). [Cockburn, C. J. **[329]** Could a manufacturer at Manchester be said to carry on business at the warehouse of his agent in London?] He might. In *Stephens* v. *Derry*, 16 East, 147, where a question arose under the London court of requests act, 39 & 40 G. 3, c. civ., as to whether a husband domiciled in Middlesex, where his wife carried on business, though he was employed as a clerk in the office of solicitors in London, was privileged to be sued only in London for a debt under 5l., as a person "seeking his livelihood" there, —Le Blanc, J., said: "This person may fairly be said to seek his livelihood where he resides with his wife in Middlesex; for, the trade carried on by her agency is his trade." Who is liable in respect of contracts made at this place,—Pickford & Co., or the company? The persons dealt with clearly are, the company, and not Pickford & Co. [Cockburn, C. J. Is there anything at the office to indicate to persons coming there that they are directly dealing with the company? Are Messrs. Pickford & Co. authorised to make contracts for the company?] It appears from the affidavit of Pickford & Co.'s clerk, that receipts are given there in the name of the company. [Cockburn, C. J. That would be so if Pickford & Co. were authorised as agents of the company. Are Pickford & Co. in fact put forward as the persons contracting, though as agents for the company?] It would seem that they are. In *Mitchell* v. *Hender*, 23 Law J., Q. B., 273, the defendant was a surgeon, apothecary, and accoucheur, residing at Callington, in the district of the county-court of Liskeard. He daily attended persons seeking his advice, residing in the district of the Launceston county court: and it was held, that he "carried on his business" within the jurisdiction of the Launceston county-court, within the meaning of the 9 & 10 Vict. c. 95, s. 128.

Horn, in support of his rule. This is clearly a case **[330]** of concurrent jurisdiction. Every reasonable intendment will be made to prevent the exclusion of the plaintiff from the right of suing in the superior court. It is not every agency that constitutes a carrying on of business. "Residence" or "dwelling," and "carrying on business," in this act, are almost identical. *Mitchell* v. *Hender*, 23 Law J., Q. B., 273, is rather an authority in favour of the plaintiff. The defendant there was also a partner in a mine worked on the cost-book principle in the district of the Launceston county-court: he never attended to the mine personally, but the business was conducted by an agent: and the court inclined to think that he did not carry on the business of a miner within the jurisdiction of the Launceston county-court, within the meaning of the statute. "I do not think," says Coleridge, J., "that it would be enough for a man who never came near the place, to carry on business by an agent. Dwelling must be a personal act: and so, I think, must the carrying on business be." Here, no personal act was ever done by the defendants at the office in Union Street. [Cockburn, C. J. As applied to a corporation, what is a personal act?] An act done by their secretary or clerk or other servant. This place, in truth, is a mere receiving or booking-office, where Pickford & Co. receive goods on behalf of all the railways. In *Shiels* v. *Rait*, 7 C. B. 116, 18 Law J., C. P., 120, it was held, that one who resides in Scotland, and

(*a*) By s. 45 of the rules framed pursuant to the 19 & 20 Vict. c. 108, s. 32, it is provided that "the service of the summons, except in the cases hereinafter specially provided for, shall be either personal, or by delivering the same to some person, apparently sixteen years old, at the house or place of dwelling or place of business of the defendant; but no place of business shall be deemed the place of business of the defendant, unless he shall be the master or one of the masters thereof." And s. 51 provides that "the service of the summons may be effected on a railway company or other corporation by delivering the summons to a secretary, station-master, or clerk of the defendant, at any station or office of the defendants within the district of the court in which the summons is to be served." The order, being the judgment of the court, it seems, need not be served at all: *Ely* v. *Moule*, 5 Exch. 918, 20 Law J., Exch. 29; *Robinson* v. *Gell*, 12 C. B. 191, 21 Law J., C. P., 155.

carries on business in London by means of an agent, is not bound to sue in the city small debts court established under the 10 & 11 Vict. c. lxxi., for a debt not exceeding 20l. Residence and carrying on business, for the purpose of this act, are synonymous. Could it be said that an attorney at Exeter carries on business in London, because a portion of his business is conducted by his London agent? These people have agents in every town through or near which their railway passes: where [331] are they to be sued? They pay no rent for the office in Union Street. In no sense, therefore, can it be said to be their place of business. They carry on their business in London at the terminus in Euston Square.

Cockburn, C. J. The point involved in this case is one of some nicety, therefore we will take a little time to consider it and to look into the affidavits.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court:—

This was a rule calling upon the defendants, the London and North Western Railway Company, to shew cause why the plaintiff should not have his costs of suit, under the County Court Act of 15 & 16 Vict. c. 54, s. 4. The rule came on to be argued on the last day of Michaelmas Term, before Cockburn, C. J., my Brothers Crowder and Willes, and myself.

Having considered the case, the court is of opinion that the defendants did not carry on business in the borough of Southwark, at the office of Messrs. Pickford & Co., within the meaning of the act of parliament in question; for, that the only business carried on at that office was that which Pickford & Co. themselves carried on there, viz. the business of railway agency to the defendants and several other companies.

The rule must, therefore, be made absolute.

Rule absolute.

[332] Cowdell *v.* Neale. Dec. 2, 1856.

[S. C. 26 L. J. C. P. 37; 2 Jur. N. S. 1248.]

The mere fact that an action is pending upon an attorney's bill does not give a common law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances.—Whether charges for attendances, &c., in attempting to procure bail for a person who has been committed by a single magistrate for a breach of the peace, constitute charges for business done in a court of law, so as to enable a judge to refer the bill for taxation,—quære?

This was an action upon an attorney's bill for business done for the defendant in the months of January, February, and March, 1853. The bill was duly delivered in May, 1853, amounting to 25l., and the action was commenced on the 29th of September last. Notice of trial was given, and the cause set down for the second sitting in the last term. On the 13th of November, the defendant took out a summons to tax the bill, which summons came on to be heard before Willes, J., on the following day, when, notwithstanding it was objected on the part of the plaintiff that the bill was not taxable, inasmuch as it had been delivered more than twelve months, and there were no special circumstances shewn, so as to bring the case within the exception in the 37th section of the 6 & 7 Vict. c. 73, and that there was no item in the bill for any business done in any court of law, and therefore no jurisdiction, the learned judge made the order, conceiving that the fact of the pendency of an action upon the bill gave him jurisdiction.

The bill was a bill of charges in respect of business done by the plaintiff for the defendant, in attempting to procure bail for him, he having been committed by a magistrate to Leicester gaol on a charge of having committed a breach of the peace. The bill contained, amongst others, the following items:—

1853.		£	s.	d.
Jan. 24.	Attending your messenger at H., on his informing me of your commitment, and your requesting me to see you at Leicester gaol to-morrow . .	0	6	8

[333]

Jan. 29.	Drawing notice of bail to magistrate, and the Rev. Thomas Neale, the complainant . . .	0	5	0

		£	s.	d.
	Three fair copies for service	0	4	6
	Long attendance on you in gaol, procuring your signature to notices, and conferring as to bail, and the indemnity to be given, when you wished me to go to Armitage, and see Mr. T. B., your trustee, thereon	0	13	4
Feb. 1.	Journey to Armitage, and thence to B., to see Mr. B. as requested, and attending him in conference as to the amount of mortgages and incumbrances on your reversionary property, and the notices he had received thereof	2	2	0
	Paid travelling expenses, railway fare, chaise hire, 32 miles and back	1	12	6
2.	Journey to Leicester, to attend before magistrate with bail for you	2	2	0
	Paid J. V. and T. P., proposed sureties, for loss of time, going to Leicester and back, when bail was opposed and refused	0	15	0
	Paid travelling expenses of self and proposed sureties to and at Leicester and back, 14 miles (no railway or coach)	1	7	6
21.	Letter to T. F. and G. C. S., wishing to know if they would serve you in becoming your sureties .	0	7	0

Holl, in Michaelmas Term, obtained a rule nisi to rescind that order, on the grounds already urged at Chambers. He referred to *Bush* v. *Sayer*, 8 Scott, N. R. 756, 7 M. & G. 1027, 2 D. & L. 602, where it was held that the statute 6 & 7 Vict. c. 73, s. 37, gives no jurisdiction to a judge of a court of law to refer to taxation a bill **[334]** for business no part of which has been transacted in any court of law or equity, although an action may be pending therein (*a*).

Hayes, Serjt., on a subsequent day, shewed cause. Under the 6 & 7 Vict. c. 73, s. 37, all charges in an attorney's or solicitor's bill are taxable: it is only a question of jurisdiction. [Wilies, J. I thought *Dagley* v. *Kentish*, 2 B & Ad. 411, 1 Dowl. P. C. 330, had been overruled. I find, however, that that is not so. In order to found the jurisdiction, two things must concur, —that an action should be brought by the attorney for his bill, and that the bill should contain taxable items: *Williams* v. *Griffith*, 6 M. & W. 32; *Williams, Executor of Williams*, v. *Griffith*, 10 M. & W. 125, 2 Dowl. N. S. 281.] Under the old statute of 2 Geo. 2, c. 23, s. 23, the court in which the principal part of the business was done, was that which had jurisdiction to tax the bill. But now, wherever there are taxable items, the court in which an action is pending on the bill may refer it for taxation, because the court will not enter upon a discussion as to the reasonableness of the charges. [Cresswell, J. I should doubt whether a court of law could refer a bill for taxation merely because an action is brought upon it therein, if it contains items that are taxable in a court of equity.] It is submitted that the mere circumstance of the bill being taxable anywhere gives the jurisdiction. This rule was obtained upon the authority of *Bush* v. *Sayer*. [Cresswell, J. Does this bill contain taxable items?] It does: the charges in respect of attendances to procure bail to be taken by the magistrate are clearly taxable, **[335]** within the 6 & 7 Vict. c. 73, s. 37. The right of an attorney to appear and act for an accused before magistrates was much discussed in *Collier* v. *Hicks*, 2 B. & Ad. 663, where Lord Tenterden says, "This was undoubtedly an open court, and the public had a right to be present, as in other courts." If this was a "court," was it a court of law or a court of equity? [Cresswell, J. It was also considered in *Cox* v. *Coleridge*, 1 B. & C. 37, 2 D. & R. 86, and *Garnett* v. *Ferrand*, 6 B. & C. 611, 9 D. & R. 657. Williams, J. At what stage did the interference of the attorney take place?] After the defendant had been committed for want of bail. Still, however, it was a proceeding in

(*a*) As to "special circumstances," see *Wells, In re*, 8 Beav. 416, 14 Law J., Ch., 215, *Bennett, In re*, 8 Beav. 467, 14 Law J., Ch., 403, *Fyson, In re*, 9 Beav. 117, *Harrison, In re*, 10 Beav. 57, 16 Law J., Ch., 170, *Williams, In re*, 15 Beav. 417, and *Barnard, In re*, 2 De G. M'N. & G. 359.

court. In *Watt* v. *Collins*, R. & M. 284, "attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify," and "attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein," were held to be taxable items in an attorney's bill, within the 2 G. 2, c. 23, s. 23: and Best, C. J., said, "It is necessary to be assured of business having been done in a cause, or that proceedings in court have existed, in the conduct of which the defendant has received assistance from the plaintiff as an attorney: it is enough that this may be fairly collected from the nature of the charge itself. The inclination of the court, if any, ought to be, to bring an attorney's bill within the range of a statute so useful to the subject." In *Dagley* v. *Kentish*, the bill contained no taxable items within the 2 G. 2, c. 23, s. 23; the charges were not for business done in any court. In *Smith* v. *Taylor*, 7 Bingh. 259, 5 M. & P. 66, 1 Dowl. P. C. 212, the following were held to be taxable items,—"You having been served with a writ, after paying the amount of debt, attending you, conferring and advising thereon," and "Attending you, advising you on the action that had been brought against you at the suit of M., and advising." Tindal, C. J., there says: "The question is, whether, when the defendant is [336] sued and consults with an attorney on the subject of the suit, and a fee is charged for the advice given, that is not a fee for business in a court of law. In one case (*a*), the charge for consulting about bail and endeavouring to procure bail, was held a charge within the statute, although the bail were unable to justify. In another case (*b*), the preparing and swearing an affidavit to hold to bail has been holden within the act, though such affidavit is made before any process issues, and is not intituled in the cause. There are many other cases which have not now been mentioned, governed by the same principle. In *Sandon* v. *Bourne*, 4 Campb. 68 (*c*), the charge was for preparing a warrant of attorney, which, until it was filed, was not an act in court. And in another case (*d*), a charge for preparing a warrant was held a taxable item, although the warrant was never executed. It seems, therefore, that the defendant has a right to question the amount of this fee before an officer of the court, and the officer would have had power to reduce it if too high. Although the charge may be on the verge of the rule, yet, as the act is remedial, and for the benefit of suitors, I think the charge is within its operation." The 37th section of the 6 & 7 Vict. c. 73, evidently intended to exhaust every description of court, and then to provide for the only case that was left, the case of business not transacted in any court at all.

Hall, in support of his rule. The learned judge clearly had no jurisdiction to make this order, the bill containing no charges for business done in any court within the meaning of the statute, and *Bush* v. *Sager*, 8 [337] Scott, N. R. 756, 7 M. & G. 1027, 2 D. & L. 602, and *Slater* v. *Brookes*, 9 Dowl. P. C. 349, shewing that the mere fact of an action having been brought upon the bill in this court makes no difference. [Cresswell, J. As to this point we are all agreed: the question is, whether this was business done in a court, and whether there are special circumstances.] There was no proceeding here before any court. A court of petty session might possibly for this purpose be considered a court: but here the proceedings took place before a single magistrate, before whom the defendant had been charged with having used abusive language to his father: and the attorney does not appear to have attended any court at all; for, he was first employed to procure bail after the defendant had been committed to prison. [Cresswell, J. Was the magistrate asked to punish the prisoner summarily, or to hold him to bail in order to secure the father against a repetition of the outrage?] The latter. The procuring a bail bond in a civil action is a proceeding in a cause. So of advice given in a pending action. The 6 & 7 Vict. c. 73, s. 37, amounts to a prohibition to the judge to order the bill to be taxed, without special circumstances, after the expiration of twelve months. In the case of *In re Winches*, 13 M. & W. 549, 2 D. & L. 407, it was held, that, in order to ground an application to tax an attorney's bill, after verdict, under the 6 & 7 Vict. c. 73, s. 37, the "special

(*a*) *Watt* v. *Collins*, R. & M. 284.

(*b*) *Winter* v. *Payne*, 6 T. R. 645.

(*c*) And see *James* v. *Child*, 2 C. & J. 678, 2 Tyrwh. 732, and *Wilson* v. *Gutteridge*, 3 B. & C. 157, 4 D. & R. 736.

(*d*) *Weld* v. *Crawford*, 2 Stark. N. P. C. 538. See also *Painter* v. *Lancell*, 8 Scott, 453, 8 Dowl. P. C. 250.

circumstances" must have relation to some matter newly come to the knowledge of the party, and that it is not sufficient to shew circumstances known to the defendant before the action. [Willes, J. to Hayes, —What special circumstances do you allege here?] The affidavit of the defendant states "that the bill contains several objectionable and unreasonable items, and that the defendant did not proceed to a taxation of the bill at an earlier stage, in consequence of his entertaining a hope that the plaintiff would make a deduction of the said **[338]** items; that charges are made in the bill for procuring bail as therein mentioned, when in truth and in fact the bail tendered by the plaintiff on behalf of the defendant was insufficient, and the plaintiff must have known that such bail would have been refused; and that the bill contained charges for letters and attendances not authorised by the defendant." [Cresswell, J. There is nothing "special" in any of these circumstances.] The real question is, whether the statute has taken away the common law jurisdiction of the courts.

CRESSWELL, J. This case involves two points which are of very considerable and general importance, the first being, whether a single magistrate acting in a matter such as that disclosed upon the affidavits can be considered as acting as a court, so as to make charges for business transacted before him taxable in a court of law: as to which some dicta may be found in some of the cases to aid us in the conclusion at which he ought to arrive, and the other being a question affecting the practice of Westminster Hall. We will therefore take time to consider, and, if possible, consult some of the other judges, before we pronounce our decision.

Cur. adv. vult.

CRESSWELL, J., now said, —My Brother Willes concurs with the rest of the court (*a*) in thinking that this case must be governed by the 6 & 7 Vict. c. 73, s. 37; and that, inasmuch as more than a year has elapsed since the delivery of the bill, it could not be referred for taxation without special circumstances: and that, no special circumstances having been shewn, the order directing the taxation of the bill must be discharged.

Rule absolute.

[339] PARRY *v.* JONES. Dec. 2, 1856.

[S. C. 26 L. J. C. P. 36; 2 Jur. N. S. 1190; 5 W. R. 121. Referred to, *R.* v. *Champneys*, 1871, L. R. 6 C. P. 397.]

An interim order for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, operates only to protect the person of the petitioner and such of his property as by those acts vests in his assignees.—Such order, therefore, does not prevent a creditor from issuing a sequestrari facias to seize the profits of a benefice, after the insolvent's petition and before the final order.

Welsby, in Michaelmas Term last, on behalf of the defendant, obtained a rule calling upon the plaintiff to shew cause why the writ of sequestration issued by him in this cause should not be set aside, and why he should not pay to the defendant or his attorney the costs of and occasioned thereby, together with the costs of the application,—upon the ground that, having obtained an interim order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, his person and property were protected from process.

J. Brown, on a subsequent day, shewed cause. It appears that the writ of summons in this case issued on the 18th of September last. The defendant filed his petition and obtained an interim order for protection from process on the 25th of September, notice of which was sent to the plaintiff by post on the 30th, and received by him on the 1st of October. On the 6th of October the writ of summons was served on the defendant; and on the 22nd the writ of sequestrari facias was sent to the consistory court of Bangor, to sequester the living of the defendant, who was vicar of Llanidare, in the county of Anglesey. The question is whether the profits of the defendant's benefice passed to his assignees on the filing of his petition. Now, the 1st section of the 5 & 6 Vict. c. 116, enacts, that the court or commissioner shall give,

(*a*) The case was argued before Cresswell, J., Williams, J., Crowder, J., and Willes, J.

upon the filing of the petition, "a protection to the petitioner from all process whatever either against his person or his property of every description," &c., and that, "upon the presentation of the petition, all the estate and effects of the petitioner shall forthwith become vested in the official [340] assignee who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." It was distinctly decided in *Arbuckle* v. *Cowtan*, 3 Bos. & Pull. 321, that the profits of an ecclesiastical benefice did not pass to the assignees under the insolvent act of 37 G. 3, c. 112, s. 12, though included in the schedule of the insolvent. Lord Alvanley, in giving judgment in that case, after referring to the common law mode of obtaining the fruits of a judgment against ecclesiastical property, says: "That a private creditor should be able to avail himself of a writ of sequestration for the purpose of satisfying his debt out of the benefice of a clergyman, and yet, that, where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly I will not pretend to say. Lord Hardwicke, in the case of *Ex parte Meymott*, 1 Atk. 196, abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems, however, to think, that, in a writ to the bishop, the assignees might have the same remedy as any other creditor. But he never hints at an idea that they could take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. Wilbraham, in arguing for the negative, insisted that his living could not be assigned by the commission; for, that the assignees must take all or [341] none: and, if they took all, nothing would be left to provide for the service of the cure. Lord Hardwicke, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common-law rule with respect to sequestration, says, —'I do not see (but I give no opinion) why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority.' As a long time has elapsed since this opinion was thrown out, during which some clergymen must probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed But, although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an insolvent act, or that the assignees under such an act will be entitled to demand and receive ecclesiastical dues." In *Bishop* v. *Hatch*, 1 Ad. & E. 171, 3 N. & M. 498, it was held, that the assignees of an insolvent clergyman do not acquire any right to his benefice, or the income of it, by the assignment, nor until they have obtained a sequestration, as directed by the 7 G. 4, c. 57, s. 28, after adjudication by the insolvent debtors court on such insolvent's petition; that an individual judgment creditor may sequester the benefice for his own debt, notwithstanding the assignment to the provisional assignee; and that the assignees, after adjudication, are not entitled to set aside the sequestration of such creditor, or to claim precedence over it for a sequestration issued by them pursuant to the act. Littledale, J., there says, "The proviso of the 28th section operates merely as an [342] exception to what is enacted in the 11th (*a*), and must be read as if introduced

(*a*) "That all powers vested in any petitioner for protection from process whose estate shall, under the provisions of the said recited act or this act, or either of them, have been vested in an assignee or assignees, which such petitioner might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be hereby vested in such assignee or assignees, to be by such assignee or assignees executed for the benefit of the creditors of such petitioner under this act, in such manner as such petitioner might have executed the same." Re-enacted, 1 & 2 Vict. c. 110, s. 49.

at the end of it. The legislature does not deprive the assignees altogether of this kind of property: but, till the adjudication, they are not in a condition to proceed against it. After adjudication they may, but until then there is nothing to prevent other creditors from suing out execution in the ordinary way." And Patteson, J., says: "The provisions of this act are certainly contradictory; and, when this case was last argued, I thought that a decision such as I am now obliged to come to, would be so much at variance with the whole object of the act, that I wished to see if any clause could be pointed out which would enable us to arrive at a different conclusion. I was much struck with the argument urged on behalf of the assignees, that by the 28th section their hands are tied until the adjudication of the insolvent debtors court, while other creditors have notice, and are at liberty, to proceed against the benefice; and I should have been glad to find any words in the act shewing this not to be so. But, on looking into it, no such words are found. The 11th section, to operate favourably to the assignees, should convey to them either a right to take the income, or an absolute property in the benefice. The first it certainly does not, or, if it did, the right is cut down by the 28th section. If the whole property passed **[343]** by the 11th, the 28th section would be absurd: and both must be taken together. *Arbuckle* v. *Cowtan*, 3 Bos. & P. 321, is an express decision that the profits of an ecclesiastical benefice do not pass by assignment under the insolvent debtors act: the words of the clause in the then existing statute (37 G. 3, c. 112, s. 12), upon which that case turned, were nearly similar to those of s. 11 of the present act. I think that case, and the words of the statute, cannot be got over. I see the inconvenience which follows; but that is a matter to be provided for by the legislature." The legislature has not thought fit to interfere in the matter: for, the 55th section of the 1 & 2 Vict. c. 110 (*a*) is a re-enactment of the 28th section of the 7 G. 4, c. 57. It is clear, therefore, that the income of the defendant's benefice had not passed to his assignees when this writ of sequestrari facias issued. The interim order under the 7 & 8 Vict. c. 96, s. 6, operates a protection of the insolvent from all "process" which might affect property vested in the assignees. The rights of a creditor are not to be taken away without express words.

Welsby, in support of his rule. By the express lan-**[344]**-guage of the 5 & 6 Vict. c. 116, s. 1, the interim order operates "a protection to the prisoner from all process whatever, either against his person or his property of every description." Here, all the proceedings took place after the making of the protecting order. The 5 & 6 Vict. c. 116, is not to be taken in pari materiâ with the ordinary insolvent acts: its object was, to give temporary protection to persons coming forward and giving up their property for the general benefit of their creditors: this is shewn by the preamble,—"Whereas it is expedient to protect from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors." And the plain meaning of the enacting words, is that, pending the protection, the person and property of the petitioner shall be free from all molestation. This is further carried out by the 5th and 7th sections. [Crowder, J. Does the 1st section mean more than that the interim order shall enure as a protection of the person of the petitioner, and of the property which on the final order is by s. 7 to vest in the assignees?] That is the question. [Crowder, J. How do you get over the case of *Bishop* v. *Hatch*?] Whether the property passes to the assignees or not, is immaterial. [Williams, J. How are the assignees to provide for the performance of the necessary duties of the benefice?] It is not necessary to insist on the rights of the assignees. All that is contended for on the part of the defendant is, that pending the proceedings under his

(*a*) Which enacts "that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy, for the purposes of this act: provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner: and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorise the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of levari facias founded upon any judgment against such prisoner."

petition, there is a stay of all process whatever as against his person and his property. It is not contended that the process is void, but merely that it is stayed.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

[345] This was a rule obtained by the defendant calling upon the plaintiff to shew cause why a writ of sequestrari facias should not be set aside, upon the ground that, as the defendant had obtained an interim order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the issuing of the sequestrari facias was in violation of the 1st section of the first-mentioned act, which enacts, that, when the interim order is obtained, all process against person or property shall be stayed.

The case was argued on the last day of Michaelmas Term, before Cockburn, C. J., and my Brothers Crowder and Willes, and myself: and we are of opinion that the rule should be discharged.

The law is clear, that property consecrated to divine uses shall not be taken in execution by temporal hands. Thus, the glebe or churchyard cannot be taken under an elegit (*a*)[1].

Upon this principle it was held in *Arbuckle* v. *Cowtan*, 3 Bos. & Pul. 321, that profits of a benefice did not pass under an assignment pursuant to the then insolvent act.

The same principle was again affirmed in *Bishop* v. *Hatch*, 1 Ad. & E. 171, 3 N. & M. 498, where it was considered by Patteson, J., that the assignees of an insolvent under the 7 G. 4, c. 57, even without the introductory words of the 28th section, would have been confined to the peculiar remedy given by that section of the statute (similar to s. 55 of the 1 & 2 Vict. c. 110): see also *Waite* v. *Bishop* 1 C. M. & R. 507, S. C. 3 Dowl. **[346]** P. C. 234, more fully reported, and *Hawkins* v. *Gathercole*, 6 De Gex, M'N. & G. 1 (*a*)[2].

The statutes now under consideration, construed with reference to the above rule of law, contain no provision by which the assignees can obtain the profits of an ecclesiastical benefice: and, as we think it clear that only such property as would pass to, or could be distributed by, the assignees under the act, is protected from process by the interim order, it follows that a writ of sequestrari facias not affecting such property, but being a direction to the bishop to apply the surplus proceeds of the defendant's ecclesiastical benefice, after providing for the cure of souls and other necessary outgoings, towards payment of the plaintiff's debt, has been properly issued, and the rule to set it aside must therefore be discharged with costs.

Rule discharged, with costs.

[347] SIMPSON *v.* SAVAGE. Dec. 2, 1856.

[S. C. 26 L. J. C. P. 50; 3 Jur. N. S. 161; 5 W. R. 147. Applied, *Mott* v. *Shoolbred*, 1875, L. R. 20 Eq. 24; *Jones* v. *Chappell*, 1875, L. R. 20 Eq. 543. Referred to, *Cooper* v. *Crabtree*, 1881-82, 19 Ch. D. 199; 20 Ch. D. 589. Applied, *Rust* v. *Victoria Graving Dock Company*, 1887, 36 Ch. D. 135; *Mayfair Property Company* v. *Johnston*, [1894] 1 Ch. 517. Referred to, *Jones* v. *Liverpool Urban Council*, [1911] 1 Ch. 404.]

In an action by a reversioner, for an injury to his reversion, by the erection of workshops and a forge and chimney on land adjoining his houses, in the occupation of his tenants, and causing smoke to issue from the chimney, and making loud noises, —the evidence was, that the chimney was built by the defendant's landlord, and that large quantities of smoke issued from it in consequence of fires lighted by the defendant for the purposes of his trade, and that the plaintiff's tenants gave notice to quit: —Held, that there was no evidence to go to the jury to prove injury to the reversion; for, that, to entitle the plaintiff to maintain the action, the injury

(*a*)[1] See Gilbert on Executions, p. 40, citing Jenk. Cent. p. 207, where it is said that an elegit does not lie of the glebe land of a parson or vicar, no more than of a churchyard: est solum Deo consecratum,"—referring to M. 29 Ed. 3, fo. 44, and M. 21 Ed. 4, fo. 45 b.

(*a*)[2] Where it was held that a registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a receiver, under the 1 & 2 Vict. c. 110, s. 13.

complained of must be of a permanent character, and the only act chargeable to the defendant, the lighting the fires, not being in its nature permanent.

This was an action for an injury to the plaintiff's reversion, by the erection of certain workshops and forges on land adjoining the plaintiff's houses, making fires therein, and causing smoke to issue therefrom, &c.

The declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, certain messuages and dwelling houses, with the appurtenances, of the plaintiff, were respectively in the occupation of certain tenants thereof to the plaintiff, the reversion thereof respectively then and still belonging to the plaintiff: yet that the defendant, whilst the said messuages and dwelling houses, with the appurtenances, were so in such occupation as aforesaid, wrongfully and unjustly, without the leave or license of the plaintiff and his said tenants, and against their will respectively, built and erected certain workshops, manufactory, and forges, and other permanent works, adjoining and close to the messuages and dwelling-houses aforesaid, for the purpose of working and permanently continuing to work the same in the manner thereinafter mentioned, and then wrongfully and unjustly made and caused to be made and continued therein and thereon divers large and injurious fires against the will of the plaintiff and his said tenants, and made thereon wrongfully and injuriously and continuously loud, heavy, jarring, hammering, battering, and agitating sounds and noises; and by reason of the premises, and of the smoke, blacks, and other gaseous effluvia arising from the said fires and forges entering into and diffusing themselves in, upon, over, [348] and throughout the said messuages and dwelling-houses, the same had respectively become utterly and permanently uninhabitable, and the said tenants respectively had been and would be compelled to quit and leave the same respectively, and to cease to be the tenants thereof, and the plaintiff would be unable to let the same, or to turn the same to any beneficial or profitable account, and the same had become and were thereby greatly deteriorated in value, and the present market-price thereof was thereby greatly diminished, and the plaintiff had been and was and would be permanently injured, prejudiced, and aggrieved in his reversionary estate and interest in the said messuages and dwelling-houses by reason of the premises: And the plaintiff claimed 500*l*.

Plea, not guilty; whereupon issue was joined.

The cause was tried before Lord Campbell, C. J., at the last assizes for the county of Norfolk. The facts were as follows:—

The plaintiff was the owner of a plot of ground in King's Lynn, in the county of Norfolk, upon which he built several houses in 1850, which were let to tenants at rents varying from 40*l*. to 44*l*. per annum. The defendant is an agricultural implement maker occupying premises consisting of workshops with a forge and chimney and yard closely adjoining the back yards of the plaintiff's houses. The workshops, forge, and chimney were erected (not by the defendant) in 1851, and were a few feet only from the back windows of the plaintiff's houses. The nuisance complained of consisted in the emission of smoke from the forge chimney, to such an extent that great quantities of soot entered the windows in the rear of the plaintiff's houses, dirtying and spoiling the furniture in the rooms, and of noises from the hammering, and offensive smells from the burning of old wood in the yard. It was proved, on the part of the plaintiff, that, in consequence of the nui-[349]-sance, which was of a serious character, some of the plaintiff's tenants had given him notice to quit (though it did not appear that any of them had actually quitted); and that, in consequence of the nuisance, the plaintiff's houses would not realize as much rent as they would otherwise have done.

On the part of the defendant, it was submitted, on the authority of *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurslt. & N. 34, and *Dobson* v. *Blackmore*, 9 Q. B. 991, that, to entitle the plaintiff, as reversioner, to maintain this action, it was incumbent on him to shew that the wrong complained of was in its nature permanent; and that there was no evidence here that the nuisances complained of were otherwise than of a mere temporary description.

For the plaintiff,—conceding that, according to the cases cited, the fires in the yard and the noises would not constitute a cause of action,—it was insisted that the smoke from the chimney was a nuisance of a permanent nature, and therefore an injury to the reversion.

His Lordship ruled, that the nuisances which were merely of a temporary nature, such as the fires in the yard, and the noises, would not give a right of action: but, with reference to the smoke issuing from the foundry chimney, he thought the case distinguishable from *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, and that there was evidence to go to the jury to prove injury to the reversion: but he reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no injury to the reversion.

A verdict having been found for the plaintiff, damages, 40s.,

O'Malley, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly, in granting which Cresswell, J., [350] observed: —The case referred to makes it imperative on the court to grant the rule, though as regards the smoke there may be a difference. In the case of an indictment against a man for a nuisance in permitting smoke to issue from a chimney, it may be a question whether the sheriff, under a writ of prostration, would do all he is bound to do, by going to the premises to put out the fire. It may be that the chimney, which was erected for the purpose, followed by the emission of smoke, would constitute the cause of complaint.

Byles, Serjt., and Couch, shewed cause. It may be conceded that a mere temporary trespass, where no actual injury is done, affords no ground of action to the reversioner. That was the case of *Baxter* v. *Taylor*, 4 B. & Ad. 72, 1 N. & M. 11, where the thing complained of was a mere transient trespass, not necessarily injurious to the plaintiff's reversionary interest, though accompanied by a claim of right, inasmuch as acts of that sort, as Taunton, J., observed, "could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act." Here, however, the complaint is of a nuisance arising from works of a permanent nature. [Cresswell, J. The permanent works were not in themselves a nuisance. It was the lighting the fire that made the chimney obnoxious.] It is of the chimney as used that the plaintiff complains. The merely placing a log of wood across a way, to the obstruction of a tenant, would not give the reversioner a right of action: but building a wall or planting a hedge across it would, because that would be a permanent interference with the right. [Crowder, J. Who is to determine what is permanent, and what not?] The jury. In *Aldred's case*, 9 Co. Rep. 58, it was held, that an action on the case lies for erecting a hog-stye so [351] near the house of the plaintiff that the air thereof was corrupted. So of a lime-kiln, if the smoke enters the plaintiff's house, so that he cannot dwell there: so of a dye house, &c., if the filth runs into his fish pond, &c. Wray, C. J., there says: "The building of a lime-kiln is good and profitable; but, if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So, if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime pit for calf-skins and sheep-skins so near the said watercourse that the corruption of the lime pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in 13 H. 7, fo. 26 b.: and this stands with the rule of law and reason, sc. Prohibetur ne quis faciat in suo quod nocere possit alieno: et, sic utere tuo ut alienum non laedas." And Coke adds: "Vide in the Book of Entries, tit. Nuisance, 106 b., he who has a several piscary in a water shall have an action against him who erects a dye house, ac limos foeditates, et alia sordida extra domum praed' decurrentia in piscariam praed' decurrere fecit, per quod idem proficuum piscariae suae praed' totaliter amisit, &c. And there is another precedent against a dyer, &c., quod idem Henricus in mansione sua praed' ob metum infectionis per horridum foetorem fumi, foeditatis, et aliorum sordidorum, &c., per magnum tempus morari non audebat. So, in the case at bar, forasmuch as the declaration is, that the defendant, maliciously intending to deprive the plaintiff of the use and profit of his house, erected a swine-stye tam prope aulam et conclave ipsius Willielmi, ac sues et porcos suos in aedificio illo posuit, et ill' ibid' per magnum tempus custodivit, ita quod foetidi et insalubres odores sordidorum praed' suum et porcorum praed' Thomae in aulam, &c., penetrar' et influen', idem Willielmus et famuli sui, &c., in messuag' praedict' conver- [352] santes existen' absque periculo infectionis in aulâ, &c., continuare seu remanere non potuerunt, praetextu cujus idem Will' totum commodum, &c., maximae partis praed' messuag' per totum tempus praed' totaliter perdidit. To which declaration the defendant pleaded not guilty, and was found guilty of the matter in the declaration:

it was adjudged that the plaintiff should recover." The corruption of the watercourse in the case there put, was as much the act of a free agent as the lighting of the fire was here. [Cresswell, J. I presume the stream was permanently corrupted. The nature of the user was continuous. Not so of a chimney.] In the one case, foulness was created and communicated to the stream: in the other, the corruption was communicated to the atmosphere surrounding the house. In *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, there was nothing of a permanent nature in that which was complained of: there was no allegation of a continuance of the noises. Pollock, C. B., says,—"The hammering and noises may be stopped and the shed removed at any time." And Bramwell, B., says,—"The real injury results from the presumed intention to continue the noises. The premises are not depreciated in value by anything that has been actually done." [Cresswell, J. Suppose the plaintiff's premises were demised for ten years, and the defendant's for five, and the defendant's tenant made the fires and caused the smoke,—could the plaintiff maintain an action against the occupier as for an injury to his reversion?] It is submitted that he might. Though, according to the ordinary course of events, the reversion would not fall into possession until the expiration of the ten years, nevertheless it may do so. [Cresswell, J. Making fires in 1856, would not be a nuisance in 1857.] That depends upon whether the lighting the fires is to be looked at independently of the preparation of the place for lighting them. [Cresswell, J. It **[353]** must be borne in mind that the building of the chimney was not the act of the defendant, but that of his landlord. Suppose this case:—The plaintiff has premises which are in the possession of a tenant under a lease which will last ten years: the proprietor of the adjoining land builds a forge and chimney, and lets them for five years; and his tenant makes fires, the smoke from which annoys the occupier of the plaintiff's premises: could the plaintiff sue the tenant for an injury to his reversion?] In the case put, the tenant did only part of the act the conjunction of which causes the injury. [Cresswell, J. It is conceded that the mere building the forge and chimney, if nothing more were done, would be no injury to the reversion. That, therefore, brings it to the question whether the act here charged against the defendant is a thing of a permanent nature.] Several things must concur to give a cause of action,—the erection of the forge and chimney, the lighting of the fire, and the disturbance to the tenants, and the consequent diminution of the saleable value of the premises. [Cresswell, J. Many things of that sort would fail to give a cause of action: nuisances, for instance, arising from the formation of railways, and the like.] Those would be acts authorised by parliament: and in such cases ample provisions are made for insuring compensation to parties aggrieved. Here, the act is wrongful and actionable: any occupier might sue. The meaning of "permanent" in these cases, is not that the state of things must necessarily continue. [Williams, J. In *Tucker* v. *Newman*, 11 Ad. & E. 40, 3 P. & D. 14, building a roof with eaves which discharged rain-water by a spout into adjoining premises, was held to be an injury for which the landlord might recover, as reversioner, while they were under demise, if the jury thought there was a damage to the reversion.] The leading cases on this subject in comparatively modern times are *Jesser* v. *Gifford*, 4 Burr. 2141, and *Tomlinson* v. *Brown*, there **[354]** cited. *Jesser* v. *Gifford* was an action for erecting a wall, whereby the plaintiff's lights were obstructed. The declaration contained two counts: in the second, the plaintiff counted as the reversioner: and, a verdict having been given for the plaintiff, with general damages, a motion was made to arrest the judgment, on the ground that the action would not lie by a reversioner, being only an injury to the person in possession. Aston, J., said, "he had looked into it, and had found a case S. P. with the present: and accordingly cited *Tomlinson* v. *Brown*, as of H. 28 G. 2, but it was determined in Easter Term, 1755. It was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. Mr. Norton, in arrest of judgment, objected that a temporary nuisance can't be an injury to the inheritance: it may be abated before the estate comes into possession: and he cited *Some* v. *Barwish*, Cro. Jac. 231: and observed, that, if this would hold, the defendant would be liable to a double action,—one by the possessor of the estate: the other by the reversioner. Mr. Crowle shewed cause on behalf of the plaintiff, and insisted that it was a damage done to the inheritance: if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it. The court were of opinion that an action might be brought by one in respect of his possession;

and by the other in respect of his inheritance, for the injury done to the value of it." Lord Mansfield. "That is decisive:" and the rule was discharged. [Cresswell, J. The nuisance there complained of was of a permanent nature: in the ordinary course of events, a wall will remain until something is done to prevent its continuance.] So, here, in the ordinary course of things, this chimney will continue to vomit forth smoke. [Cresswell, J. If something else is done; if a fire is lighted in it. Crowder, J. Have you any autho-[355]-rity for saying that whether the obstruction or the nuisance is permanent or not is a question for the jury? Williams, J. This court so treat it in *Kidgill* v. *Moor*, 9 C. B. 364.] *Young* v. *Spencer*, 10 B. & C. 145, 5 M. & R. 47, was an action by a reversioner against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises: the defendant pleaded not guilty; and the jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it; whereupon the judge directed a verdict to be entered for the plaintiff with nominal damages, subject to a case: and, after argument, it was held that the plaintiff was not at all events entitled to a verdict: but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the court ordered a new trial. [Williams, J. Lord Tenterden there puts it on the ground of the act having a tendency to destroy the evidence of title. Cresswell, J. There was no question there made as to the injury being permanent. Crowder, J. Is it for the jury to say whether the nuisance is or is not of a permanent nature?] In *Tucker* v. *Newman*, 11 Ad. & E. 40, 3 P. & D. 14, Lord Denman, in leaving the case to the jury, told them that it was for them to say whether the construction of the eaves was such as to cast the water on the plaintiff's premises; that there was, in his opinion, a fair case to shew that permanent injury was created: that the dripping might possibly be injurious to the reversion: and that it was for them to consider whether it was so or not." Here, the court are called upon to say that there was no evidence of any such injury as to sustain the action. "Permanent" with respect to a trespass, is not susceptible of the same meaning as it is when dealing with a question of nuisance. If [356] the nuisance affects the value of the reversion, the reversioner, who is entitled at any moment to sell, has a right of action. It was proved here, and indeed it was perfectly obvious, that the saleable value of the plaintiff's premises was materially diminished by reason of the nuisance complained of. [Cresswell, J. You do not, I presume, contend that everything that diminishes the saleable value gives a right of action?] Certainly not. It is true that the buildings alone do not produce the nuisance: but they are constructed for the purpose of carrying on a particular trade, which cannot be carried on without fires; and, the chimney being there, it must be assumed that it will continue to be used in the way complained of. In *The King* v. *Moore*, 3 B. & Ad. 184, an indictment charged the defendant with keeping certain inclosed lands near the King's highway, for the purpose of persons frequenting the same to practise rifle-shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c., near the said inclosed grounds, discharging fire-arms, making a great noise, &c., by which the King's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situate in Bayswater, near a public highway there, into a shooting-ground, where persons came to shoot with rifles at a target, and also at pigeons; and that, as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable conse-[357]-quence of his keeping ground for shooting pigeons in such a place. Littledale, J., in giving judgment, says, "It has been contended, that, to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt, it was not his object, but I do not agree with the other position; because, if it be but the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." [Cresswell, J. That case

is rather wide of this: the defendant, by holding out his premises as a shooting-ground, enticed the parties to come there and commit the nuisances complained of. Was the case in the Year Book, T. 13 H. 7. fo. 26, an action by the reversioner?] It was. [Cresswell, J. The case of the lime-kiln, cited in *Aldred's case*, 9 Co. Rep. 59 a., I presume was an action by the occupier. Williams, J. There is some trace of the action in the note to *Rich* v. *Basterfield*, 4 C. B. 783, 805 (*a*), by the name of *Daulby* v. *Berch*, M. 4 E. 3, fo. 36; Lib. Ass. Anno 4, fo. 6, pl. 3; resumed, M. 5 E. 3, fo. 43, pl. 36.] The proper question for the jury in these cases is, whether the reversion is injured.

O'Malley, Q. C., and D. D. Keane, in support of the rule. It is conceded that there was nothing unlawful in the erection of this chimney: all that is complained of is, the use that is made of it. The judgment in *Tucker* v. *Newman*, 11 Ad. & E. 40, 3 P. & D. 14, was founded upon the fact that the thing itself which constituted the nuisance was permanent,—that is, something which would probably, and in the natural course of things, continue down to the time when the reversion would come into possession (*a*)[1]. Upon the same principle it [358] was that an assize of nuisance was held to lie, in *Trahern's case*, Godb. 221, Case 321, for raising a house so high as to injure the plaintiff's windmill. But, in *Rex* v. *Pappineau*, 2 Stra. 686, it was held, that, where a nuisance is temporary as, the steeping stinking hides, &c., in a water-course, there need not be judgment that it be abated, the nuisance arising, not from the erection of the mill, but from the use that was made of it (*a*)[2]. In *Baten's case*, 9 Co. Rep. 53 b., a distinction is taken between a nuisance which is of a temporary character only, and one which is permanent. In *Hopwood* v. *Schofield*, 2 M. & Rob. 34, where it was held that a reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right, Patteson, J., says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case; but *Jackson* v. *Pesked*, 1 M. & Selw. 234, and all the authorities shew that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent, which, it is in evidence, can be redressed in a few days?" So, here, how can that be said to be an injury to the plaintiff's reversion, which is but the act of to-day, and which may possibly not be repeated to-morrow? *Rich* v. *Basterfield*, 4 C. B. 783, was decided upon a ground which must dispose of this case. The action was brought against the owner of premises, for a nuisance arising from smoke issuing out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage; and it was sought to be sustained on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorised the lighting of a fire therein: but it [359] was held that the action would not lie. The building the chimney here gives no cause of action: and the intention to light future fires gives no cause of action. [Williams, J. When was the expression "permanent injury" or "permanent nuisance" first used with reference to this subject?] As early, at all events, as the case of *Rex* v. *Pappineau*. The injury, in order to sustain this action, must be to the property, and not to the personal comfort of those residing there: smoke and noises, therefore, differ materially from the erection of a wall or projecting eaves, or the darkening of a light. *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurlst. & N. 34, is expressly in point. It was there held, that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent. Pollock, C. B., says: "The hammering and noises may be stopped, and the shed removed at any time. In order to give a right of action to a reversioner, the injury must be of a permanent character." And Alderson, B., said: "A reversioner cannot maintain an action for an injury not necessarily permanent. This injury is not in its nature permanent. Till the reversioner comes into possession, he is not prejudiced. There was no evidence to be left to the jury, and nothing to lead to the inference that the injury would be permanent, except the presumed intention of the defendants to continue the nuisance." Here, the tenant may have full compensation for

(*a*)[1] And see *Fay* v. *Prentice*, 1 C. B. 828.
(*a*)[2] And see *Rex* v. *White and Ward*, 1 Burr. 333.

the injury complained of. To hold this action to be maintainable, would be to subject the defendant to damages twice over for precisely the same thing. The fact of the tenants quitting, or requiring a reduction of rent to induce them to stay, affords no ground of action. Besides, here the tenants had not in [360] fact left, nor were the rents reduced. The plaintiff, in effect, sues because he apprehends a damage or injury.

After the argument, the following additional authorities were referred to by Keane, —*Humphry* v. *Dame Brown*, Dyer, 319 b., and *Bower* v. *Hill*, 1 Bro. P. C. 555.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action for an injury to the plaintiff's reversion by erecting a manufactory on land adjoining the plaintiff's houses, and causing smoke to issue from a chimney, and making loud noises. The plaintiff also complained of a nuisance arising from the lighting of wood fires in the yard adjoining the factory.

The cause was tried before Lord Campbell, at the last assizes for Norfolk, when his lordship ruled that the nuisances merely of a temporary nature, such as the wood fires and the noises, would not support the action: but, with reference to the smoke issuing from the foundry chimney, he thought the case distinguishable from *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurlst. & Norm. 34, and that there was evidence to go to the jury to prove injury to the reversion: but he reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no injury to the reversion.

A rule nisi having been obtained accordingly, cause was shewn in the course of the last term, before my Brothers Williams and Crowder and myself.

The only point reserved for our consideration was, whether there was evidence for the jury of any injury to the reversion in the premises of which the plaintiff was owner, but not the occupier, they being let to tenants.

The evidence was, that the defendant erected a fac-[361]-tory with forges and a chimney within a few feet from the yards of the plaintiff's houses; that fires were lighted in the forges; and that the smoke issuing from the chimney caused annoyance to the plaintiff's tenants, the soot entering their windows and dirtying and spoiling the furniture in the rooms; and that the tenants had in consequence given notice to quit.

On the argument, it was insisted that the injury done by the defendant need not be of a permanent nature, and that it was sufficient if proved to be of such a description as would cause the reversion in the premises to sell for a smaller sum if brought into the market.

After considering the authorities, we are of opinion that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character.

The earliest instances of such an action are, cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former cases the thing done was not removeable or remediable during the term: in the third it was; but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance.

The decision in *Jesser* v. *Gifford*, 4 Burr. 2141, falls within the same principle. A window was obstructed; the obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. *Tucker* v. *Newman*, 11 Ad. & E. 40, 3 P. & D. 14, belongs to the same class.

Now, the building erected in this case did not injure the plaintiff's inheritance: but it is said that the use made of it did. The real subject matter of complaint, therefore, is, not the erection of the building, but causing smoke to issue from it. If the fires had not been made [362] by the defendant, he could not have been sued for an injury either to the possession or the inheritance: *Rich* v. *Basterfield*, 4 C. B. 783. Now, making the fires and causing smoke to issue, was not an act of a permanent nature. It is very like the case of *Baxter* v. *Taylor*, 4 B. & Ad. 72, where a person trespassed, asserting a right of way; and not distinguishable from *Mumford* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, where the action was brought against the defendants as occupiers of certain sheds, for making noises therein, which caused the plaintiff's tenants to give notice to quit.

The real complaint by the reversioner is, that he fears the defendant, or some other

occupier of the adjoining premises, will continue to make fires and cause smoke to issue from the chimney: and, if the reversion would sell for less, that is not on account of anything that has been done, but of the apprehension that something will be done at a future time.

According to the authorities, we feel bound to say that this is not such an injury as will enable the reversioner to maintain an action. The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute.

End of Michaelmas Vacation.

[363] Cases Argued and Decided in the Court of Common Pleas, in Hilary Term, in the Twentieth Year of the Reign of Victoria.

The Judges who usually sat in Banco in this term, were,—Cockburn, C. J., Cresswell, J., Crowder, J., and Williams, J.

Memoranda.

On the 27th of January, Sir Edward Hall Alderson, one of the Barons of Her Majesty's court of Exchequer, died, in the 70th year of his age.

He was succeeded by William Fry Channell, Serjeant-at-Law, who took the oaths on the 14th of February, and shortly afterwards received the honour of knighthood.

On the 4th of March, Charles Wilkins, Serjeant-at-Law, died at his Chambers, No. 8 King's Bench Walks, Temple.

[364] Patience Swinfen *v.* Frederick Hay Swinfen. Jan. 12, 1857.

[S. C. 26 L. J. C. P. 97; 3 Jur. N. S. 85; 5 W. R. 203. For other proceedings see 18 C. B. 485; and in Chancery, 24 Beav. 549; 2 De G. & J. 381. See *Strauss* v. *Francis*, 1866, L. R. 1 Q. B. 381; *In re Wood*, 1872, 21 W. R. 104; *Holt* v. *Jesse*, 1876, 3 Ch. D. 177; *Neale* v. *Gordon-Lennox*, [1902] 1 K. B. 843; [1902] A. C. 465.]

The court will not dispense with personal service of a rule nisi for an attachment for disobedience of a rule.—A compromise having been entered into by the plaintiff's counsel on her behalf at the trial, and embodied in an order of nisi prius, afterwards made a rule of court,—upon a motion against her for an attachment for refusing to perform it, on the ground that it was done without her authority and against her express instructions:—Held, that the dissent of one of its members was enough to justify the court in declining to attach the plaintiff.—The order having been made upon the trial of an issue out of Chancery,—quære, whether this court had jurisdiction to make it a rule of court, and whether the application to enforce it should not have been made to the court of equity?—As to how far counsel and attorneys may bind their clients by acts done by them in court, in the absence of express authority,—quære?—The proper time for an application for leave to file affidavits in answer to "new matter," under the 17 & 18 Vict. c. 125, s. 45, is when the new matter has been brought before the court by the other side; and, semble, that these also may be answered at the proper time.

This was an issue directed by the Master of the Rolls to try the validity of the will of one Samuel Swinfen, deceased.

The issue came on for trial at the Spring Assizes at Stafford in 1856. At the close of the first day, negotiations for an arrangement took place between the leading counsel for the respective parties, and ultimately the following terms were agreed upon and embodied in a memorandum which was signed by the Attorney-General on the part of the defendant, and by Sir F. Thesiger on the part of the plaintiff, to the following effect:—

"Terms of compromise. Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of incumbrance, if any, created since death of

Samuel Swinfen; such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity for her life on the estate of 1000*l.* a year, inclusive of the 300*l.* a year already secured to her on estate, also to date from Michaelmas, 1855. If any charge is existing on the estate created prior to the death of Samuel Swinfen, the interest to be born in equal moieties. Plaintiff's costs as between attorney and client, not exceeding 1250*l.*, to be paid by defendant. Power to either party to make this agreement a rule of court. In event of any question arising on the above terms, the same to be referred to Sir **[365]** F. Thesiger and the Attorney-General. The house and grounds to be occupied by plaintiff without payment of rent, till Michaelmas next."

This memorandum was embodied in an order of nisi prius, which was afterwards made a rule of court; and, the plaintiff having refused to abide by it, an unsuccessful attempt was made in Trinity Term last, to enforce it by attachment: see *Swinfen* v. *Swinfen*, 18 C. B. 485.

The Attorney-General, early in Michaelmas Term last, again obtained a rule nisi for an attachment of contempt against the plaintiff for disobedience of the rule of court. The affidavits (*a*)[1] upon which the motion was founded, stated that performance of the rule on her part had been duly demanded of the plaintiff, and an ingrossment of a conveyance of the Swinfen estate tendered to her for execution, together with a deed (executed by the defendant) to secure to her the annuity or rent-charge stipulated for by the order of nisi prius, when she refused to execute the conveyance or to perform the engagement entered into by her counsel on her behalf at the trial.

The Attorney-General, on a subsequent day, upon a suggestion that the plaintiff was evading the service of the rule, applied for leave to serve it by leaving a copy at her residence, and also with her attorney and agent respectively, in lieu of serving the plaintiff personally.

Cresswell, J. You must do the best you can to serve the rule. We cannot by anticipation say what sort of service will do. I very much doubt whether anything short of personal service will suffice in the case of an attachment. The rule had better be enlarged until the **[366]** last day but one of the term, to give the attorneys an opportunity of effecting the service.

Service having subsequently been accepted on the part of the plaintiff,

Nov. 24.—R. Kennedy and W. R. Cole appeared to shew cause upon affidavits of the plaintiff, her attorney (Mr. Simpson), and Sir H. Durrant.

Whateley prayed leave on the part of the defendant to answer the new matter contained in those affidavits, pursuant to the 45th section of the common Law Procedure Act, 1854, —17 & 18 Vict. c. 125. He stated, that, on moving for the rule, it was thought unnecessary to state anything in the affidavits about the compromise; but that, finding that the affidavits which were about to be used on the other side went fully into the matters which were disposed of on the former motion, it was now thought advisable that affidavits should be filed in answer.

Cresswell, J. We cannot at present say whether or not we are prepared to adhere to our former decision. But we cannot at the present stage of the proceedings grant this application. The affidavits which Mr. Whateley proposes to file, are to answer affidavits which by the courtesy of the counsel for the plaintiff have been handed to him for his inspection. To permit this now might be to allow the defendant to file affidavits in answer to something which may never appear upon the files of the court at all. If, upon cause being shewn, matter appears which we think the defendant ought to have an opportunity of answering, this application may be renewed.

Williams, J. concurred.

Crowder, J. This point has already been decided by **[367]** this court on more than one occasion (*a*)[2]. We may, in the exercise of our discretion, when the rule comes on, allow affidavits to be filed in answer: but we must first be satisfied that they are necessary.

Kennedy, for the plaintiff, then proceeded to read the affidavits. The plaintiff's affidavit was in substance as follows: "I never, either before or after the commencement of legal proceedings, gave any instructions or authority to my attorney, or to

(*a*)[1] In addition to those used on the former rule.

(*a*)[2] See *Wood* v. *Cox*, 17 C. B. 280, and *Hague* v. *Rowlatson*, 17 C. B. 548.

any other person, to make any compromise on my behalf. After the commencement of legal proceedings, I gave my attorney no other instructions than to support the will of my father-in-law, and to maintain its validity and integrity. I was a witness on the trial of this issue, on Saturday, the 15th of March last." "After the examination of myself and five other witnesses, and at about 6 o'clock, the judge adjourned the court: and I have been informed, and believe, that, immediately afterwards, and before leaving the court, Sir F. Thesiger, my leading counsel, had a conversation with the judge, and that he caused the other counsel and my attorney to follow him to his lodgings. I went from the court to the Swan Hotel, and shortly afterwards was informed by my attorney and his London agent, Mr. Cole, that Sir F. Thesiger wished to see me. I went, accompanied by Mr. Cole, to Sir F Thesiger's lodgings. On arriving there, I was informed by Sir F. Thesiger that the Attorney-General had offered to give me an annuity of 1000l., on condition of my relinquishing the Swinfen estate. Sir F. Thesiger strongly urged me to accept the offer. I told him I would not accept that or any other offer. He persisted in urging me to accept it, and at length said that he had had an [368] intimation from 'high quarters,' which he was not at liberty to name, that the case was likely to go against me, and it was better to save something from the wreck. I understood him by the expression of 'high quarters,' to mean the judge. Nevertheless, I had no fear as to the result, and desired to get nothing but what I was justly entitled to. I said to Sir F. Thesiger that I would not listen to the proposal: that I only wanted my own: that I wished the case to be tried by the jury, and would abide by the verdict: and that I considered it my duty to support the will: but, upon his still pressing me, I requested Mr. Cole to fetch my friend, Sir H. Durrant, who had come with me to Stafford. Upon Sir H. Durrant's arrival, the substance of what Sir F. Thesiger had said to me was repeated to him: and Sir H. Durrant recommended that I should take a little time to consider the offer. To this I assented; and it was at once arranged that I should send my reply to Sir F. Thesiger by 1 o'clock the next day, in order that he might communicate it to the other side. On rejoining my attorney, I expressed my entire disapproval of the proposed mode of terminating the trial: and I told him (as was the fact) that I only took time to consider it, out of respect to counsel, especially as Sir F. Thesiger seemed so anxious on the subject; and I requested him to come early the next day to Swinfen for my reply. I then returned to Swinfen, which is at a distance of twenty miles from Stafford. Early the next day (Sunday) my attorney reached Swinfen Hall: and I immediately, without any discussion, expressed to him positively my resolution to reject the offer, and requested him to convey my answer to Sir F. Thesiger. Sir H. Durrant said he fully agreed with me; and we both declared to him that the cause must stand or fall by the will, and that I would sink or swim. My attorney had received no authority whatever from me, directly or indirectly, to accept any [369] other terms, or to give any new instructions to counsel: and he left Swinfen Hall that morning with the simple direction to convey my refusal of the offer to Sir F. Thesiger. I am informed, and believe, that my attorney the same morning sent my instruction by the electric telegraph from Lichfield to Stafford, addressed to Mr. Cole, and that it was received by Mr. Cole and conveyed to Sir F. Thesiger at about 1 o'clock of the same day, and was then made known to the defendant's counsel. It was in the following words, "The offer is refused." I was not informed, nor had I the least reason to suspect, that there would be any further negotiation for a compromise; and, from the circumstance of my counsel consulting me on the said offer, I concluded that they would not, nor could, assent to any arrangement without my sanction. My attorney had advised me to come to Stafford by the first train from Lichfield on Monday morning, to be present at the trial. I therefore went from Swinfen to Lichfield in time for the first train, and travelled by that train to Stafford in company with Sir H. Durrant and several of my witnesses. We found a car waiting for us at Stafford station; and a gentleman named Barron informed us that an arrangement was going on in court, and that we must make the utmost haste. We went immediately to the court-house, and we arrived there a minute or two (as I am informed and believe) after a juror had been withdrawn. We passed from the outer hall of the court-house into an ante-room, and there met Sir F. Thesiger. He said to us, —'It is all settled: I have compromised the case: I have done my best for you,'—or words to that effect. Sir H. Durrant asked, with an expression of surprise, 'By whose authority!' Sir F. Thesiger replied, after a little hesitation,

addressing Sir H. Durrant, 'By your's;' to which Sir H. Durrant rejoined,—'The deuce you did!' Sir F. Thesiger made no reply to this, but left the room immediately." "My [370] attorney soon afterwards came into the ante-room. I expressed to him my astonishment and resentment at what had been done, and my determination not to submit to the compromise. My attorney said that he had nothing to do with it. Being informed that my cause was at an end, I left the court-house with Sir H. Durrant, and returned home. Since that time, I have never done anything to ratify or confirm the compromise, nor anything which might lead my opponents to believe that I intended to ratify or confirm, or that I acquiesced in it: but, on the contrary, I have in various ways signified to them my disapproval of the compromise, and my resolution to repudiate it and contest its validity. And I am informed and believe that some time in March last, and after the assizes, the London agents of my attorney, or one of them, communicated that resolution to Mr. Frere, the defendant's attorney; and, on the 2nd of April last, the firm of Mr. Frere wrote to my attorney informing him that they had instructed counsel to prepare a supplemental bill to enforce the agreement; and I was then informed by my attorney, that, if I meant to contest the compromise, I must leave my opponents to take proceedings against me in equity to enforce it, and I must meet it there." "On the 9th of June last, I declined to execute a deed which was tendered to me by Mr. Greene; and I referred him to my solicitor for further information; and I am informed and believe that my London agent informed the attorney on the other side that it was of no use to tender any deed to me, as I would not sign it." "The value of the Swinfen estate is about 65,000*l.*; and the annuity which I should take under the agreement, is worth 10,000*l.*; and I had previously resigned, without litigation, to the next of kin a sum of 7000*l.* and upwards given me by my father-in-law, to which I believe, and am advised, I might have established a good title. The agreement was impro-[371]-vident, inasmuch as it contained no stipulation for the discontinuance of the proceedings in equity and in Doctors' Commons then and still pending at the suit of the defendant against me as devisee and executrix under the said will. The validity of the will was not a mere pecuniary question; for, it involved my character as one necessarily acquainted with the state of mind of the testator, and peculiarly capable of forming a correct opinion of his competency to make a will. Even if the agreement had been advantageous to me in a pecuniary point of view, yet, considering the circumstances under which it was effected, I could not conscientiously have availed myself of it. I verily believe, as I believed at the trial, that my cause is a just one, and that the will of my father-in-law is valid and ought to be upheld, and that I should have obtained a verdict in my favour if the case had been suffered to go to the jury. It is my desire to have a full and fair trial of the issue directed by the Master of the Rolls; and I refuse to ratify the unauthorised and illegal act of my counsel."

Mr. Simpson's affidavit,—after corroborating that of the plaintiff as to what took place down to the morning of Sunday, the 16th of March, -was as follows: -"On my return to Stafford in the afternoon, I was informed by Mr. Cole that Sir F. Thesiger wished to see me at 8 o'clock the next morning; and Mr. Cole made an appointment accordingly. The next morning, I called with Mr. Cole upon Sir F. Thesiger, and in the first place informed him that I had no authority to re-open the treaty; and I stated that I was quite sure that Mrs. Swinfen would entertain no other offer than on the basis of the whole estate for her life. I had made a memorandum to this effect in writing, which, to the best of my recollection and belief, I then gave to Sir F. Thesiger, and he read it in my presence, and left for the purpose of speaking to the Attorney General. I did not see Sir [372] F. Thesiger again, nor did I know what steps had been taken, until the counsel met in court at 9 o'clock. They began immediately to correspond and confer in court in the presence of the judge and jury, and also went out of court apparently for that purpose. Sir F. Thesiger, in the course of a short time, informed me that the defendant, who was in court, and the Attorney-General, expressed their willingness to abide by their former offer, and to give a sum of money for the costs; to which I stated my positive dissent. The conference was still proceeding; and I reminded Sir F. Thesiger that I had no authority to negotiate any compromise for my client; to which Sir F. Thesiger replied, that he would take all the responsibility on himself jointly with his colleagues. Refusing to have any concern in the affair, I left the court, and after a short time was sent for by Sir F. Thesiger, who was then in conversation with the Attorney-General; and the latter

put a question to me respecting the Swinfen estate, which I answered. Soon afterwards, I received a written request from Mrs. C. Swinfen, who was in attendance as a witness, to speak to her in the hall of the court-house. I went to her: and both she and her husband most earnestly requested me to put a stop, if possible, to the proposed agreement, and said that they were quite sure Mrs. Swinfen would repudiate it, and refuse to submit to it. I then returned to Sir F. Thesiger; and, as Mrs. Swinfen was expected every minute, I requested him to wait for her arrival; but he did not comply with my request; and a juror was withdrawn a few minutes before her arrival. The conference between the respective leading counsel continued nearly an hour and a half, from the beginning to the conclusion." "I do not know whether the agreement was drawn up and signed before or after a juror was withdrawn. I was not asked to peruse it. My attention was directed to the alienation of the estate, and my objection was to [373] that condition. I particularly urged to Sir F. Thesiger that he was making a mere commercial bargain, and therefore I could not act as Mrs. Swinfen's attorney on such a basis. I distinctly understood that he admitted this. I left the court soon after Sir F. Thesiger, and found Mrs. Swinfen in the ante-room. She was in great distress, and reprobated the transaction, in the presence of her witnesses and many other persons."

Sir Henry Durrant's affidavit was in substance as follows: "I was present at the trial of the above-named cause on Saturday, the 15th of March." "Soon after the adjournment of the court, I went, at the request of Mr. Cole, to Sir F. Thesiger's lodgings, when I found the plaintiff with Sir F. Thesiger and some other counsel. The plaintiff asked Sir F. Thesiger to repeat to me what he had said to her. He then stated that the Attorney-General had offered to give her 1000*l.* a year and the costs of the trial, if she would relinquish the estate to Captain Swinfen, the defendant. He said also that the case was going against the plaintiff." "I made no answer to Sir F. Thesiger, but looked at the plaintiff, and said to her, 'This requires a little time for consideration.' I said so, thinking it advisable that we should talk over the matter by ourselves. I returned with the plaintiff that evening to Swinfen Hall. We talked about the proposed compromise. She made up her mind instantly to reject it; and I entirely concurred with her. The next morning, Mr. Simpson, her attorney, came to Swinfen Hall. I was present at his interview with the plaintiff. She declared her resolution to reject the offer of the Attorney-General, and desired her attorney to convey her answer to Sir F. Thesiger. She said that she would stand or fall by the will, or words to that effect: and I said that I approved of her resolution. On the Monday morning, I went with the plaintiff to Stafford, in order to attend the trial. On arriving at the Stafford station, we were informed that we must make haste to the court, as there [374] was a negotiation going on between the counsel. The plaintiff and myself were both greatly surprised, as we had not the least suspicion that such a thing would be done. We hastened to the court-house; and, upon entering the ante-room, through which the witnesses have to pass into the court, we met Sir F. Thesiger, who accosted us and said that he had done his best, and compromised the case. I asked him directly by whose authority he had done so: and Sir F. Thesiger, looking at me with some confusion of manner, said, 'By yours.' I replied instantly, 'The deuce you did!' and was proceeding to say more, but Sir F. Thesiger walked quickly away. The statement of Sir F. Thesiger, that he acted by my authority, is wholly untrue. I never assumed to give any authority upon the subject; nor had I any authority from the plaintiff so to do."

Cresswell, J. The affidavits having now been used, we think the defendant should be allowed to file affidavits in answer.

Whateley. The affidavits which, if the court see no objection to that course, it is proposed to put in, are those of Sir F. Thesiger, Mr. Alexander, Q. C., Mr. Whitmore, Q. C., and Mr. Gray, who were the counsel for the plaintiff at the trial, detailing what took place there so far as they were concerned.

Cresswell, J. I am of opinion that there is no legal objection to the reception of the affidavits proposed. The court cannot take upon themselves to give any opinion as to the propriety of counsel making affidavits (*a*). Every gentleman is the best guardian of his own honor, and the best able to decide for himself whether or not it is fitting for him to make an affidavit. It is not a question of [375] professional

(*a*) Such an affidavit was made in *Elworthy* v. *Bird*, Tamlin, 38

confidence; but the question is, what was the authority given. All we can say is, that the affidavits may be filed.

WILLIAMS, J. The only question that can be put to us is a question of law: and, as a matter of law, there clearly is no objection to the affidavits proposed.

The affidavit of Sir F. Thesiger was to the following effect:—"I was the leading counsel engaged on the part of the plaintiff in the matter of an issue directed by the court of Chancery to try the validity of the will of Samuel Swinfen, deceased, and which issue came on for trial at the Spring Assizes at Stafford in the present year. I have read a copy of an affidavit made in this matter by Charles Simpson, the plaintiff's attorney, sworn the day of November instant, which professes to give an account of what took place at the trial with reference to a compromise between the parties which was then effected under my advice and through my instrumentality, but which in many respects is entirely contrary to my recollection of the circumstances. At the close of the first day of the trial, I had reason to believe that the plaintiff was in some danger of an adverse verdict; and I desired Mr. Simpson to bring her to my lodgings, requesting Mr. Alexander and Mr. Whitmore, the other counsel who were with me in the cause, to attend. I pointed out to the plaintiff the consequences of a defeat, and the desirableness of coming to some arrangement. I did not say that the Attorney-General, who was employed by the defendant, had offered an annuity of 1000*l.*: no such offer having been made by him: but, upon the plaintiff asking me what sort of an arrangement was contemplated, either I or the other counsel suggested the sum of 1000*l.* per annum as an amount which we all agreed in thinking would be reasonable. [376] The plaintiff said she would do nothing without her friend Sir Henry Durrant, under whose advice she had been acting: and, finding that he was in Stafford, I desired him to be sent for, and we repeated in his presence all that we had previously stated to the plaintiff. We separated that evening upon an understanding that they were to consider the suggestions which we had made, and communicate by telegraph the next day, being Sunday, whether (as I supposed) the counsel were to be at liberty to negotiate with the other side for an arrangement. In the afternoon of Sunday, I received a communication by telegraph in these terms 'The offer is refused.' Mr. Whitmore and myself thought that the message did not exactly meet the case, as no offer had been made: but I believe we were all convinced that the idea of an arrangement must be abandoned, and we were prepared to proceed with the trial on the following day. On the Monday morning, Mr. Simpson came with Mr. Cole (his London agent) to my lodgings. Mr. Simpson in his affidavit states that he did so at my request. I have no recollection of my having requested his attendance upon me; and my belief is, that his visit was unexpected. On his coming into my room, Mr. Simpson told me that a circumstance had come to his knowledge which in his judgment made it extremely desirable that the case should be arranged Having previously entertained this opinion, I was strongly confirmed in my view that it would be for the interest of the plaintiff, by what Mr. Simpson communicated to me; and I said that I would instantly go to the Attorney-General and offer to take 1000*l.* a year, which I believed he would be willing to give. I have not the slightest recollection of Mr. Simpson having produced to me any written paper at this interview: and my firm belief is, that no such paper was produced. With the entire acquiescence and sanction of Mr. Simpson, I proceeded to the Attorney-Gene [377]-ral. When I reached the lodgings of the Attorney General, it only wanted a few minutes to the time of the court's assembling, and therefore our communication was very brief: but he at once agreed to the proposal that the plaintiff should receive 1000*l.* a year, as the basis of the arrangement. In consequence of the haste with which this took place, nothing was agreed upon on the subject of the costs; but, on our arrival in court, Mr. Simpson, having been informed of what had been agreed upon, endeavoured to stipulate for the payment of costs as between attorney and client. I proposed this to the Attorney General, who objected to leaving the amount of costs indefinite, and suggested the naming of a certain sum. Upon this I inquired of Mr. Simpson, in the presence of Mr. Cole, what would be a proper sum to fix for the costs. He answered 2000*l.* The Attorney General thought this sum extravagant, and said that the defendant's advisers considered that 1000*l.* would be amply sufficient. I then discussed with Mr. Simpson and Mr. Cole for some time the subject of the costs, and asked him (Simpson) to explain the mode in which he made up the amount. He did not satisfy me that the costs could possibly exceed 1500*l.*, which sum, therefore,

with his consent, I agreed to take. The Attorney-General in the meantime had drawn up the heads of the arrangement; and, upon my sending over my proposal to take 1500*l.*, he inserted the sum of 1250*l.* for the costs, as the utmost he was disposed to give on this account. I was pressing Mr. Simpson not to prevent a beneficial arrangement, and one which he had urged me to make, by standing out for 250*l.*, when a friend of the defendant interfered, and induced him (the defendant) to declare his determination not to settle at all. After what I had heard from Mr. Simpson at my lodgings, I was certainly most anxious that the trial should not proceed; and I pressed the Attorney-General with the observation, that, [378] after we had substantially agreed, it would not be right for him to allow his client to recede. After considerable discussion, he at last said, that, unless I would consent on the part of the plaintiff to the proposed arrangement commencing as from the preceding Michaelmas, the plaintiff receiving an annuity from that time, and the defendant having the rents due at Lady-Day, no settlement could take place, and the trial must proceed. It was also insisted by the Attorney-General that the interest of any charges upon the estate should be borne equally by the plaintiff and defendant. I found, upon calculation, that the difference between the amount of the rents and of the annuity would not be very great, and I therefore urged on Mr. Simpson the acceptance of these terms. Mr. Simpson certainly more than once at this period of the negotiations requested me to wait till the plaintiff arrived, who, he informed me, was expected in an hour; but I, fearing from the disposition of the defendant, that, if the trial was resumed, all hope of an arrangement was at an end, and considering it of great importance to the plaintiff's interests that this should not occur, especially after Mr. Simpson's impression of the expediency of settling the case had strongly confirmed my own, pressed upon Mr. Simpson to agree before it was too late; and, upon his hesitating, said that I must take it upon myself: to which Mr. Simpson made no objection, but said that I must defend him against his client. I immediately answered that I was willing, with my friends, meaning the counsel who were with me, to take the responsibility on myself: and I then signed the paper which had been drawn up by the Attorney-General, and which contained the final terms of agreement between the parties. It is not true, that, when the plaintiff came to my lodgings, or that at any other time, I told her that the Attorney-General had offered to give her an annuity of 1000*l.* a year: no such offer had been [379] made: and that sum was mentioned by myself or the other counsel, as a suggestion, in the manner previously suggested by me. I did not say that I had had an intimation from high quarters, which I was not at liberty to name, that the case was likely to go against her; nor did I give her or Sir Henry Durrant to understand that I had had a private communication from the judge that the case was going against her. I told her that it appeared to me that the case was going against her, and urged the prudence of an arrangement, to prevent the consequences of an adverse verdict. The plaintiff did not say that she would not accept 1000*l.* a year, or any other offer: on the contrary, there was a considerable discussion as to terms of compromise; and, when the interview terminated, it was understood that the plaintiff and Sir Henry Durrant would take the whole matter into consideration, and send a decision on the following day. It is not true that I stated to Sir Henry Durrant that the Attorney-General had offered to give the plaintiff 1000*l.* per annum and the costs of the trial, if she would relinquish the estate to Captain Swinfen. I have already stated the mode in which the sum of 1000*l.* per annum was introduced into the discussion, and which statement is correct."

The statements contained in the above affidavit were corroborated as to the whole of the facts therein deposed to, by the affidavits of Mr. Alexander, Mr. Whitmore, and Mr. Gray (who were also counsel for the plaintiff at the trial),—the two former gentlemen expressly swearing that Mr. Simpson never at any period of the discussion intimated that he was acting without authority from his client.

R. Kennedy shewed cause. When this matter was before the court on the former occasion (18 C. B. 485), the materials on which to form a correct judgment were [380] wanting. The court will not, therefore, hold itself bound by what took place then. [Cresswell, J., intimated that the argument would sustain no prejudice from what fell from the court upon the former rule.] The authorities upon this subject are numerous, and somewhat conflicting,—a confusion having been introduced into it from a want of properly distinguishing between the duty and power of the attorney and those of the counsel, and between the power to refer and the power to com-

promise a suit. The affidavits now before the court in some of their particulars are perfectly irreconcilable with each other, and lead to the irresistible conclusion that there is wilful misstatement on one side or the other. One thing, however, is manifest, viz. that the plaintiff never gave any authority either to her counsel or to her attorney to enter into the agreement that has been entered into on her behalf: and there is no case in the books which has decided that either counsel or attorney has authority to enter into a compromise involving matters foreign to the record, without the consent of the client. The counsel is the advocate, not the agent of his client. His instructions may be more or less vague; but, whatever they are, he must confine himself strictly within their limit. Most of the cases have arisen out of matters addressed to the discretion of the court, and those chiefly in courts of equity, where a larger degree of latitude is allowed than in actions at law, where the issue to be decided is upon the record. The form of the venire shews that this must be so; for, neither the court nor the jury have power to do any thing else than to try the issues presented to them. Counsel may, indeed (his brief having been delivered) withdraw the record, or consent to a nonsuit or a verdict against him or may assent to a verdict passing for a sum less than that claimed by his client: but he cannot travel out of the record: he is not the general agent of the client. All his authority is derived from [381] the instructions contained in his brief, with reference to the matters in issue upon the record: and it has been held that he is not answerable for any matter spoken by him relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but, if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is liable to an action at the suit of the party injured: *Brook* v. *Sir Henry Montague*, Cro. Jac. 90; *Hodgson* v. *Scarlett*, 1 B. & Ald. 232; *Ahithol* v. *Benedetto*, 3 Taunt. 225, 2 Campb. 487; *Richardson* v. *Peto*, 1 M. & G. 896; 3 Bl. Com. 29. Even the attorney's power, though necessarily more extensive than that of the counsel, is limited to steps in the cause (*a*)[1]. The distinction between the powers and duties of attorneys and those of counsel, are well pointed out in Story on Agency, § 24, and Colquhoun's Summary of the Roman Civil Law, vol. 3, § 2207, and in two very able articles in the Law Magazine,—vol. 12, p. 26, and vol. 20, p. 269. It has been decided that an attorney may refer a cause to arbitration, *—Filmer* v. *Delber*, 3 Taunt. 486: but that proceeds upon this principle, that a reference is only a mode of trying the cause. It may be that counsel have the like authority, after brief delivered; but the authority is at all events limited to the cause: *Baillie* v. *The Edinburgh Oil Gas Light Company*, 3 Clark & F. 639. The strongest dicta in favour of the power assumed to be exercised here, are those to be found in *Mole* v. *Smith*, 1 Jac. & W. 673, and *In re Hobler*, 8 Beavan, 101. But, in equity, the counsel has a much larger discretion than he has at law; and, on the last-named occasion, the lan-[382]-guage of the Master of the Rolls (Sir L. Shadwell) went much beyond the necessity of the case. *Butterworth* v. *Clapham*, in the note to *Mole* v. *Smith*, is somewhat at variance with Lord Eldon's dictum in the principal case. In *Knipe* v. *M'Mahon*, 4 Drewry & Warren, 295, the Lord Chancellor (Sugden) said that "counsel were perfectly justified in acting upon their own discretion and judgment, in determining whether a minor heir at law should take an issue of devisavit vel non, and that Lord Chancellor Eldon had expressed an opinion to the same effect." *Elworthy* v. *Bird*, Tamlyn, 38 (*a*)[2], is a distinct authority to shew that the court will in a case like this inquire whether or not counsel had the authority they professed to exercise. There, the husband, being prosecuted and found guilty at the quarter sessions of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*, and the court, adverting to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court that the defendant had come into the agreement, and that the defendant

(*a*)[1] In *Richardson* v. *Peto*, 1 M. & G. 896, Tindal, C. J., says "The attorney admitted to prosecute or defend represents his client throughout the cause: but a counsel represents his client only when speaking for him in court."

(*a*)[2] See this case, upon demurrer to the bill for want of equity, 2 Sim. & Stu. 372. And see 13 Price, 222, 9 J. B. Moore, 430, 2 Bingh. 258.

was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions which to some extent supported it. Upon a bill filed for a specific performance, it was held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to the agreement entered into by his counsel, but on the defendant to disprove it; that, the [383] weight of the evidence being that the defendant did not dissent, the court would conclude that counsel had authority; and that the plaintiffs were entitled to a decree for a specific performance, with costs. The Master of the Rolls (Sir John Leach) said: "This agreement concludes the parties; and the only question is, whether the counsel had sufficient authority. In the absence of evidence, a court will conclude that he had authority; for, it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides: but, after duly considering it, I come to the conclusion that counsel had authority which would bind his client. The defendant, it is true, objected when the arrangement was first proposed: but, the question is, did he not afterwards, impressed with the weight of his counsel's reasoning, assent? His counsel swears that such arrangement was concluded between the parties, and Mr. Bird was present. The chairman, in passing sentence, said, 'I impose a nominal fine upon you, because you have entered into the arrangement.' It necessarily follows that the plaintiffs are entitled to a decree for a specific performance, with costs." No case is to be found where counsel has been held to have power to bind his client, where he acts in defiance of his client's instructions, and against his will. An agreement entered into with the defendant's assent at sessions, was upheld in *Porter* v. *Cooper*, 1 C. M. & R. 387, 4 Tyrwh. 456. Lord Langdale, in *Hargrave* v. *Hargrave*, 12 Beavan, 408, refused to enforce an arrangement very similar to the present. In *Furnival* v. *Bogle*, 4 Russ. 142, it is assumed that the client would not be bound by an agreement entered into by his counsel in ignorance or under a mistake of facts. In *Colledge* v. *Horn*, 3 Bingh. 119, 10 J. B. Moore, 431, Burrough, J., says that a statement made by a counsel upon his address to the jury, in the hearing of his client, is binding [384] on the client, if he makes no objection. But, in *Machell* v. *Ellis*, 1 Car. & K. 682, Pollock, C. B., declined to hold the client bound by the opening of his counsel. In the case of attorneys, their authority extends over the whole course and progress of the cause. The attorney's acts bind his client; and, even where he acts without any authority, the party for whom he assumes to act is bound by what he does, except in the single case of the attorney being insolvent: *Anonymous*, 1 Salk. 88; *Mudry* v. *Newman*, 1 C. M. & R. 402; *Bayley* v. *Buckland*, 1 Exch. 1. In equity, the rule is different: there, the attorney is required to have an authority in writing: *Pinner* v. *Knights*, 6 Beavan, 174; *Hood* v. *Phillips*, 6 Beavan, 176. In *Bodington* v. *Harris*, 1 Bingh. 187, the court set aside a consent rule to abate a nuisance, on the ground that it had been agreed to by the defendant's attorney without his assent, and against his express directions. *Thomas* v. *Hewes*, 2 C. & M. 519, 4 Tyrwh. 335, is also a strong authority to shew that the court ought not to interfere to enforce the agreement by this summary process. There are numerous cases to shew that there are limits to the authority even of the attorney. Thus, an authority to proceed in an action to recover a debt, does not warrant the attorney in opposing the party's discharge in the insolvent debtors court: *Drake* v. *Lewin*, 4 Tyrwh. 730. So, the attorney has no power to discharge a defendant from execution. The American courts repudiate the right of attorneys and counsel to make compromises without express authority from their clients: *Holker* v. *Parker*, 7 Cranch, 436; *Maule* v. *Maule*, 4 Dev. 363; *Robert* v. *The Commercial Bank*, 13 Louisiana, 532. Then, this is not a case in which there is any necessity for resorting to an attachment for the purpose of enforcing the agreement. It raises an important question, which ought not to be disposed of summarily, and without giving an opportunity for ap-[385]-peal. The granting or withholding an attachment is discretionary with the court: *Stock* v. *De Smith*, Cas. t. Hardw. 106; *Wilmot* v. *Allen*, there cited; *Sir Thomas Hales* v. *Taylor*, 2 Stra. 695; *Thornton* v. *Hornby*, 8 Bingh. 13, 1 M. & Scott, 48, 1 Dowl. P. C. 237; *In re Cargey* v. *Aitchison*, 2 D. & R. 222; *Hetherington* v. *Robinson*, 4 M. & W. 608; *Stalworth* v. *Inns*, 13 M. & W. 466, 2 D. & L. 428; *Peterson* v. *Ayre*, 15 C. B. 724; Hemingway's Arbitration, 15 Q. B. 305 (*b*), 3 N. & M. 860; *Mendell* v. *Tyrrell*, 9 M. & W. 217. This is not an award, but a contract,—a contract relating to an interest in land, which the statute of frauds requires to be in writing and signed by the parties to be charged. This instrument is not signed.

If it is a contract, why is it to be carried into effect by a judge's order or a rule of court? The only proper course is, to apply to a court of equity for a specific performance. Then, this was an issue directed by the Master of the Rolls, to inform the conscience of the court as to the validity or invalidity of the will of Samuel Swinfen. When an issue is so directed, the whole and sole control over the record is in the court which directs it. When this matter was before this court on the former occasion, it was supposed that the statute 8 & 9 Vict. c. 109, s. 19, made a difference in this respect. That, however, is manifestly a fallacy. Before that statute, when an issue was directed by the court of Chancery, it was returned to the court from which it emanated, and nothing further was done with it here: but, where an action was directed to be brought, a writ issued, and the parties proceeded to trial as in ordinary cases, and all the subsequent steps necessary in the action were taken in the common law court. In the case of an issue, there could be neither judgment,—*Dickenson* v. *Eyre*, 7 Q. B. 307, n.,—nor execution, nor bill of exception,—*Lewis* v. *Armstrong*, 3 Mylne & K. 52,—nor writ of error, *King* v. *Simmonds* 7 Q. B. 289, 312; **[386]** *Thorpe* v. *Plowden*, 2 Exch. 387,—nor an amendment at nisi prius under the 3 & 4 W. 4, c. 42, s. 23,—*James* v. *Lynn*, 13 Q. B. 845, nor an indorsement of a special finding upon the record, under s. 24,—*Brown* v. *Hutchinson*, 13 Q. B. 185. The statute does not affect to deal with the jurisdiction: and, if the court assumes the power of enforcing this arrangement by attachment, it will be indirectly doing that which by law it cannot do directly. In a case of *Bird* v. *Kerr*, now pending before Wood, V. C., a motion for a new trial of an issue which was tried before Willes, J., at the last assizes at Newcastle, was made in the court by which the issue was directed. And such has always been the practice, whether before or since the 8 & 9 Vict. c. 109. It will probably be urged on the other side, that it would operate injustice upon the defendant to deprive him of the benefit of this compromise, after he has incurred expense in relation to it. But the answer to that is, that the defendant is in no worse position in that respect than is every one who finds he has been dealing with an unauthorised agent: he may have a remedy against the agent: per Bayley, B., in *Thomas* v. *Hewes*, 2 C. & M. 530, n.; *Kennedy* v. *Gouveia*, 3 D. & R. 503; Russell on Arbitration, 2nd edit. 27. [The learned gentleman (*a*)[1] con-**[387]**-cluded by observing in very unmeasured language upon the affidavits of the plaintiff's counsel; and contended, that, upon the whole, it was manifest that they had not the authority which they professed to exercise in entering into the compromise.]

W. R. Cole also appeared to shew cause against the rule. He submitted, that Mrs. Swinfen's refusal to hold herself bound by the compromise entered into on her behalf, was not a wilful contempt of the order of the court, but was founded upon a bonâ fide conviction that she was not compellable to carry out an agreement to which she was no party, and which had been made not only without her sanction, but in defiance of her express prohibition: that, this being a proceeding against which there was no appeal, the court would only act upon the clearest and most unequivocal evidence; and that the rule of practice which requires parties to come prepared with proper materials at first, had never been relaxed in a case of this sort (*a*)[2]. He then proceeded to urge the several points, and to cite the several authorities following:—

(*a*)[1] Towards the close of his argument, the court having been adjourned from the 24th of November to the 1st of December, Kennedy asked leave to file fresh affidavits on the part of the plaintiff, in answer to the affidavits of Sir F. Thesiger and Messrs. Alexander, Whitmore, and Gray, under the 17 & 18 Vict. c. 125, s. 45.

He urged, in excuse for the lateness of the application, that he had had no opportunity of consulting with his client as to the contents of those affidavits when they were placed in his hands on the former day.

Cresswell, J. Had you asked at the time for an opportunity to examine the affidavits, the court would probably have had no difficulty. The course now proposed, after so long an argument, is fraught with extreme inconvenience. If the plaintiff were allowed now to file new affidavits, we should probably be asked the same indulgence by the other side, and the case would never end.

Crowder, J. The application should have been made at the time. It is now too late.

(*a*)[2] The former rule was discharged expressly without prejudice to a renewed application.

1. That the rule should have been re-served in a proper manner, and performance at the same time demanded; the practice of the court requiring that all necessary steps for obtaining an attachment shall be taken at the same time,—*Rogers* v. *Twisdel*, 3 Dowl. P. C. 573; *Doe d. Sturges* v. *Ward*, 2 Dowl. N. S. 706; *The King* v. *Smithies*, 3 T. R. 351; *Dodington* v. *Hudson*, 1 Bingh. 410, 8 J. B. Moore, 510; *Swinfen* v. *Swinfen*, 18 C. B. 485.

[388] 2. That a proper deed should have been tendered to the plaintiff at the time of the service, for her execution; that the deed then tendered was in many respects objectionable, and one she was not bound to execute; and that the defects were not cured by the deed subsequently prepared,—*Tebbutt* v. *Ambler*, 2 Dowl. N. S. 677; *Doe d. Williams* v. *Howell*, 5 Exch. 299; *Vonhollen* v. *Knowles*, 12 M. & W. 602; *Manning* v. *Bailey*, 2 Exch. 45.

3. That the rule of court was too loose and indefinite to warrant an attachment, even supposing it to be valid as an agreement; that it did not order any specific act to be done by the plaintiff, or provide how the deed was to be settled in case of difference, or order the plaintiff to deliver up possession of the house and grounds, or identify the land she was to occupy until Michaelmas, or dispose of the Chancery suit or of the process in Doctors' Commons,—*Doe d. the Earl of Cardigan* v. *Bywater*, 7 C. B. 794.

4. That the agreement on which the rule of court is founded, was made on the trial of an issue directed by the court of Chancery, and therefore the obviously more convenient course would be to leave the defendant to apply to that court to enforce it; especially as there were other questions pending in the equity suit, —8 & 9 Vict. c. 109, s. 19; *Luard* v. *Butcher*, 2 C. B. 858, 3 D. & L. 815.

5. That the rule of court is founded upon the agreement; and that the court had no jurisdiction to set aside the agreement if invalid, and therefore ought not to give itself jurisdiction by deciding in a summary manner that the agreement was valid.

6. That, if the rule gave the court jurisdiction, it was one which they might properly decline to exercise in a summary manner, inasmuch as they would thereby preclude the plaintiff from taking the opinion of a jury as to the facts, and of a court of error as to the law,—*Thomas* v. *Heaves*, 2 C. & M. 519; and that it is only in **[389]** plain cases that an attachment is granted,—*Dodington* v. *Harris*, 1 Bingh. 187.

7. That, although counsel are in the first instance to consider and decide whether or not they have sufficient authority to refer a cause upon terms, yet such decision is not conclusive upon the client, who may (if he can) negative such authority.

8. That, although the court will, in the absence of proof to the contrary, infer that counsel had sufficient authority to refer a cause upon terms, yet such inference may be rebutted by evidence, and no such inference will be drawn in the face of sufficient proof to the contrary,—*Mole* v. *Smith*, 1 Jac. & W. 673; *Furnival* v. *Bogle*, 4 Russ. 142; *In re Hobler*, 8 Beavan. 101; *Welch* v. *Nash*, 8 East, 394; *Thompson* v. *Ingham*, 1 L. M. & P. 216; *In re Chew* v. *Holroyd*, 8 Exch. 249; *Bunbury* v. *Fuller*, 9 Exch. 111, 140.

9. That the power of counsel to compromise a cause does not stand upon the same footing as the power of counsel to refer a cause upon terms; and that the court will not infer a power to make a disadvantageous compromise, but the authority of the client must be proved,—see the cases referred to by Mr. Kennedy, ante p. 381.

10. That the reservation of future power to counsel, contained in the agreement, made it bad in toto; and that, at all events, the court would not infer an authority to that extent,—Roll. Rep. 214; Watson on Awards, 104; *Thinne* v. *Rigby* Cro. Jac. 315; *Winch* v. *Sanders*, Cro. Jac. 584; *In re Tandy and Tandy*, 9 Dowl. P. C. 1044.

11. That, upon the affidavits, it clearly appears that the plaintiff never authorised the compromise, but, on the contrary, expressly and distinctly objected to it, and has never in any manner ratified it: that Simpson, her attorney, had no authority from her to make or sanction any such compromise; and that the want of such autho-**[390]**-rity in Simpson was well known to the counsel when they took upon themselves the responsibility of making it.

12. That, inasmuch as the case involves a serious question of law, viz. as to the extent of the power of counsel to bind their clients by a compromise, and also a serious question of fact, viz. whether Simpson did, in violation of his duty to his client, and in spite of her express direction to the contrary, authorise or sanction the alleged compromise,—the court ought not to determine those questions in a summary manner

(and in the absence of Simpson, who was no party to the rule), and so deprive the plaintiff of her right to take the opinion of a court of error; but should leave the defendant to enforce the alleged agreement by action, or by a bill in equity for a specific performance.

Whateley, Q. C., Keating, Q. C., and E. James, Q. C., in support of the rule. The main question is as to the extent of counsel's authority to enter into a compromise of this sort on behalf of the client, in his absence. That the counsel in this particular case acted with good faith, and exercised a sound discretion, there can be no doubt. The concession on the other side as to the extent to which counsel in the conduct of a cause may bind the client, is ample enough to embrace this case. Circumstanced as the case was at the time the compromise was agreed to, the counsel would have been wanting in duty to their client if they had abstained from doing as they did. The client being absent, the hearing of the cause about to be resumed, the counsel are informed by the attorney that a circumstance has just come to his knowledge which makes it highly expedient that the matter should be compromised. What that matter was, does not appear. It may be that Mr. Simpson had employed his London agent, shortly before he received instructions to prepare the will in question, to take proceedings with **[391]** a view to a commission of lunacy against the testator, and he had ascertained that the defendant's counsel were in possession of proof of that fact; and so he might think it expedient, for the sake of his client's character and his own, to withdraw from the contest upon the best terms which could be obtained. The question depends more upon principle than upon authority; but authority is not wanting. *Mole* v. *Smith*, 1 Jac. & W. 673, contains an intimation of opinion from a very eminent lawyer. "It is for Mr. Shadwell to consider," says Lord Eldon, "whether he is authorised to give his consent for the widow. If he does, I must act upon it; and she will be bound by it." So, in *Furnival* v. *Bogle*, 4 Russ. 142, it is distinctly laid down that a party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion. Can it be said in the present case that there was any fact the knowledge of which was essential to the exercise of their discretion, of which the plaintiff's counsel were ignorant? If Mrs. Swinfen had disapproved of the arrangement, she should at once have repudiated it. Instead of adopting that course, though the arrangement was made on the 15th of March, it was not until the 1st of April that any intimation was given to the defendant that she disapproved of it. The observations of Lord Lyndhurst, in *Furnival* v. *Bogle*, 4 Russ. 146, are extremely strong upon the point. He says: "I must consider the case as if Mr. Furnival's solicitor, Mr. K., had been in court, and assented to the order. His clerk was in court when Mr. Sugden made the proposition. Some communication took place between Mr. Heald and him. He did not object to the arrangement; and I must presume that he immediately communicated what had occurred to his principal, K. It was the duty of the solicitor, if he dissented from **[392]** the order, to have given immediate notice of his objection. Saturday and Monday elapsed: on the Tuesday morning, a new solicitor is appointed, and then, for the first time, an objection is made to the order. If Mr. K. had been in court, and had assented to the arrangement, it would have bound his client. He has adopted it; for, it was communicated to him, and he did not object to it. The client must therefore be bound." The cases of *Thomas* v. *Howes*, 2 C. & M. 519, 4 Tyrwh. 335, and *Hargrave* v. *Hargrave*, 12 Beavan, 408, have very little bearing upon the present question. In the former, Bayley, B., expressly guards himself against laying down any rule as to the extent of the authority of attorneys and counsel: and the latter, so far as it goes, is rather an authority for the defendant. The court must always bear in mind that the defendant will be seriously prejudiced by the withdrawal of the arrangement. He had no means of knowing that the authority of the plaintiff's counsel to enter into it would be questioned; and he has incurred heavy expense upon the faith of it. It has been said that this court has no jurisdiction, because the issue was directed by the Master of the Rolls: but the complaint is, that a rule of this court has been disobeyed; and clearly no other court could enforce it by attachment. [Williams, J. If this was an order of nisi prius, it might properly be made a rule of this court. Crowder, J. Can two litigant parties at any time consent to an order of nisi prius?] It is submitted that they can. Submissions to reference are commonly made rules of court. [Cresswell, J. By authority of the statute 9 & 10 W. 3, c. 15. Williams, J. In the case

of a reference, the court performs its functions.] As to the service of the rule, there is no foundation for the objection urged. The service was in strict conformity with the practice of the court. A sufficient deed, it is submitted also, was tendered for execution. And, at all [393] events it is not open to the plaintiff to make that objection, she and her attorney having positively refused to execute any deed. Neither is there any foundation for the objection that the order of nisi prius is too vague. It sets out the agreement, which upon the face of it purports to be a valid agreement, and one which the court will enforce. It was not for the defendant to prove the plaintiff's assent to or ratification of the agreement: it was incumbent on the plaintiff to shew that she dissented, and that she communicated her dissent promptly: *Elworthy* v. *Bird*, Tamlin, 38: *Furnival* v. *Bogle*, 4 Ross, 146. If Simpson acted without authority,—and that he assented to the arrangement, is clear from all the affidavits,—the plaintiff may have a remedy against him; but still the agreement must stand. The business of the courts could not proceed, if, after counsel has acted upon the faith of his attorney having authority, the want of such authority should be held to annul any act done by him in court. Upon the whole, it is submitted that no sufficient reason has been urged against the propriety of enforcing this rule in the usual way.

Cur. adv. vult.

CROWDER, J. This was a motion for an attachment against the plaintiff for contempt in disobeying a rule of court. A rule nisi having been granted, cause was shewn against it at the latter end of last Term, and on two successive days after Term. The case was argued before us at very great length, and the court took time to consider its judgment.

As I have the misfortune to differ from the opinion expressed by my learned Brothers when the former rule was discharged, and to which opinion they still adhere, I cannot but entertain serious doubts of the correctness of my own judgment. Nevertheless, I feel it to be my [394] duty to the litigant parties to deliver my opinion, together with the reasons on which it is founded.

Many points were made on behalf of the plaintiff in the course of the argument. But, as my opinion is in her favour upon the main point, it becomes unnecessary to pronounce any judgment upon the others.

The attachment is prayed against the plaintiff for not performing an agreement embodied in an order of nisi prius which has since been made a rule of this court. It seems to me that there is no sufficient proof of a valid agreement between the plaintiff and defendant to warrant the order of nisi prius, and that therefore the rule of court founded upon it cannot be enforced by attachment.

The order of nisi prius was made upon the trial of an issue directed by the Master of the Rolls, to try the validity of a will under which the plaintiff was devisee of an estate estimated by her of the value of 65,000*l.*: the defendant being the heir-at-law. The cause came on for trial at Stafford, on Saturday, the 15th of March, before my Brother Cresswell; and, after the examination of several witnesses on the part of the plaintiff, it was adjourned to the following Monday. On Monday morning negotiations took place in court, and an agreement was finally signed by the leading counsel on both sides, in the following words: "Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of incumbrances, if any, created since the death of Samuel Swinfen: such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity for life on the estate of 1000*l.* a year, inclusive of the 300*l.* a year already secured to her on the estate, also to date from Michaelmas, 1855. If any charge is existing on the estate, created prior to the death of Samuel Swinfen, the interest to be borne in equal moieties. Plaintiff's costs as between attorney [395] and client, not exceeding 1250*l.*, to be paid by defendant. Power to either party to make this agreement a rule of court. In the event of any question arising on the above terms, the same to be referred to Sir F Thesiger and the Attorney-General. The house and grounds to be occupied by the plaintiff, without payment of rent, till Michaelmas next." A juror was then withdrawn, and the cause terminated.

The plaintiff contends that this agreement was entered into by her counsel, Sir F. Thesiger, without her authority, and contrary to her instructions; and she refuses to perform it.

The defendant contends,—first, that Sir F. Thesiger had a special authority to make it on behalf of his client,—secondly, that, even if he had no special prior

authority, the plaintiff subsequently ratified the agreement, thirdly, that, independently of any special prior authority or subsequent ratification, Sir F. Thesiger had an implied general authority, arising from his position as counsel in the cause, to bind his client by that agreement.

After the fullest consideration of the affidavits, and of the arguments on both sides, I have not been able to satisfy my mind that the agreement can be supported on either of those grounds. I think, therefore, that the rule for an attachment ought to be discharged, and that the defendant should be left to such other remedies as are open to him. And I have the less difficulty in arriving at this conclusion, when I consider, that, by making this rule absolute, we should be finally concluding the question against the plaintiff, without appeal; whereas, by discharging it, we should be allowing the defendant, if so advised, to have the matter further investigated before a tribunal from whose decision an appeal would lie to the House of Lords.

First, as to the alleged special authority given to Sir **[396]** F. Thesiger, the case rests mainly upon the affidavits of the plaintiff, her attorney, and Sir Henry Durrant, on the one side, and the affidavits of all her learned counsel at the trial on the other.

Before adverting to the affidavits, I feel bound to express my decided reprobation of the unmeasured and unwarrantable language uttered by one of the learned counsel (Mr. Kennedy) who argued this rule for the plaintiff, against Sir F. Thesiger, directly charging him with the most dishonourable conduct. It is hardly necessary to say that such an unjustifiable attack could not have the slightest tendency to injure the well-established reputation of Sir F. Thesiger in the mind of the court: nor, indeed, could have any other effect than that of damaging its author. It is the unanimous opinion of the court that Sir F. Thesiger's honour remains entirely unsullied in this transaction.

Some discrepancies undoubtedly exist in the adverse affidavits, as might naturally be expected where the deponents are detailing conversations at several interviews, But, assuming, as I do, that Sir F. Thesiger's affidavit, and those of the learned counsel acting with him, are in all substantial particulars correct, I am by no means satisfied that any special authority was given, either by the client or her attorney, to enter into the agreement in question. As regards the plaintiff herself, it seems perfectly clear that she gave none. At a personal interview with her on Saturday, after the adjournment of the cause, a suggestion was made by her counsel that it would be prudent to put an end to further litigation, and to abandon her claim to the estate, if an annuity for her life could be obtained of 1000*l.* per annum. She took time to consider the proposition, and by electric telegraph on Sunday distinctly rejected it: and, from that time until her arrival in court on Monday morning, after the cause was at an end by the withdrawal of a juror, it **[397]** is not suggested upon any of the affidavits that any other communication was sent from the plaintiff herself, or that she had authorised her attorney to make any to her counsel. On the contrary, I think it is quite clear that she had not the most distant idea of acceding to any such terms, and that she came to Stafford with her witnesses on Monday morning with the sole intention of being present throughout the hearing of her cause, which was expected to last several days. But then it is said that her attorney, Mr. Simpson, authorised Sir F. Thesiger to make the agreement, which therefore bound his client. I am strongly disposed to think, that, after counsel has had a personal interview with his client for the express purpose of obtaining authority to compromise, on a given basis, to which the client has declined to assent, the counsel ought not to act, even upon the direct instructions of the attorney, if at variance with the client's expressed determination. And I do not find it suggested in any of the affidavits that the plaintiff was supposed to have given any fresh instructions to her attorney, or to have changed her mind since the transmission of the telegraphic message. Indeed, any such idea is negatived by that part of Sir F. Thesiger's affidavit which refers to the anxiety expressed by Mr. Simpson for the arrival of his client, which was shortly expected, on the Monday morning, before any arrangement should be finally concluded.

It appears to me also, from the affidavits of Sir F. Thesiger and Mr. Gray, another of the plaintiff's counsel, that, although Mr. Simpson sanctioned the negotiations for a compromise, he declined to authorise the agreement in the terms in which it was signed by Sir F. Thesiger. The facts appear to be these:—On the Monday morning, Sir F. Thesiger was put in motion by a communication from his attorney, Mr. Simpson, that a circumstance had come to his knowledge which made it **[398]** extremely

desirable, in his judgment, that the cause should be arranged. Sir F. Thesiger immediately called upon the defendant's leading counsel, and expressed his readiness to come to terms of settlement; and, at the sitting of the court, the negotiation was renewed, which terminated in the agreement in question. Mr. Simpson was fully aware of the steps which Sir F. Thesiger was taking, and was in court, and perfectly cognizant of the endeavours there making to effect an arrangement, on the basis of an annuity of 1000*l.* a year to the plaintiff, and the relinquishment by her of the estate. But it seems to me quite consistent with this state of things, that Mr. Simpson might have thought, that, on the arrival of his client, who was shortly expected in court, she would be induced to alter her mind by the representation to her of the circumstance which had led Mr. Simpson himself to deem a settlement extremely desirable,—not contemplating that the arrangement should be finally concluded without his client's sanction: and by no means intending to take the responsibility upon himself of giving instructions to counsel, against her express directions. Still, it may be a grave question whether Mr. Simpson, by his presence in court during the negotiation of counsel, and his tacit acquiescence, by offering no objection to it of which the opposite side could be aware, did not impliedly sanction the agreement, and so bind his client by it: for, neither his refusal to take upon himself the responsibility of the step, nor Sir F. Thesiger's expressed readiness to do so in conjunction with his learned friends, nor even Mr. Simpson's request to Sir F. Thesiger to wait for the arrival of his client, appear by the affidavits to have been known to the opposite party.

The dictum of Lord Lyndhurst in *Furnival* v. *Bogle*, 4 Russ. 142, was referred to on this part of the case, to the effect, that, if the attorney had been in court when [399] counsel concluded the arrangement made in that case, he (Lord Lyndhurst) should have held the client bound by it. As, however, the attorney was not in court, but only his clerk, no decision was necessary on that point; and the ultimate decision was, in fact, against the binding effect of the agreement, upon another ground.

Without deciding, therefore, conclusively that the agreement made by Sir F. Thesiger ought not to be held binding on the client by reason of the attorney's tacit acquiescence, I think it is sufficient to say that we ought not to grant an attachment for contempt against a party who under such circumstances refuses to perform it. Therefore, on the ground of any special authority given to Sir F. Thesiger either by his client or attorney, I do not see my way clearly to supporting the agreement.

Secondly, it is insisted that the conduct of the plaintiff after the termination of the cause amounted to a ratification of the agreement: and the correspondence between the attorneys on each side was referred to in proof of it, together with the fact that the plaintiff did not discharge her attorney, or in express terms inform the other side of her repudiation of the agreement until the month of June following the trial. But I do not find that the defendant's position has been at all altered by any thing which has occurred subsequently to the trial: and it certainly was not the intention either of the plaintiff or her attorney to ratify the agreement; but, on the contrary, they always considered it so prejudicial to the interests of the plaintiff that they intended by every means in their power to resist it. I think, therefore, that the agreement cannot be supported on the ground of ratification.

Thirdly, it is contended, that, without any special authority previously given, or any subsequent ratification, Sir F. Thesiger, by the mere relation of counsel to his [400] client, was invested with a general agency, and with power to bind her by any agreement he might in his discretion enter into on her behalf while conducting the cause in court.

It was assimilated in argument to the case of partners in trade, where a general agency arising from their relation as partners makes the acceptance of a bill of exchange by one binding upon the other, in favour of third parties, although, in the particular instance, the authority may have been expressly revoked. And it was further insisted, that, even if Mrs. Swinfen had come into court during the negotiation, and had expressly prohibited Sir F. Thesiger from proceeding, yet, unless she gave notice of her prohibition to the opposite party, she would have been bound by her counsel's signature to that agreement.

This introduces a question of very general and grave importance,—far beyond the particular merits of the present case. Is counsel in the position of an agent clothed with any such general authority to bind his client? I must own, that, in the course

of a somewhat long professional experience at the bar, I was never aware of the existence of such an extensive agency: and I was, therefore, much astonished at the proposition so broadly laid down by the counsel for the defendant in the course of the argument. We were not referred to any text book, antient or modern, in support of such a principle: nor to any positive decision in which such a doctrine has been established.

It is said that business could not be conducted in courts of justice, if counsel were not to trust each other as the authorised agents of their clients, and if the court were not to place implicit reliance on their acts. This is quite true with respect to all acts or admissions of counsel in the ordinary course of the conduct of a cause. He professes, in conducting a cause, to act entirely upon his [401] own judgment and discretion, uncontrolled by his client: and the client leaves the whole management of the cause to his counsel. But, where a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel then can only act, as I believe, under special instructions. Undoubtedly, by the courtesy of the bar, counsel in all cases repose entire confidence in each other as the authorised agents of their clients. When, therefore, opposing counsel confer together with a view to the settlement of a cause, each is supposed to act from his own client's express special authority, and each believes his opponent to be so acting. But I am not aware that any counsel engaged in making terms, ever supposed for a moment that his opponent had power to bind his client without express instruction. Each acts upon the assumption that his adversary has his client's special authority to enter into the arrangement, which otherwise could not be concluded. And the judge also presumes the special authority given, when he sanctions the drawing up of an order of nisi prius embodying the terms of the arrangement. If, therefore, in any such case, a counsel, under a misapprehension of his client's instructions, and, believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client.

When a litigant party in a cause intrusts his brief to a counsel, his object is to have the benefit of his advocacy, and not to employ an agent to negotiate terms of compromise. Taking the general rule laid down in Smith's Mercantile Law, 5th edit. p. 134, to be correct, viz. that "the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment" can it be said that it is part of counsel's usual employment, not only to plead the cause of his client in court, but to negotiate for the division of the property in dispute between the litigant parties? A client might think a particular barrister [402] an excellent advocate, and therefore employ him, but might have no confidence in his power as a negotiator of terms of compromise. And, taking the present case as an example, it would seem a strong thing to hold that counsel receiving a brief from the plaintiff in a feigned issue out of Chancery to try whether or not there was a valid devise of a large estate to her, has incidentally an implied authority to decide that his client shall agree to waive the question, and give up all claim to the estate, upon receiving a certain annuity for life.

We have been much pressed, in the course of the argument, with the serious consequences which may result to the opposite party from such engagements being avoided. But these are precisely such as may result in every case from the acts of unauthorised agents: for, the principal is never bound where the agent acts beyond the scope of his authority. Nor do I perceive the necessity of investing counsel with any such extensive agency: for, where a client wishes to give his counsel a discretionary power to compromise a cause, it is very easy to do so by special instructions: and, if the client gives no special instructions, it may fairly be assumed that he intends to give no power to compromise. But, if the law should be laid down, that counsel have, without special instructions, such a power vested in them, it will be necessary, in every case in which the client is determined to try his cause out, not only to give special instructions to his counsel to make no compromise, but also to notify to the opposite party that he has so done; or else to be personally present at the trial, in order to be ready at a moment's notice to withdraw his brief from counsel, and thus revoke his authority. This would surely be attended with much inconvenience, and would be alike disagreeable to counsel and client.

The case of *Filmer* v. *Delber*, 3 Taunt. 486, has been referred to, in which it was held that the attorney [403] had power to bind his client by an order of reference of nisi prius, without his assent, and even against his instructions. But the court there

said that the client has a remedy against his attorney for any injury resulting from his acting without authority. Lord Tenterden, however, in *Biddle* v. *Dowse*, 6 B. & C. 255, 9 D. & R. 404,—where the question was whether infants could be bound by the attorney's agreeing to refer,—seems to have carefully abstained from expressing any acquiescence in the decision of *Filmer* v. *Delber*: for he says,—"Admitting, for the sake of argument, but no further, that the consent of the attorneys of such of the parties in the suit as were adult, might be binding upon them," &c.; then deciding that the infants at all events were not bound.

Attorneys are responsible to their clients for negligence or unskilfulness; but no action lies against the counsel for his acts, if done bonâ fide for his client. In this respect, therefore, the counsel stands in a different position from the attorney: and it is every day's experience at nisi prius, for counsel, when pressed by the judge to refer a cause, to inform the court, that, in the absence of any instructions, he has no power to agree to a reference. And my firm conviction always was, and still is, that counsel is not justified in referring a cause against the client's consent: and that it is not within the scope of his authority. It has been thought by the legislature convenient for the due administration of justice that the presiding judge should have the power in certain cases to compel a reference of the whole or part of a cause (*a*). But, before the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), I apprehend no judge had power to insist upon a reference, and no counsel, without the consent of his client, had power to agree to one.

[404] The cases mainly relied upon as establishing the extensive general agency of counsel were, *Mole* v. *Smith*, 1 Jac. & W. 673, *In re Hobler*, 8 Beavan, 101, *Hargrave* v. *Hargrave*, 12 Beavan, 408, and *Furnival* v. *Bogle*, 4 Russ. 142.

Of these, *Hargrave* v. *Hargrave* most resembles in its circumstances the present case. A feigned issue had been there directed by the court of Chancery, to try the legitimacy of the plaintiff, and at the trial a juror was withdrawn, upon an agreement entered into by counsel on both sides, without the instructions of their clients, for the division of the estate between the litigant parties. This agreement could not have been enforced in Chancery if the fullest authority had been given, because of the plaintiff's infancy, and the consequent want of reciprocity. The petition to the Master of the Rolls only prayed that the defendant should elect whether he would abide by the agreement, and, if not, that he should pay the plaintiff's costs thrown away upon the abortive trial. There is, certainly, some language of Lord Langdale in that case extremely strong to support the view of counsel's implied authority to bind his client, with respect to third parties, by such an agreement: but the decision against the defendant proceeded mainly on the ground that the defendant actually consented to the agreement at one time, after it was made, though subsequently he determined to repudiate it; for Lord Langdale says, "From the affidavits, I cannot doubt, that, beyond the general authority which the defendant's counsel had, there was either previously or subsequently an adoption or consent to the terms by the defendant. It is expressly stated, and not denied by the defendant, that he did at one time consent to the terms, and that he afterwards refused to be bound by them." And the agreement was set aside, and a new trial granted, upon the terms of the defendant paying all costs. Had Lord **[405]** Langdale been quite satisfied that the general implied authority of counsel was sufficient of itself to bind the defendant, it would have been needless to refer to his consent, which in that view was quite immaterial.

The other cases seem to fall within the ordinary scope of counsel's authority at the Chancery bar, where parties to the suit are obliged to give their consent to many important matters, through their counsel, in open court. Thus, in *Mole* v. *Smith*, counsel consented to his client's accepting in lieu of dower what the court might think her entitled to out of certain purchase money. And Lord Eldon there said: "It is for Mr. Shadwell to consider whether he is authorised to give his consent for the widow. If he does, I must act upon it, and she will be bound by it." And so in the case of *In re Hobler*, 8 Beavan, 101, where a petition to tax a solicitor's bill had been dismissed without costs, by consent of the petitioner's counsel, a fresh counsel, on a subsequent day, applied to rescind the order, on the ground that his client had not authorised his former counsel's consent to the dismissal. Lord Langdale there said:

(*a*) See *Browne* v. *Emmerson*, 17 C. B. 361.

"The business of the court cannot proceed unless credit is given to the statements of counsel that they have authority for what they do. They must themselves judge of the extent of their authority, under the ordinary responsibility. The petition must be dismissed with costs." The consent to the dismissal of such a petition was in the ordinary course of the practice of the court. And, unless counsel's word were to be taken as conclusive in such matters, it would be impossible that the ordinary business of the court could proceed. But these cases seem to me to have no very strong bearing upon that now under consideration. In *Furnival* v. *Bogle*, where an agreement had been made by counsel, without the plaintiff's authority, that the defendant should take money out of court, the decision was in favour of the plaintiff, and the agreement [406] was annulled. The ground of the decision certainly was, that the counsel for the plaintiff had acted without a knowledge of all the facts essential to enable him to exercise a sound discretion for his client. This case, therefore, would seem to be no authority in favour of the defendant.

The facts not known to counsel in *Furnival* v. *Bogle* were, that the client had before rejected the very same proposition to which the counsel had agreed. And Lord Lyndhurst, adverting to that circumstance, says: "If Mr. Furnival had been in court when Mr. Sugden made his proposition, I have no doubt he would have prevented the arrangement from being acceded to. And, if the circumstances to which I have referred had been communicated to his counsel, they would not have assented to the order; for, it is quite impossible that they should have considered themselves justified in acceding, in the absence of Mr. Furnival and his solicitor, to the proposal of Messrs. Bogle, had they been aware that a similar offer had been before made to him, and rejected; that, upon its being renewed, he returned no answer, which amounted to a second rejection; and that he had desired the utmost activity to be used in order to prevent the money being taken out of court."

Now, it appears in the present case, that the plaintiff, before the commencement of the litigation, had rejected an offer much more advantageous in its terms than those contained in the agreement in question; and that she had refused again to entertain the proposition, when recommended to her by Sir F. Thesiger, after the adjournment of the cause on Saturday. It appears further, however, from Mr. Simpson's affidavit, that he had communicated to counsel the fact of his client's rejection of the former offer. In this respect, therefore, the present case differs from *Furnival* v. *Bogle*. But I think it may well be doubted whether Lord Lyndhurst would have [407] held Mr. Furnival bound by his counsel's agreement, if it had appeared upon affidavit that such agreement had been made with a full knowledge that it was in direct violation of his client's wishes and instructions, although with the honest intention of promoting his client's interests.

Lord Lyndhurst's decision, however, based as it is upon the counsel's ignorance of important facts, tends strongly to shew that he did not hold the client conclusively bound by the agreement of his counsel, upon the ground of general agency, and implied authority; for, had he so held, the counsel's knowledge or ignorance of any fact, however essential to guide his discretion, would be wholly immaterial in considering whether the agreement was binding upon the client in favor of the opposite party, who would not know what facts had been stated to the plaintiff's counsel.

The case of *Thomas* v. *Howes*, 2 C. & M. 519, was also cited on the argument, and claimed by each side as an authority in his favor. In that case, the power of counsel and attorneys to bind their clients was much discussed, and considered. But Mr. Baron Bayley in his judgment cautiously avoided defining the extent of that power. He refused the application of Lord Falmouth, which was, to set aside an order of nisi prius embodying counsel's agreement on his behalf, and the rule of court made thereon, on the ground of want of authority, but said, "If a distringas is applied for against Lord Falmouth, he may shew that he has given no authority to his attorney to enter into this arrangement; and, if so, it is probable that the court would decline granting a distringas, and leave the plaintiff to his remedy by action. If we were to interfere in a summary manner, we should be preventing the parties from taking the opinion of a jury on the facts, and of a court of error on the law."

Although the judgment of Mr. Baron Bayley has no [408] very strong tendency either to support or to invalidate the agreement in the present case, it is, I think, a cogent authority in favour of our discharging the rule for an attachment; as, by doing

so, we shall not preclude the defendant from endeavouring to establish the validity of the agreement in a court of law or equity, from whose judgment an appeal will lie to the highest tribunal.

I would only add, in conclusion, that I desire it may not be supposed from anything I have said, that I consider the plaintiff's counsel did not exercise a sound discretion for the benefit of his client, or that the agreement was not more advantageous to her than the continuance of a doubtful conflict, in which defeat would have been the loss of everything. But still I think she was entitled, if so minded, to have the issue which the Master of the Rolls had sent for trial, disposed of by the verdict of a jury.

CRESSWELL, J. The opinion expressed by my Brother Crowder in this important case, leaves my Brother Williams and myself no room for doubt as to the propriety of discharging the rule for an attachment; for it is impossible for us to treat the plaintiff as guilty of contempt for refusing to perform an agreement by which one member of the court thinks she is not bound. As the validity of that agreement must be discussed before another tribunal, we are anxious that the question should be as little prejudiced as possible by anything that passes in this court. We therefore abstain from discussing it further, and from noticing the affidavits which have been laid before us, except for the purpose of expressing our commiseration for the unfortunate condition of the mind of one who could for a moment imagine that there has been anything to warrant an impeachment of the honour of the distinguished advocate who was during the argu-**[409]**-ment so unsparingly, so unjustifiably, and so disgracefully attacked.

The rule will be discharged: but, inasmuch as we think no fault can be imputed to the party making the application,—seeing that he had no reason to doubt that the arrangement made at nisi prius was made with the full concurrence of the plaintiff,—we all agree that it should be discharged without costs.

Rule discharged, without costs(*a*).

EDWARDS *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. Jan. 29, 1857.

Service of a rule for an execution against a shareholder of a joint-stock company, must be personal, or by leaving it at his place of abode: delivering it to his attorney, though at his request, will not do.

Lush moved to make absolute a rule for execution against a shareholder in the Kilkenny and Great Southern and Western Railway Company. The rule had not been served personally on the shareholder: but, upon receiving notice of it, he referred to his attorney; and the attorney, receiving the rule, said that no cause would be shewn.

COCKBURN, C. J. The statute requires the rule to be served upon the party or at his place of abode. He has not been served; nor has any attempt been made to serve him; but his attorney has been served. It will not do.

The rest of the court concurring,

Rule discharged.

[410] IN THE MATTER OF THE COMPLAINT OF THE CATERHAM RAILWAY COMPANY AGAINST THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY AND THE SOUTH EASTERN RAILWAY COMPANY. Nov. 20, 1857.

[S. C. 26 L. J. C. P. 161. See *South Eastern Railway* v. *Railway Commissioners*, 1880-81, 5 Q. B. D. 238; 6 Q. B. D. 586; *R.* v. *Railway Commissioners and Distington Iron Company*, 1889, 22 Q. B. D. 655.]

The court refused to grant a writ of injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31, on the complaint of a company having a branch on a trunk-line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus, than they charged for the conveyance

(*a*) Proceedings to compel performance of the agreement are now pending in equity.

of passengers to the terminus of another branch line (in which they themselves were interested) extending over the same number of miles.—To constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the same line or the same portion of the line.—To induce the court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line do not stop at the junction, or stop at inconvenient times, it must be distinctly shewn that sufficient accommodation is not afforded to meet the fair requirements of the public.—It is no ground of complaint that the company working the main line refuse to grant third class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. But, semble that it is a good ground of complaint that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation.

The 2nd section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, enacts that "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals [411] which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

The 3rd section enacts that, "it shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England to Her Majesty's court of Common Pleas at Westminster, or in Ireland to any of Her Majesty's superior courts in Dublin, or in Scotland to the court of session in Scotland, as the case may be, or to any judge of any such court; and, upon the certificate to Her Majesty's Attorney General in England or Ireland, or Her Majesty's Lord Advocate in Scotland, of the Board of Trade, alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate to apply in like manner to any such court or judge; and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint; and, for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode, and by such engineers, barristers, or other persons as they shall think [412] proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and, if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this act, by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and injoining obedience to the same; and, in case of disobedience of any such writ of injunction or interdict, it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall

issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of 200l. for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict; and such moneys shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to Her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the court of session; and, in **[413]** any such proceeding as aforesaid, such court or judge may order and determine that all or any costs thereof or thereon incurred shall and may be paid by or to the one party or the other, as such court or judge shall think fit; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relative to the matter of any such inquiry, and to administer any such oath."

By the 4th section, the judges of the court of Common Pleas were impowered to make the rules and regulations necessary for carrying the act into effect. This was done by rules made in Hilary Term, 1854: see 15 C. B. 473.

And the 6th section enacts that no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner therein provided; but that nothing therein contained should take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

The Caterham Railway Company was incorporated in 1854, by the 17 & 18 Vict. c. lxviii., intituled "An act for making a railway from the London, Brighton, and South Coast railway to Caterham, in the county of Surrey." This railway, which commences at or near the Godstone Road Station of the London, Brighton, and South Coast railway, was opened on the 5th of August last for the conveyance of passengers from the Godstone Road Junction to Couldsdon, Warlingham, and Caterham.

Upon the opening of the Caterham railway, a table was issued, shewing the times of starting of the several trains running between London Bridge and Caterham in conjunction with the trains of the Brighton and the South Eastern railway companies. This table shewed trains running daily, as follows: Down trains, at 6.0 A.M., 9.30 A.M., 3.0 P.M., and 5.30 P.M.; and up trains at 6.15 A.M., 8.15 A.M., 9. 50 A.M., 3.15 P.M., 5.5 P.M., **[414]** 5.45 P.M., and 7.45 P.M. These several trains continued running down to the month of November, when a 6.45 A.M. down train was substituted for the 6.0 A.M. down train, and a 10.10 A.M. down train for the 9.30 A.M. down train, and an additional up train was granted, which arrived in London at 1.15 P.M., and certain alterations were made in the Sunday trains.

The South Eastern Railway Company are the proprietors of the main line between London and a point near New Cross; and the London, Brighton, and South Coast Railway Company are the proprietors of the rest of the line to the Godstone Road (or Caterham) Junction, the distance between London and the Caterham Junction being 13 miles, and the entire distance to Caterham 18 miles.

The charges fixed by the above-mentioned table as the daily fares for conveying the public over the London, Brighton, and South Coast, South Eastern, and Caterham lines, to and from Caterham and London, were,—single journey tickets, first class 3s. 4d., second class 2s. 10d., third class 2s. 1s., parliamentary 1s. 6d.: return tickets, first class 5s., second class 4s. 3d.

Sir Fitzroy Kelly, Q. C. (with whom was Wells, Serjt.), on behalf of the Caterham Railway Company, moved for a writ of injunction, under the 17 & 18 Vict. c. 31, commanding the London, Brighton, and South Coast Railway Company, and the South Eastern Railway Company to afford to the Caterham Ralway Company the same facilities as they afforded to the traffic on other branches on their respective lines, and to desist from giving any undue or unreasonable preference or advantage to or in favour of any other particular person or company, or any other particular description of traffic.

The motion was founded upon an affidavit of the secretary of the Caterham Railway Company, which, after [415] setting out the time-table above referred to, stated that the times for starting the trains, as shewn in the table, were very inconvenient, and the rates and fares excessive and unreasonable, and prejudicial to the interests of the Caterham Railway Company: That the charges fixed by the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company, as the daily fares for conveying the public over their said lines to and from Epsom and London, a distance of about 18 miles, were as follows: single journey, first class 2s. 6d., second class 2s., third class 1s. 6d.; return tickets, first class 3s. 6d., second class 2s. 9d., third class 2s.: That the excess of daily fares charged the public travelling on the Caterham railway by those companies, over the daily fares charged by them to the public travelling on the Epsom branch line was therefore as follows: — an excess of 10d. on the single journey in the first and second classes, and of 7d. in the third class, and of 1s. 6d. on return tickets by first and second class: [The affidavit then went on to shew similar excess of charges as compared with those on the Wimbledon branch]: That the said companies do not issue third class return tickets to and from Caterham and London: and that the non-issuing of third-class return tickets on their lines to and from Caterham and London, and the issuing of them on the Epsom and Wimbledon lines, was an unfair preference of the public travelling in third-class carriages to and from Epsom and Wimbledon, and a disadvantage to the public travelling in third-class carriages to and from Caterham: [The affidavit then proceeded to shew that the sums charged by the London, Brighton, and South Coast and the South Eastern railway companies, for single and return tickets, and also for annual or season tickets, to and from various other places on their respective lines, viz. Reading, Godstone, Shalford, Maidstone, and Tunbridge Wells, were considerably less in propor-[416]tion to the several distances than the sums charged to and from Caterham]: That the Caterham Railway Company, finding from experience of the working of the above time-table, that the accommodation afforded by the London, Brighton, and South Coast railway and the South Eastern railway companies, was altogether insufficient for the working of their traffic and the convenience of the public using their line, made repeated applications to both companies for alterations to be made in the times of trains stopping at the Caterham Junction, and for additional trains: That these applications were not acceded to by the company, save to a very inadequate extent: That the trains now stopping at the Caterham Junction on their journey to and from London, stop at times that are inconvenient to the public living in the Caterham and surrounding districts: That it is necessary for the convenience of the public, that additional up and down trains should stop at the Caterham Junction to deliver and take up passengers: That it is necessary for the due development of the Caterham railway, that facilities should be granted for passengers to travel to and from Caterham by excursion trains to various places on the London, Brighton, and South Coast railway and the South Eastern railway, and particularly to and from London: That application was accordingly made to the London, Brighton, and South Coast Railway Company, by the Caterham Railway Company, for such facilities, but that the same have not been granted by the said company to any beneficial extent: the result being, that, to the general public and excursionists, the Caterham railway and district are almost unknown: And that there is a very large amount of traffic lost to the Caterham line by such facilities not having been granted; large numbers of vans and private carriages conveying every week during the summer months to the Caterham district hundreds of people, the greater part [417] of whom, if proper accommodation were afforded at fair and reasonable rates, would travel by the said railway. The affidavit then set out a number of letters which had passed between the secretaries of the several companies as to the points in issue between them; and also shewed, that, though at every other junction on the lines a proper covered place was provided for the convenience of passengers waiting for trains, there was none at the Caterham Junction.

Enough, it is submitted, appears upon the affidavits to shew that the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company have been guilty of that which it was the express object of the statute to prevent. [Cresswell, J. Do any persons who desire to travel by the Caterham railway join in the application?] No: but the affidavits shew that many individuals who have travelled by it have sustained inconvenience. The main ground of com-

plaint is, the inequality in the amount of fares exacted by the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company, from persons travelling on the Caterham line, as compared with the charges for similar distances on other branches. For instance, the Brighton company, being proprietors of the Epsom branch, charge about one fourth more upon first and second class tickets for the journey from London to Caterham than they charge from London to Epsom, which is about the same distance, or a little more: and so in proportion for return tickets and season tickets. And this is one of the chief causes of injury to the Caterham line: and it is clearly an offence against the act, which prohibits the making or giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company," or the subjecting "any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or [418] disadvantage in any respect whatsoever." [Cresswell, J. The question you are calling on us to consider is, whether rival companies shall be allowed to compete with each other in the price of carrying passengers.] Not quite so. [Crowder, J. It is not denied that the same charge is made to every body who travels on the line from London to the Caterham Junction (*a*). Do you contend that the companies are bound to charge the same amount for similar distances on all parts of their respective lines?] The complaint is, that the particular charges are so apportioned as to place the Caterham Railway Company at considerable disadvantage in comparison with another company: and that the charges are excessive in themselves, and excessive in comparison with those made on other branches of the line similarly situated. The next ground of complaint is, that the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company refuse to allow certain trains to stop at the Caterham Junction, which are quite necessary for the convenience of persons travelling by the Caterham railway. [Cresswell, J. How is it sworn that the public sustain inconvenience from the non-stoppage of trains?] It is sworn distinctly that the trains now stopping at the Caterham Junction on their journey to and from London, stop at times that are inconvenient to the public living in the Caterham and surrounding districts; and that it is necessary for the convenience of the public that additional up and down trains should stop at the Caterham Junction. [Cresswell, J. That is a very general statement of the secretary's notion that the times and the number of trains are incon [419] venient.] It is rather of the times of stopping than of the insufficient number of trains that complaint is made. The other companies have no right, it is submitted, to prefer their own branch lines, and to refuse to afford equal facilities to the traffic on the Caterham branch. The third ground of complaint is, that the two companies named refuse to issue third-class return tickets to passengers to Caterham. And the last ground is, that, although a proper covered place of waiting is provided at every other station or junction on the line, none is provided for the Caterham passengers: as to which the affidavits shew that numerous complaints have been made of the inconvenience and annoyance thereby sustained.

CRESSWELL, J. By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who are engaged in carrying on railway concerns; and therefore the court should be very cautious, before they set on foot an inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed. Four several grounds of complaint have been urged in this case. The first is, that the companies against whom the application is directed make unequal charges to persons travelling along their lines to the Caterham branch. It does not, however, appear that there is any inequality of charge to persons using the same portion of those lines: and it is not sufficient to shew an inequality as compared with the rates charged on another line. The words of the 2nd section of the act are, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person [420] or company, or any particular description of traffic, to any undue or unreasonable

(*a*) The only persons so travelling in all probability are the very persons on whose behalf the Caterham Railway Company make the application, viz. those intending to proceed on their branch.

prejudice or disadvantage in any respect whatsoever." I apprehend that it cannot be said, that, because persons may travel between London and Epsom at a less rate than they can between London and Caterham, any undue or unreasonable preference or advantage is given, or any undue or unreasonable prejudice or disadvantage imposed. I can see nothing upon the affidavits to shew that any undue preference has been given to any particular person or company. All persons, it appears, who come from London to Caterham are charged alike. The second ground of complaint is, that a sufficient number of trains are not allowed to stop at the Caterham Junction, or that the times of stopping are inconvenient. It does not appear from the affidavits that there is any other station of a similar character on the same line, the traffic to which is of the same sort, where greater facilities are given. I therefore think that the applicant has not made out a case of undue or unreasonable prejudice or disadvantage in that respect, and consequently there will be no rule on that ground. The third ground of complaint is, that the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company refuse to grant third-class return tickets to Caterham. It appears, however, by the time-bills referred to in the affidavits, that third-class return tickets are not granted to any place on the line below Croydon. That ground, therefore, also fails. But, with respect to the last ground of complaint, viz. the absence of a convenient covered station at the Caterham Junction, so that persons waiting for trains are exposed to the weather, inasmuch as it appears that there are covered stations at all other places on the line, I think the absence of such accommodation at the Caterham Junction subjects persons travelling on the Caterham line to undue inconvenience and disadvantage, and therefore as to that the rule should go.

[421] WILLIAMS, J. I am of the same opinion. As to the first point, it seems to me that no case of undue or unreasonable preference or advantage in favour of any particular person or company is made out because passengers are carried at lower rates on other branches on the same lines. If it could be distinctly shewn that the excess of charge on the Caterham branch was owing to a design on the part of the other companies to exclude the Caterham Railway Company from the benefits to be derived from the use of their lines, that would bring the case within the act. But no such case has been made out. As to the second point, I agree with my Brother Cresswell in thinking that no materials are before us to enable us to say whether or not more trains are necessary for the convenience of the public. That must depend upon the amount of population and a variety of circumstances which are not presented to us. Whether or not the London, Brighton, and South Coast Railway Company and the Eastern Counties Railway Company could reasonably be expected to stop their trains more frequently, or at other times, at the Caterham Junction, is a question which obviously must depend upon the profits likely to be realised by it. No sufficient materials are before us to enable us to come to any conclusion upon the matter. As to the third-class return tickets, if it had appeared that the companies had been in the habit of granting third-class return tickets to other places on their line beyond Croydon, and refused to grant them to Caterham, there might be ground of complaint. But the fact appears to be otherwise. The rule will, therefore, only be granted as to the last ground of complaint which has been urged, viz. the want of proper station accommodation at the Caterham Junction.

CROWDER, J. Upon the first three points I agree with my Brothers Cresswell and Williams that there is no case **[422]** made out. The meaning of the act, as it seems to me, is, that railway companies shall so conduct their traffic that no undue preference shall be given to, and no undue prejudice imposed upon, any particular person or company, and that these words refer to persons and companies using the line from the same point of departure to the same point of arrival: and, when we find the same rate charged to every person travelling on the same portion of the line, I think the act does not apply. With respect to the number of trains, and the times of stopping, there is nothing in the affidavits to shew that the companies have been guilty of any impropriety. It might be, and that, I think, would be ground for our interference, that sufficient accommodation is not afforded to meet the fair requirements of the public. But, no such case is made out upon the face of these affidavits. As to the third-class return tickets, the answer is, that, below Croydon, none are issued. With respect to the want of shelter from the weather at the Caterham Junction, I think that is a withholding a "reasonable accommodation" to which the public are entitled.

WILLES, J. I am of the same opinion. The jurisdiction given to this court by the statute in question is one which the court ought not to exercise without being satisfied that there exists some serious public inconvenience. The concluding words of the 2nd section shew that it was the intention of the legislature in passing the act to provide a means of enforcing reasonable accommodation on the part of railway companies to the public.

Rule granted accordingly (*a*).

[423] IN THE MATTER OF THE COMPLAINT OF JOSEPH MORTON BARRET AGAINST THE GREAT NORTHERN RAILWAY COMPANY AND THE MIDLAND RAILWAY COMPANY. Jan. 20, 1857.

[S. C. 26 L. J. C. P. 83. See *In re Boadell Eastern Counties Railway*, 1857, 2 C. B. N. S. 511.]

To justify the interference of the court to enforce the running of through trains on a continuous line of railways, under the second branch of the 17 & 18 Vict. c. 31, s. 2, it must be shewn that public convenience requires it, and that it can reasonably be done. They will not interfere, at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route,—no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation.

Welsby, in Michaelmas Term last, on behalf of Joseph Morton Barret, obtained a rule to shew cause "why a writ or writs of injunction should not issue against the Great Northern Railway Company and the Midland Railway Company, respectively, injoining them to cause trains to run from their respective stations at Leeds, in the county of York, southwards to the terminus of the Great Northern railway at King's Cross, in the county of Middlesex, and northwards to the terminus of the North Western railway at Lancaster, by which passengers arriving at Leeds aforesaid from King's Cross, or from any other station on the Great Northern railway, on the south, or from Lancaster or any other station on the North Western railway, or on the Midland railway, on the north, and desiring to proceed from Leeds aforesaid to Lancaster or to any other station on the North Western railway, or on the Midland railway, on the north, or to King's Cross, or any other station on the Great Northern railway, on the south, may be forwarded from Leeds aforesaid without any unreasonable prejudice or disadvantage."

The application was stated to be made by the direction of the Board of Trade, for the purpose of taking the opinion of the court as to whether railway companies are compellable to book through traffic in all cases where their railway with those of other companies form one continuous line of communication; and it was found **[424]** ed upon an affidavit of the applicant himself, who deposed, in substance, as follows:—

That he has frequent occasion to travel between London and Leeds and Lancaster and the intervening towns: That he had occasion, on Friday, the 4th of July last, to travel between London and Settle, one of the towns upon the North Western railway between Leeds and Lancaster: That the said North Western railway is worked by the Midland Railway Company: and such North Western railway has its southern terminus between Settle and Leeds, at Skipton, in Yorkshire: That the Midland railway extends from Skipton to Leeds, and from Leeds the same Midland railway extends on the one hand to Rugby, where it joins the London and North Western railway, which extends from Rugby into London, having its station at Euston Square; and, on the other hand, the same Midland railway extends from Leeds to Methley, where it joins the North Eastern railway; and such North Eastern railway extends from Methley to Askern, in Yorkshire, where it joins the Great Northern railway; and

(*a*) The rule was not drawn up; the Caterham Railway Company considering that the single point upon which they had succeeded in obtaining the rule was not worth the contest; and the other companies not being unwilling to provide the accommodation which the court thought ought to be provided.

such Great Northern railway extends from Askern to London, where it has its station at King's Cross: That the line of railway from Settle, through Skipton, Leeds, Methley, and Askern, to London, is a continuous line: That the Great Northern Railway Company work continuous trains from King's Cross, in London, over their own line, over the North Eastern railway from Askern to Methley, and over the Midland railway from Methley into Leeds: That the said line from Settle, through Skipton, Leeds, and Rugby, to London, is also a continuous line, and continuous trains are worked by the London and North Western Railway Company from the Euston Square station in London to Rugby, and by the Midland Railway Company from Rugby to Settle: That the length of the said route from King's Cross, in London, to Settle, is 19¼ **[425]** miles shorter than the said route from Euston Square station in London to Settle: That, on Thursday, the 3rd of July last, the deponent wrote and sent the following letter to the secretary of the Great Northern Railway Company:—

"Sir,—I beg to give you notice, that, considering the railway companies under the Railway and Canal Traffic Act, 1854, as regards traffic intended to pass over more than one line of railway, are bound to book through, in any case where their railways form part of a continuous line, so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, I shall to morrow demand to be booked by the train leaving King's Cross station at 9.30 A.M. through to Settle, in Yorkshire, to which place your railway and those of the Midland and North Western companies form a continuous line of communication. I beg further to state, that, in case you should refuse so to book through, it is my intention to apply to Her Majesty's court of Common Pleas at Westminster for such remedy in that behalf as is provided by the said act."

That, on Friday, the 4th of July last, about 9.20 A.M., the deponent went to King's Cross station, and applied at the railway booking-office, to the clerk in charge there, demanding a ticket which would enable him to pass by the Great Northern railway through to Settle, in Yorkshire, by the express train then about to leave London at 9.30: and he offered to pay for such ticket: That the clerk, in answer to his application, said "We do not issue tickets to Settle, but only to Leeds and Bradford in that direction:" That the deponent then took a ticket by the said train to Leeds, which is the furthest point upon the said route to which the Great Northern company work, and arrived at the Leeds station at 2.30 P.M. of the same day: That, on his arrival, he inquired of the Great Northern officers, at their said station, **[426]** whether there was any train on to Settle, and was informed, as he believed the fact to be, that there was no such train, but that such trains only ran from the Midland station: That he then went to the Midland station in Leeds, to meet the next train to Settle, which started at 5.30 the same afternoon, booked himself to travel by such train, and arrived at Settle at 7.45 the same evening: That, if the train by which he travelled from London to Leeds had passed continuously from London to Settle, and travelled at the same rate at which it had passed from London to Leeds, the deponent would have arrived at Settle at about 3.45 on that afternoon, but, by the interruption of the journey from the want of such through train, he lost on his said journey about four hours.

[The affidavit then stated that a similar application was made on the 7th of July, for a through ticket by the 12.45 P.M. train from Settle to King's Cross, by the Midland, Great Northern, and North Western railways, and a refusal on the same ground, but an offer to book the applicant through to Euston Square. It then proceeded,—]

That, finding he could not procure a through ticket to King's Cross, the deponent took a ticket to Leeds, and travelled by the train leaving Settle at 12.45 P.M., and reached Leeds about 2.59 in the afternoon of the same day: That he was set down at the Midland station at Leeds, where he was informed and believed a train was waiting to carry passengers on to Euston Square: but he found no train going on to King's Cross; and he was obliged to go, and accordingly went, to the Great Northern station, which is about a quarter of a mile lower down the same street, and took a ticket for the first train going on to London, which left Leeds at 4.10 in the afternoon: That the deponent had then to stay in Leeds about an hour and twenty minutes between the arrival **[427]** of the train from Settle and the departure of the train for London; and he arrived in London that evening by such train, which is due at King's Cross about 9.30: That, although the Midland and Great Northern stations at Leeds are

distinct, yet the Midland railway trains, in working from Settle into their own station in Leeds, pass by the entrance lines of the Great Northern station, and the Great Northern railway trains, in working from their station at Leeds to London, pass by the entrance lines of the Midland station; consequently there would be no difficulty whatever in the transfer of passengers, if the trains of the Midland Railway Company and the Great Northern Railway Company worked to the stations of each other: And that the route by the Great Northern line from Leeds to London is 19¼ miles shorter than the route by the Midland line to London; and, if the deponent had travelled from Leeds to Euston Square, he must have passed over that greater distance.

CRESSWELL, J. As we are told that this motion is made with a view to some future legislation upon the subject, I think we ought to grant the rule. But I cannot help thinking that the applicant puts his case upon a very narrow ground. The grievance complained of is, that he waited at Leeds two hours and a half for the purpose of saving 19¼ miles of railway travelling.

Sir Fitzroy Kelly, Q. C., Mellor, Q. C., and Phipson, now shewed cause on behalf of the Midland Railway Company, upon an affidavit of the general manager of that company, which stated, -That the Midland railway extends from Rugby to Leeds, and thence northwards to Skipton, where the North Western railway commences, and extends through Settle to Lancaster: That, in Leeds, there are two separate and distinct stations, at a distance of about a quarter of a mile from each other,—one, [428] called the Wellington station, belonging to and used by the Midland Railway Company, the other, called the Central station, belonging in part, with the lines of approach thereto, to the Great Northern Railway Company, and used by them; but neither of the said last-mentioned companies has any power to use the station of the other in Leeds: That, between London and Leeds, there are two routes, one, from the Wellington station of the Midland railway, thence by way of the Midland railway to Rugby, and thence by the London and North Western railway to Euston Square station,—and the other of such routes from the Central station of the Great Northern Railway Company at Leeds, thence southwards over the Midland railway as far as a place called Methley, thence over a part of the Lancashire and Yorkshire railway from Methley to a place called Askern, and thence by the Great Northern railway to the King's Cross station in London; and over the first of such routes passengers are carried by the Midland and London and North Western railway companies; and over the last of such routes passengers are carried by the Great Northern company, who for that purpose run over the lines of the Midland company between Leeds and Methley, and the line of the Lancashire and Yorkshire company between Methley and Askern. [The affidavit then verified the books containing the different time-tables, and then proceeded]: That the Midland Railway Company have no power whatever to use the station of the Great Northern Railway Company at Leeds, or any part of the said Central station there: That the Great Northern and Midland railway companies are to a great extent rival and competing companies; and the two routes between Leeds and London, by Rugby on the one hand, and by Askern on the other, are rival and competing routes: That, although the distance between Leeds and London is shorter by the [429] Great Northern to King's Cross than by the Midland route to Euston Square, yet, in the month of July, the fares for passengers were the same by both routes: That, if Barret had proceeded from Settle to London on the 7th of July mentioned in his affidavit, direct by the route of the Midland and London and North Western lines to Euston Station, he would have arrived there at about 9.30 the same evening; and, if he had proceeded from London to Settle on the 4th of July mentioned in his affidavit, by the route last mentioned, he might have remained in London till 11 45 A.M., and still have arrived at Settle at the same time as he arrived there by leaving the Great Northern terminus in London at 9.30: That the Midland Railway Company work the line of the North Western railway under an arrangement by which a certain amount is secured to the North Western Railway Company; and the Midland company have, as it was their interest to do, used their best endeavours to accommodate and develope the traffic on the North Western railway: That the traffic on the North Western railway is comparatively very small; being chiefly short traffic of a local nature, and very little of it being through traffic to London: That the trains on the North Western line, as well as those on the Midland line itself, are fixed with reference to the convenience of the public generally using those lines of communication; and it is a matter of great difficulty, and requires the greatest consideration, especially

with a view to the great number of junctions with other lines, to adjust their times of departure and arrival, and to fix the different stations at which they shall stop, so as to afford the greatest amount of convenience on the whole to the public generally: That, in fixing the times for the arrival and departure of the trains, and conducting the traffic on the Midland railway, and on the North Western railway, no undue or unreasonable preference [430] or advantage has been given to any particular person or company; but, on the contrary, all due and reasonable facilities have been given for receiving and forwarding all the traffic which has arrived or been presented: That no complaint had ever been made, till that of Barret, with regard to the time of starting or arrival of any of the trains on the North Western railway, or otherwise with regard to the traffic passing between London and Settle, or any other part of the North Western railway: That, in what is called booking through, the company issuing the ticket is understood to be answerable to the passenger for the whole journey, and for any damage or loss that may occur on any part of the journey, whether on the line of that company or on the line of any other company over which he is to travel; and that, however this system may be practicable between lines working together, and having similar interests, yet it is in its nature totally inapplicable to the case of rival and competing companies whose interests are adverse: That, although the line of railway from Settle, through Skipton, Leeds, Methley, and Askern, to London, might be said to be (physically speaking) continuous, there is not any station, nor any convenience or means whatever of transferring passengers from the line of the Midland company to the line of the Lancashire and Yorkshire company at Methley, where the line of the Midland company in the direction of Askern ceases: That, with reference to the complaint of Barret, that, on arriving at the Midland station at Leeds, on the 7th of July, he found no train going to King's Cross, the deponent said that the Midland company had no power to run a train from Leeds to King's Cross station: And that he did not believe that the application was bonâ fide for the remedy of a real grievance under the act, but was made for an indirect object.

This is not a bonâ fide application: nor is any such [431] public grievance shewn as to justify the interference of the court. In the first place, this is not a case within the act at all: and, if it were, the demand of the applicant is one which cannot reasonably or properly be complied with. The 2nd section of the act consists of two branches (*a*): The first branch is directed against the giving of undue or unreasonable preference or the imposition of undue or unreasonable prejudice. The second branch provides that every railway company having or working railways which form part of a continuous line of railway communication, or which have the terminus or station of the one near (*b*) the terminus or station of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf. Has the complainant here made out a fair case of unreasonable delay? His complaint is, that, wishing to proceed from London to Settle, he went to the King's Cross station of the Great Northern Railway Company, and demanded a through ticket by the 9.30 A.M. train: that, failing to obtain it, he was compelled to content himself with a ticket to Leeds, where he arrived at 2.30 P.M.; that, arrived at Leeds, he was obliged to proceed from the Great Northern station there to the Midland station, and was unable to start for Settle until 5.30, and consequently did not [432] reach his destination until 7.45. He demands that which he knows the company had no power to give him. If he had chosen to go to the Euston Square station of the North Western railway, he might have obtained a through ticket for Settle, by the London and North Western and Midland lines, at 11.45 A.M., and would have arrived at Settle much earlier than he did, viz. at 5.45 P.M. Is it to be said that any one of the public may at his pleasure call upon a railway company to put on a through train, and grant through tickets from any one place on their line to any other place in England or

(*a*) See the section, ante, p. 410.

(*b*) Not exceeding a mile, such stations not being situate within five miles of St. Paul's church, London: see s. 1.

Scotland which may be reached by a continuous line? These companies are to exercise their powers under the various acts of parliament regulating them, for the general benefit of the public: but they cannot be called upon to do anything which is beyond the scope of those powers. [Cockburn, C. J. The applicant must, of course, make out a case of public inconvenience arising from the want of through trains; a mere private and personal inconvenience will not do.] No one complains but Mr. Barret; and his complaint is answered. The Great Northern Railway Company, who are the parties the most deeply interested, do not complain: on the contrary, they join in the opposition to this rule.

Denison, Q. C., and R. Clarke, shewed cause on behalf of the Great Northern Railway Company, upon an affidavit by their general manager, which stated,—That the main line of the Great Northern railway extends from King's Cross, London, to York, in one direction, and to Leeds, Bradford, and Halifax in another: that the Great Northern line proper finishes at Askern, four miles north of Doncaster, but, from that point, the Great Northern company have running powers over the Lancashire and Yorkshire line to Knottingley, and thence by the North Eastern railway to York, and by the Midland line to [433] Leeds: That, by arrangements made by the Great Northern, the North Eastern, the North British, Edinburgh and Glasgow, Scottish Central, and Scottish North Eastern railway companies, the trains of the Great Northern company are timed so as to run in connexion with the trains of the said other companies through from London to Aberdeen, and vice versâ, and from Knottingley to Leeds, Bradford, and Halifax: That the North Western line between Kirby Lonsdale and Low Gill on the Lancaster and Carlisle railway, has never been constructed, although authorised by parliament: That the North Western railway is an incomplete line, producing very little traffic, and is now worked as a mere branch of the Midland railway between Leeds and Settle and Lancaster: That the Great Northern company would be willing to time their trains at Leeds so as to receive the traffic from the North Western railway, but it is impossible to do so without a re-arrangement of the trains of the North Eastern, the North British, the Edinburgh and Glasgow, the Scottish Central, and Scottish North Eastern companies, none of which companies are before the court on this rule: That the deponent was informed and believed that the said North Western Railway Company applied to parliament in the last session, to obtain running powers over the Midland (Leeds and Bradford) railway, the Lancaster and Carlisle railway, the Caledonian railway, and the Leeds Central railway station, and the several lines of approach thereto; and that the said several railway companies over whose lines running powers were sought appeared before the parliamentary committee of the House of Commons, to whom the said bill was referred, and strenuously opposed the powers thus sought to be obtained; and that, after a very protracted discussion, the committee reported against granting the running powers sought to be obtained, but intimated their opinion in favour of facility clauses being [434] granted over the Lancaster and Carlisle, the Caledonian, Glasgow and South Western, Midland, and Great Northern railways; and the deponent was informed and believed that facility clauses were accordingly prepared by the promoters of the said bill; and that, upon application being made to the standing orders committee to dispense with the standing orders, the application was opposed by some of the said companies other than the Great Northern, and the standing orders committee refused to dispense with the standing orders; and that the bill was accordingly not proceeded with: And that the deponent was informed and believed that the said North Western Railway Company have given notice of their intention to apply to parliament in the ensuing session for powers to extend their railway to a point on the Lancaster and Carlisle railway: but, in the event of this application being granted, the North Western railway cannot be made a line for through traffic between London and Scotland, viâ the Great Northern railway, without some legislative provision binding on all the other companies whose lines constitute a part of the route.

Byles, Serjt., and Welsby, in support of the rule. The companies are bound, where their railways form part of a continuous line of communication, so to conduct their traffic that no unreasonable delay or obstruction may be offered to the public desirous of using such railways as a continuous line of communication. The complaint is, that there is no through train to Settle by the shortest route; and the consequence is, that persons desiring to proceed by that route are compelled to wait two hours or two hours and a half at Leeds. It is no answer to that complaint, to shew that a hostile company

has a train which does not correspond with that by which the complainant wished to travel. [Cresswell, J. I doubt whether that which is asked would be reasonable if the whole [435] line from London to Settle was in the hands of one company. Much less would it be so where the line belongs to two or more companies.] To justify the court in enforcing the provisions of this act, it is not necessary that any individual grievance should be specifically brought before them: it is enough to bring forward a state of facts shewing a real and substantial cause of complaint.

Cockburn, C. J. I am of opinion that no case has been made out by the complainant for the interposition of the court, and consequently that the rule should be discharged. I agree, that to justify a party in calling upon the court to enforce the provisions of this act, it is not indispensably necessary to shew a case of individual grievance: but it is clear that a case of public inconvenience must be made out. It does not appear, even upon Mr. Barret's affidavit, that there is any complaint of a want of sufficient accommodation on the part of the public: and it is clearly shewn by the affidavits filed in opposition to the rule that no complaints have been made. I can quite understand that two competing companies may so arrange the departures and arrivals of their respective trains as to operate injuriously to the shorter line, and inconveniently to the public. In such a case, the court would be justified in interposing under this act. But it appears here that abundance of accommodation is provided on the Midland line; and, though the distance travelled over is somewhat longer, no additional cost is incurred, nor any materially greater loss of time sustained by the public. And one very striking fact is, that the Great Northern Railway Company, the parties by far the most likely to be injuriously affected by it, so far from complaining, are satisfied with the arrangement existing, and appear by their counsel to oppose the rule. I think we must discharge the rule, with costs.

[436] Cresswell, J. I am entirely of the same opinion. The complainant has totally failed to make out anything like a case of want of reasonable accommodation. In considering what is a reasonable amount of accommodation, regard must be had to the convenience of the general traffic of the company. I am of opinion that the applicant has failed to make out a case of want of reasonable accommodation.

Williams, J. I also think that we can only be justified in interfering where it is made out to our satisfaction that the public convenience requires it. The affidavit of the applicant shews very slender grounds for the rule: and the affidavits filed in opposition to the rule entirely remove all shadow of pretext for the motion. If the complainant had satisfied me that public convenience did really require that which he asks, and that the accommodation sought could reasonably be granted, I should have paused considerably before I assented to the rule being discharged. But this he has altogether failed to do.

Rule discharged, with costs.

[437] In the Matter of the Complaint of Frederick Ransome and John Bradly Geard against the Eastern Counties Railway Company. Jan. 29, 1857.

[S. C. 1 Rly. & Can. Ca. 63; 26 L. J. C. P. 91; 3 Jur. N. S. 217. For subsequent proceedings between the same parties see 4 C. B. N. S. 135; 27 L. J. C. P. 166; 8 C. B. N. S. 709. See *In re Orlando*, 1857, 1 C. B. N. S. 454; *In re Harris and Cockermouth Railway*, 1858, 3 C. B. N. S. 711; *Great Western Railway* v. *Sutton*, 1868-69, L. R. 4 H. L. 226; *Budd* v. *London and North Western Railway*, 1877, 36 L. T. 804; *Toomer* v. *London, Chatham and Dover Railway*, 1877, 2 Ex. D. 156; *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Railway*, 1885, 11 App. Cas. 121; *R* v. *Railway Commissioners and Distington Iron Company*, 1889, 22 Q. B. D. 655; *Liverpool Corn Trade Association* v. *London and North Western Railway*, [1891] 1 Q. B. 120; *Phipps* v. *London and North Western Railway Company*, [1892] 2 Q. B. 246.]

In dealing with the first branch of the 17 & 18 Vict. c. 31, s. 2, which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic, or subjecting any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, the fair interests of the company

are to be taken into the account. -A railway company made an agreement with A. to carry for him a large quantity of coals during three years from Peterborough to various places on their lines of railway, at certain rates.—B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway; and the company charged him a much larger sum per ton in proportion to the distance over which his coals were carried, than they charged to A., the professed object of the difference being, to enable A. (whose coal came to Peterborough by railway) to compete in the coal trade of the district with B., who had the advantage of having his coals brought to Ipswich by sea:—Held, that this was giving an "undue preference" to A.—Quære, whether a railway company may not charge different rates, where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, and where one party provides his own waggons and the other uses those of the company? See *In re Oxlade*, post, p. 454.

T. Jones, in Trinity Term last, on behalf of Messrs. Ransome & Geard, obtained a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of injunction should not issue against them, injoining them, first, to desist from charging to the complainants for the carriage of coals on their railways called the Eastern Counties Railway, the Eastern Union Railway, and the Newmarket Railway, any greater sum per ton per mile than was charged by the said company to Messrs. E. & A. Prior & Co., secondly, to desist from charging to the complainants any greater sum per ton per mile for the carriage of coal on the said railways than they charged to persons with whom they had private agreements for the carriage of coals on the said railways, thirdly, to desist from giving any undue preference or advantage to or in favour of Messrs. E. & A. Prior & Co., or any other person, for or in respect of the carriage of coals on the said railways: and why the company should not pay the costs of the application

[438] The affidavit upon which the rule was obtained, stated, that the complainants were dealers in coals at Ipswich, Bury St. Edmunds, Thurston, and Elmeswell, in Suffolk, at Diss, in Norfolk, and at Mellis, Stowmarket, Needham Market, and Hadleigh, in Suffolk, and at Colchester, in Essex, and at other towns and places in the neighbourhood of those places: That the Eastern Counties railway commences at London, and proceeds thence to Colchester, where it joins the Eastern Union railway, which last-mentioned railway proceeds thence to Hadleigh, Ipswich, Needham Market, Stowmarket, Mellis, Diss, Elmeswell, Thurston and Bury, where it joins the Newmarket railway, which proceeds thence to Newmarket and Cambridge, where it joins another portion of the Eastern Counties railway, and then proceeds to Ely and Peterborough, where it joins the Great Northern railway: That the Eastern Counties Railway Company have a lease for ninety-nine years of the Eastern Union and Newmarket railways, or have an agreement with those companies whereby the working and management of their railways is entirely under the control and direction of the Eastern Counties Railway Company, or the said Eastern Counties Railway Company have now by some other ways or means the possession of the said Eastern Union and Newmarket railways, or have the full power and control over or management of the traffic conveyed or carried on the said railways, or either of them; and the same are now generally designated and known, for the purposes of traffic, as the Eastern Counties Railway (*a*): That the coal in which the complainants trade is principally derived from the collieries in Durham and Northumberland, and is brought from thence to Ipswich by sea; and the only mode in which the complainants [439] are able thence to convey such coal to their customers in Hadleigh, Needham Market, Stowmarket, Elmeswell, Thurston, Bury, Mellis, and Diss, and such other neighbouring towns and places as aforesaid, is by the Eastern Counties railway: That the Eastern Counties Railway Company make and give an undue and unreasonable preference or advantage to or in favour of particular persons or companies or merchants trading or trafficking on the said lines of railway in a similar description of goods to those in which the complainants trade; and the company subject the complainants and

(*a*) Worked under (amongst others) an agreement of the 6th of February, 1854, confirmed by an act of 17 & 18 Vict. c. cexx.

their goods or traffic to an undue and unreasonable prejudice or disadvantage in respect thereof: That the Eastern Counties Railway Company charge the complainants and other merchants dealing in coal, for toll for the conveyance or carriage of their coal on the said railways 2d. and 2½d. per ton per mile, and charge Prior & Co., who are coal-merchants trading under the name or style of the Norfolk and Eastern Counties Coal Company, and who deal in coal at Colchester, Hadleigh, Needham Market, Stowmarket, Elmeswell, Thurston, Bury, Mellis, and Diss, and at other neighbouring towns and places, for toll for the conveyance or carriage on the said railways of the same description of coal produced from the said collieries, from ⅜ of a penny to ¾d. per ton per mile only: That the Eastern Counties Railway Company have entered into private contracts or agreements with particular persons or companies trading in coal on the said lines of railway, and particularly with Prior & Co., for the conveyance or carriage of the coals of such particular persons or companies on the said railways, at a less rate per ton per mile than the said company charge the complainants and other merchants who may not have such private agreements for the carriage of their coal on the same portions of the said railways: [The affidavit then proceeded to specify particular inequalities of charge, shewing that **[440]** the company charged the complainants the following rates of toll for carrying coals from Ipswich to the several places following,—to Bury St. Edmunds (27½ miles), 3s. 6d. per ton; to Thurston (23½ miles), 3s. 1d. per ton; to Elmeswell (19 miles), 2s. 10d. per ton; to Diss (27½ miles), 3s. 6d. per ton; to Mellis (24 miles), 3s. 1d. per ton; to Stowmarket (13¼ miles), 2s. 7d. per ton; to Needham Market (9¾ miles), 1s. 10d. per ton; to Hadleigh (13 miles), 2s. 2d. per ton; to Colchester (18 miles), 2s. 11d. per ton (*a*): and that they charged to Prior & Co. for the carriage of coals from Peterborough to the same places, at the following rates,—to Bury St. Edmunds (74 miles), 5s. per ton; to Thurston (78 miles), 5s. per ton; to Elmeswell (83 miles), 5s. per ton; to Diss (98 miles), 5s. per ton; to Mellis (95 miles), 5s. per ton; to Stowmarket (88 miles), 4s. 6d. per ton; to Needham Market (92 miles), 4s. 6d. per ton; to Hadleigh (113 miles), 4s. 8d. per ton; to Colchester (117 miles), 4s. per ton (*b*)]: That the said company in other respects made and gave undue preference or advantage to or in favour of the said Messrs. Prior & Co., or other persons with whom they had private agreements for the carriage of coals, and subjected the complainants and their said traffic in other respects to undue and unreasonable prejudice or disadvantage: And that, in consequence of the said railway company having given such undue and unreasonable preference or advantage to or in favour of such particular person or persons or company, and in **[441]** consequence of the said railway company having subjected the complainants and their said traffic to such undue and unreasonable prejudice and disadvantage as aforesaid, the complainants were much injured in their trade, and, in consequence thereof, had during the past two years suffered damage and loss therein to the extent of 1000*l.* and upwards.

Bovill, Q. C., and Sharp, on a former day in this term, shewed cause, upon an affidavit by the traffic manager of the Eastern Counties Railway Company, to the following effect: That neither the said Eastern Counties Railway Company nor the Eastern Union Railway Company had any private agreement either with Prior & Co. or with any other person or persons, company or companies whatsoever, for the carriage of coal from Ipswich to any of the places aforesaid; but that the tolls mentioned in the complainant's affidavit were charged equally and after the same rate to all persons whatever; and that no reduction or increase in any such tolls had been made, either directly or indirectly in favour of or against any particular company or person: That the coals conveyed from Peterborough to Thurston, Elmeswell, Mellis, Stowmarket, Needham Market, Hadleigh, and Colchester, were conveyed on the Eastern Counties railway from Peterborough to Ely and Cambridge, thence along the Newmarket railway to Bury St. Edmunds, and thence along the said Eastern Union railway to all the said before-mentioned places: That the coal conveyed by the Eastern Counties Railway

(*a*) The affidavits filed in answer to the rule shewed that this statement of the charges was somewhat inaccurate,—the real sums charged being respectively 3s. 2d., 2s. 9d., 2s. 6d., 3s. 2d., 2s. 9d., 2s. 7d., 1s. 6d., 1s. 10d., and 2s. 2d. per ton. But, in addition to these sums, there was a charge for haulage from the docks at Ipswich to the railway station, of 4d. per ton.

(*b*) The statement as to these charges was admitted to be accurate.

Company from Peterborough to Bury St. Edmunds and the several places before mentioned, is produced principally from collieries situate in Derbyshire and Yorkshire, and is carried in large quantities, by the Great Northern and Midland railway companies respectively, to Peterborough; and that such coal is much cheaper in **[442]** price at the pit's mouth than coal produced from the collieries in Northumberland and Durham: That all the coal of Prior & Co. carried by the Eastern Counties Railway Company has been and still is carried by the company in waggons or trucks furnished by Prior & Co., or in waggons or trucks of the owners of the collieries from which the said coal is procured, and not in the waggons or trucks of the company; and which said waggons or trucks arrive at or are made up at Peterborough, and are dispatched from Peterborough in entire trains, and depart at fixed times from Peterborough to the several places before mentioned; and that the said coal, up to the 30th of June last, was carried from Peterborough to the places aforesaid under an agreement made in the year 1853 between the Eastern Counties Railway Company and Prior & Co., by which it was agreed that Prior & Co. should forward for conveyance along the said Eastern Counties railway, or should pay the company for the conveyance of, at least 240,000 tons of coal within three years after the making the said agreement, and that the tolls to be charged by the said company to Prior & Co., and which tolls had accordingly been so charged and paid by Prior & Co. for so carrying such coal, should be as follows, viz. [as stated in the complainants' affidavit]: That the said agreement with Prior & Co. expired on the 30th of June last; and that, within the stipulated period of three years, Prior & Co. did forward from Peterborough for conveyance along the said Eastern Counties railway coal in excess of the said 240,000 tons so agreed to be carried or paid for as aforesaid; and that the company had not contracted or bound themselves to carry coal at the tolls aforesaid from Peterborough aforesaid to any of the places aforesaid, or from or to any place or places whatever, solely or exclusively for Prior & Co.; but that the company merely agreed that they would not grant to any other **[443]** person or persons or company or companies more favorable terms than those which they had agreed to with Prior & Co.; and that the Eastern Counties Railway Company had always been and still were ready and willing to enter into any arrangement with the complainants or any other person or persons or company or companies to carry coal upon the same or equivalent terms and conditions they so carry for Prior & Co.; and that the carriage of coal at the reduced tolls aforesaid is beneficial and advantageous to the consumers of coal in Bury St. Edmunds, Thurston, Elmeswell, Diss, Mellis, Stowmarket, Needham Market, Hadleigh, and Colchester aforesaid, by extending the area of the supply of coal, and by bringing different descriptions of coal into the market in competition with the coal produced from the collieries in the counties of Northumberland and Durham, and in preventing a monopoly of the supply of coal for those places of the complainants and other coal-merchants in Ipswich aforesaid: That, since the 30th of June last, the Eastern Counties Railway Company have carried, and do now carry, coals forwarded by Prior & Co. from Peterborough upon and over the line of their railway, to all the stations upon the lines worked by them, under the terms of a memorandum or agreement whereby the company have contracted, for a period of three years from the 1st of July last, upon terms similar in substance to the arrangement previously existing, but at tolls somewhat higher: That the tolls charged by the Eastern Counties Railway Company to Prior & Co. are fair and reasonable, having reference to the large quantity they engage to forward or pay for, and to the fact that they and not the company supply the waggons or trucks for the purpose, and that the cost to the Eastern Counties Railway Company of the carriage of coal in entire trains is much smaller per ton per mile than when coals are forwarded in smaller **[444]** quantities and form only portions of entire trains: That the coals of the complainants are sent by them to be, and have been and are, carried in waggons or trucks supplied by the company, and not in quantities sufficient to form entire trains, but form part of the ordinary goods trains: That, for the purpose of facilitating the traffic from Ipswich, the Eastern Counties Railway Company have at great expense constructed a tram-way from their station at Ipswich to the docks at Ipswich (at which said docks the coal so conveyed by sea from the collieries in Northumberland and Durham is landed), and along which said tram-way the company convey the coal of the complainants and of other coal-merchants of Ipswich from the said docks to the station for a toll of 4d. per ton, whereas the former cost of conveying the said coal from the docks to the station was 1s. per ton: And that the company have not charged,

and do not charge, to any person or persons less than they have charged and still charge to the complainants for the conveyance of coals from and to the same places; and that the company have not charged any person or persons less than they have charged the complainants for the conveyance of coals from the places from which the complainants have sent their coals; and that, if any should be sent from those places by Prior & Co., or by any other person, they would be charged at the same rate as the complainants; and that the company have not given any undue preference or advantage to or in favour of Prior & Co., or any other person, for or in respect of the carriage of coals on the said railways, or either of them.

This is, in effect, a contest between two rival coal-merchants. The first ground of complaint is, that the Eastern Counties Railway Company charge Ransome & Co. a larger sum per ton, in proportion to the distance over which their coals are carried, than they charge to **[445]** Prior & Co. The difference is justified by the circumstances: and there is no pretence for saying that any preference is given where the coals are carried in the same direction. The effect of an equal tonnage rate both ways would be to give Ransome & Co a monopoly of the coal trade throughout the district in question,—confining it to sea-borne coals, to the exclusion of coals coming from Yorkshire and Staffordshire. The course, therefore, which is adopted by the company, is for the advantage of the public. [Cresswell, J. I can very well understand that circumstances might exist to justify a higher charge for carriage one way than the other; for instance, the gradients might be such in one direction as to cause a much larger expenditure of power. But, nothing of that sort being shewn, are you not by the inequality of charge subjecting a particular description of traffic to undue prejudice?] The object is to enable the Yorkshire and Staffordshire coal to compete with the Northumberland and Durham, which have the advantage of a cheaper mode of conveyance to Ipswich. [Crowder, J. The object is to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. Cresswell, J. Would it be justifiable in the company to carry cattle for a Norfolk farmer at a cheaper rate than for an Essex farmer, in order to enable the former to compete upon more equal terms with the latter in the London market?] It is submitted that it would (*a*)[1]. [Cresswell, J. The argument as to difference of direction does not apply as between Ipswich and Colchester.] True: but then a new state of things arises. The coals carried for Prior & Co. are carried over several lines of railway constructed **[446]** under the authority of different acts of parliament (*a*)[2]: whereas, those carried for Ransome & Co. are carried only over the Eastern Union railway. Under the arrangement with Prior & Co., all their coals are brought from Peterborough, where they are made up into entire trains, in their own waggons, and start at fixed times, so that the company are enabled to convey them at less expense than they can for persons whose coals are brought at uncertain times and in quantities insufficient to form a train, and for whose use they provide the waggons or trucks. Besides, Prior & Co. were under covenant to send 240,000 tons within three years, or to pay for that quantity. The company are willing to carry for every one in entire trains, and at fixed times, at the same rate as they do for Prior & Co. [Crowder, J. But not from Ipswich to Peterborough.] They are willing to make the same arrangements with others as they make with Prior & Co The difference of charge by reason of the difference of direction, is not incompatible with justice and equity. Freights from Newcastle to London, it is well known, are higher than for the back voyage from London to Newcastle. The tolls upon this railway are regulated by the 17 & 18 Vict. c. cxxx., ss. 13, 16, an act which passed after the passing of the Railway and Canal Traffic Act, 1854, and which fully justifies all that is now complained of (*b*). [Cress

(*a*)[1] This is hardly a fair criterion, seeing that rents and other expenses are in a great measure regulated by the more or less advantageous position of the land with respect to markets.

(*a*)[2] See the 7 & 8 Vict. c. lxxxv., for making a railway from Colchester to Ipswich, the 8 & 9 Vict. c. xcvii., for making a railway from the Eastern Union railway at Ipswich to Bury St. Edmunds, the 9 & 10 Vict. c. liii., for making a railway from the Eastern Union railway, in the parish of Bentley, to Hadleigh, and the 9 & 10 Vict. c. celxxx., to amend "The Ipswich and Bury St. Edmunds Railway Act, 1845," and for making a railway from the Ipswich and Bury St. Edmunds Railway to Norwich.

(*b*) The learned counsel prayed in aid the arguments urged in the case of *In re Oxlade*, which was heard on the preceding day. Vide post, p. 451.

well, J. [447] The act of parliament referred to does not cast you loose from the obligations of the 17 & 18 Vict. c. 31.]

Byles, Serjt., and T. Jones, in support of the rule. This is a question of very grave importance to the ports of Ipswich, Colchester, and Maldon. Their trade in the article of coals will be utterly ruined, if the Eastern Counties Railway Company are permitted to charge these disproportioned and extortionate tolls. The 17 & 18 Vict. c. 31, which is a most salutary act, provides, in s. 2, that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Now, what was the position of these parties at the time of the passing of that act? Messrs. Ransome & Co. were able to bring coals from Northumberland and Durham to Ipswich by sea. Messrs. Prior & Co. brought their coals from Yorkshire and Staffordshire by means of the Great Northern and the Midland railways. The legislature has thought fit to leave each to the natural advantages of his position,—to the fair and legitimate competition between railway and sea carriage. The affidavits plainly shew how the company have sought to frustrate this intention of the legislature, by diminishing their rate of carriage as they approach the sea. [Cresswell, J. It is quite clear that the company have not charged equally in proportion to distance, but have diminished the rate to Messrs. Prior as the sea-borne coal comes in competition [448] with the inland coal. That raises the question.] It is said that there are circumstances which make a difference between the two cases. But there is nothing upon the face of the affidavits shewing why the charge for carrying from east to west should not be the same as from west to east. And in several of the instances both are going in the same direction, and yet the inequality of charge remains. It is contended that the difference of charge is justified by the fact of Prior & Co.'s coals being made up into entire trains. But it does not appear upon the affidavits that the entire trains go through to Ipswich. On the contrary, it is sufficiently apparent that they drop some of the waggons as they proceed: and the probability is, that, as they advance, they subside into the ordinary goods trains, as Ransome & Co.'s coals do. [Cresswell, J. Of what particular part of the statute is it that you complain of a violation? What is the precise grievance which you call upon us to redress?] The statute says that the company shall not make or give any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic. That imports all the provisions of the acts regulating the railways in question: the companies are bound to charge an equal mileage rate to all. The company have given an undue and unreasonable preference and advantage to and in favour of a particular description of traffic: they have given an undue preference to the traffic in coals from Peterborough over the traffic in coals from Ipswich. They have also given an undue and unreasonable preference and advantage to individuals over others carrying coals over the same portions of their railway. [Crowder, J. How do you make that out? Cresswell, J. Suppose the same individual were to send coals from both places?] Possibly he could not complain. [Cresswell, J. Why not?] If the act does not apply to such a case as this, it is hardly possible to conceive a case to which any [449] ingenuity of construction could apply it. The court has power, under s. 3 (*a*) to call for further information, if it should be found necessary.

Bovill. It is a common and understood practice on the part of railway companies to carry at reduced fares, where there is competition: for instance, the Great Western Railway Company, in order to compete with the South Western, carry passengers at this moment from London to Reading for 2s.: and yet the charge to Slough, which is a considerably less distance, is more than double that sum. Nobody has yet been ingenious enough to suggest that the Slough passengers have any cause of complaint (*b*).

Cresswell, J. This case raises questions of great importance, and of no little difficulty, and therefore we will take time to consider. One difficulty is this,—Suppose at Colchester there is a considerable traffic in coal, and also in lime or any other

(*a*) See the section, ante, p. 411. This was done in *Oxlade's case*, post, pp. 454, 477.

(*b*) See *In re the Caterham Railway Company*, ante, p. 410.

commodity which will not bear an equal amount of charge: say that coal could bear a charge of ¾d. per ton per mile, and lime only ½d.: could those engaged in the coal trade complain that the company charge them a higher rate for coal than they charge for the other commodity, and say that that is an undue and unreasonable preference in favour of a particular description of traffic? That is one of the many difficulties we have to encounter in endeavouring to put a construction upon this act.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court (*c*).

[450] This was a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of injunction should not issue against the company, injoining them,—first, to desist from charging to the complainant for the conveyance of coals on their railways called the Eastern Counties Railway, the Eastern Union Railway, and the Newmarket Railway, any greater sum per ton per mile than is charged by the said company to Messrs. Edward & Alfred Prior & Co.,—secondly, to desist from charging the complainant more than those with whom they had made private agreements,—thirdly, to desist from giving any undue preference or advantage to Messrs. Prior.

It appeared from the affidavits used by the respective parties, that Messrs. Prior had made an agreement with the company to send a large quantity of coals in three years from Peterborough to various places on the lines of railway mentioned in the rule, at certain rates to different places.

The applicants, coal-merchants at Ipswich, sent coals which had been brought to that port by sea, to various places on the same lines of railway, and the company charged them a much larger sum per ton in proportion to the distance over which their coals were carried, than was charged to Messrs. Prior: and it was manifest that the sums charged to Messrs. Prior for the carriage of coals to different places, were fixed so as to enable them to compete in the coal trade with Ransome & Co., who had the advantage of having their coals brought by sea to Ipswich.

The question which we have to determine on this rule, depends upon the construction to be put upon the 17 & 18 Vict. c. 31, s. 2, by which it is enacted that no railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of **[451]** traffic; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The first thing to be ascertained is, the meaning of the expressions "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage." Are those words to be construed with reference to the interests of the parties using the railway only? or, may the interests of the railway owners be taken in any manner into consideration? Ex. gr., if one thousand tons can be carried for a lower sum per ton per mile than one hundred tons, yielding an equal profit per ton to the railway company, may they so regulate the charge as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference? Or, if goods can be carried one hundred miles at a lower rate than ten, and yield an equal profit per ton per mile, may the company charge less per mile for those carried one hundred miles, without giving an undue or unreasonable preference? If that may be done without giving what the statute calls an undue or unreasonable preference, may not the company, in fixing the rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their line, and longer distances, agree to make a reduction in such case? It is true that the sender of smaller quantities for a shorter distance will pay more per mile and more per ton in the respective cases; but, will that be an undue or unreasonable prejudice or disadvantage?

Again, if two railways start from the same terminus, and arrive at the same terminus, by different routes, must they charge for the whole line at the same rate as from intermediate stations to either terminus? Ex. gr. there are two lines from Portsmouth to London, the London and South Western, viâ Bishopstoke and Win- **[452]** chester, and the London, Brighton, and South Coast, by Brighton: must they charge as much per mile for passengers and goods from Portsmouth to London, as

(*c*) The case was argued before Cresswell, J., and Crowder, J.

from Winchester or Brighton to London? or, may they carry at a lower rate the whole distance, in order to compete with each other, without being subjected to the charge of imposing on the Winchester or Brighton traffic an undue or unreasonable disadvantage?

After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account: and then the questions above suggested assume a very complicated and difficult character, and are such as we feel but little qualified to decide. Nevertheless, as the legislature has thought fit to impose on the judges of this court the duty of dealing with such questions, we must do so to the best of our abilities, whenever it becomes necessary.

The present case is, in our judgment, free from these difficulties, because the difference between the rates charged to Messrs. Prior and to Messrs. Ransome is not founded on such considerations as have been suggested, but manifestly on the intention to enable Messrs. Prior, who deal in coals brought inland to Peterborough, to compete with Ransome and Co., dealing in coals sea-borne to Ipswich. No such advantage is due to them: it is, therefore, an undue advantage: and, without deciding that a railway company may not charge different rates where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, we think that some order must be made to prohibit the continuance of the practice now existing on the railway in question.

We cannot say that both parties should be charged the same sum per ton per mile: for, Messrs. Prior find their own trucks, and Messrs. Ransome use the trucks of [453] the company: and it is possible that it may cost the company more to carry over some parts of the line than others. We cannot, therefore, prescribe an equal mileage rate independent of the allowance for trucks.

And, for the same reason, we cannot make absolute the second branch of the rule, and injoin the company to desist from charging Ransome & Co. any greater sum per ton per mile for the carriage of coals on their railways, than they charge to persons with whom they have private agreements.

But we think that a writ should issue injoining them to desist from giving an undue preference to Messrs. Prior, and to carry coals for Ransome & Co. on equal terms with Messrs Prior: having due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other. And, as the scale of charges hitherto made for carrying coals for Ransome & Co. manifestly imposed on them an undue and unreasonable disadvantage, the railway company must pay the costs of the application and rule.

Rule accordingly (*a*).

[454] IN THE MATTER OF THE COMPLAINT OF WILLIAM OXLADE AGAINST THE NORTH EASTERN RAILWAY COMPANY. Jan 30, 1857.

[S. C. 26 L. J. C. P. 129; 3 Jur. N. S. 637. See *In re Harris and Cockermouth Railway*, 1858, 3 C. B. N. S. 711; *West* v. *London and North Western Railway*, 1870, L. R. 5 C. P. 632; *Dickson* v. *Great Northern Railway*, 1886, 18 Q. B. D. 185; *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Railway*, 1885, 11 App. Cas. 114.]

Upon a motion for an injunction against a railway company under the 17 & 18 Vict. c. 31, injoining them, "first, to carry upon their railway for the complainant such coal and coke as might be offered to them by him for that purpose,—secondly, to charge for the carriage thereof respectively tolls not higher than the tolls charged

(*a*) The rule was drawn up as follows: "It is ordered that a writ of injunction do issue against the said Eastern Counties Railway Company, pursuant to the Railway and Canal Traffic Act, 1854, injoining the company to desist from giving an undue preference to Messrs. Prior for or in respect of the carriage of coals on the said railway, and injoining the said company to carry coals for the said complainants on equal terms with the said Messrs. Prior, having due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other, and that the said company do pay to the said complainants, or to their attorneys, their costs of the application," &c.

by them for carrying coal and coke to persons for whom the same coal and coke were also carried on another railway forming a continuous line with theirs, and tolls not higher than the tolls charged by them to persons with whom they had private agreements for the carriage of coal or coke,—thirdly, to provide for the complainant depots for depositing and receiving his coal and coke on the stations of the railway similar to those provided at such stations for persons with whom they had private agreements for the carriage of coals along their railway, and similar to those provided at such stations for persons who consigned their coal and coke to the company,—fourthly, to afford to the complainant the same facilities for the receiving, forwarding, and delivery of his coals and coke upon and from the railway, as the company afforded to persons who consigned their coal or coke to the company,—fifthly, to provide for the complainant waggons, carriages, and trucks for the conveyance and carriage of his coal and coke, and forwarding the same upon the railway,—sixthly, to afford to the complainant all reasonable and proper facilities and accommodations for the unloading of his coals and coke at the various stations of the railway, and to afford to the complainant at the said stations the same facilities and accommodations for the unloading of his coals and coke as the company afforded to colliery owners or lessees of collieries, or to any other person,"—on cause being shewn, it was referred to one of the masters to inquire and report upon the following questions:—"First, whether any, and what, accommodation and facilities were provided or afforded at any, and what, stations on the line of the railway for the unloading of coal and coke, and for what persons and under what circumstances,—secondly, whether the company carried coals or coke for persons other than the complainant on any, and what, terms different from the terms on which the company had carried, or had offered to carry, coals and coke for the complainant,—thirdly, whether there was any, and what, difference between the circumstances under which the company had so carried coals and coke for such other persons, and the circumstances under which the company had carried, or had offered to carry, coals and coke for the complainant,—fourthly, whether, and in what manner, and how, the company were enabled by reason of such difference of circumstances so to carry coals and coke for such other persons at a cost to the company less than the cost to the company of carrying coals and coke for the complainant."—Upon the first point, the master reported as to the accommodation afforded by the company for unloading coals and coke at the different stations, that they ascertained as nearly as possible the consumption in the neighbourhood of each station, and the sort of coal required, and entered into terms with collieries having the particular description of coal, to supply the required quantity; that they appointed a depot agent to manage the sale of the coals so supplied, through whom the orders were transmitted to the colliery, and who accounted to the colliery owners for the proceeds; that all the depots were allotted to such agent; that all coal dealers were treated alike; and that this course was adopted by the company for the purpose of preventing any obstruction of the general traffic of the railway:—Held, disposing of the fourth and sixth branches of the rule, that this was not giving an undue or unreasonable preference or advantage to or in favour of any particular person or company, or subjecting any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage.—Upon the second point, the master found that the company charged for through rates ¾d. per ton per mile for coal and coke going south, unless their waggons were used, in which case they charged one eighth of a penny per ton per mile more for the first 100 miles, and one sixteenth for any distance beyond, and 3s. per day for demurrage on every waggon detained more than four days off the line; that there was no variation made in the charge to any one, except in the case of coals carried by the North Eastern Railway Company in conjunction with the Great Northern Railway Company through from the collieries to London, the North Eastern Railway Company's haulage ceasing at York, where their railway joined the Great Northern; such coal being made up into full trains, and the waggons for the entire distance being provided by the Great Northern Railway Company, for which the charge was ½d. per ton per mile for the whole distance,—the circumstances of the coals so carried being carried in entire trains, and at regular times, and without stoppages, enabling the company to carry them at such lower rate:—Held, that it was sufficiently made out that the circumstances stated enabled the company to carry such coals at a cost less to them than

the cost of carrying coals and coke for the complainant, and that by carrying them under the circumstances stated, at such lower rate, no undue or unreasonable preference was given, or any undue and unreasonable disadvantage imposed.—The master also found that a similar arrangement was made with the Midland Railway Company, but not under the same circumstances, the inducement on the part of the company being a desire to introduce the northern coke into Staffordshire:—Held, that lowering their rates for that purpose was giving an undue preference to that particular traffic, there being no special circumstances affecting the pecuniary interests of the company to justify the course pursued.—As to the fifth branch of the rule (which was not referred to the master), viz. the complainant's demand to have waggons or trucks provided by the company for the carriage of his coal and coke:—Held, that the company were justified in refusing to furnish them, by the complainant's refusal to pay demurrage for the detention of the waggons beyond the time allowed by the regulations of the company. Held also, that the company could not be called upon to carry coals to the extremity of their line (where it joined the Midland railway), and there shift them into other trucks or waggons, they having no convenience at that place for that purpose, and not affording such facility to any other person.—And, as to the first branch of the rule,—Held, that the company were not common carriers of coal. And, the complainant having asked by the rule more than he was entitled to, and the company having been partially in the wrong, the court refused to allow costs to either.

T. Jones, in Michaelmas Term, 1885, on behalf of William Oxlade, obtained a rule calling upon the North Eastern Railway Company to shew cause "why a writ of [455] injunction should not issue against them, injoining them, first, to carry upon their said railway for the said William Oxlade such coal and coke as may be offered to them by the said William Oxlade for that purpose,—secondly, to charge for the carriage thereof respectively tolls not higher than the tolls charged by the company for carrying coal and coke respectively to persons for whom the same coal and coke respectively are also carried on the Great Northern railway, and tolls not higher than the tolls charged by the said company to persons with whom the said company have private agreements for the carriage of coal or coke,—thirdly, to provide for the said William Oxlade depots for depositing and receiving his [456] coal and coke, on the stations of the said railway, similar to those provided at such stations for persons with whom they have private agreements for the carriage of coals along the said railway, and similar to those provided at such stations for persons who consign their coal and coke to the said company,—fourthly, to afford to the said William Oxlade the same facilities for the receiving and forwarding and delivery of his coals and coke upon and from the said railway, as the said company afford to persons who consign their coal or coke to the said company,—fifthly, to provide for the said William Oxlade waggons, carriages, and trucks for the conveyance and carriage of his coal and coke, and for forwarding the same upon the said railway: and why the said North Eastern Railway Company should not pay to the said William Oxlade, or to his attorney, his costs of and occasioned by this application."

The affidavits upon which the rule was founded, stated that the complainant was a coal dealer trading in coal principally produced from the West Belmont and other collieries in Durham, and in coke from the same county: That the only mode in which he could bring his coal and coke to York, where he principally carried on his trade, was, by conveyance on the North Eastern Railway as far as York (which was a continuous line of railway from Durham to York), and thence to Normanton by the said line of railway, where such railway joins the Midland railway, upon which they were carried to the other places where he traded: That the North Eastern Railway Company did not afford reasonable facilities for receiving and forwarding the complainant's coal and coke upon and from their line, but made and gave an undue and unreasonable preference and advantage to and in favour of particular persons or merchants trafficking on their line in a similar description of goods, and subjected the complainant and his goods or traffic to an undue and unreasonable prejudice or disadvantage in respect thereof: That the said [457] North Eastern Railway Company charged the complainant toll for the carriage of his coal and coke on their railway 1d. per ton per mile and upwards, and charged merchants who trade on the Great Northern railway (which adjoins the North Eastern railway at Knottingley, in the county of York) for toll for

the carriage of coal and coke over the same portion of the railway, and under like circumstances, ½d. per ton per mile only: That the said North Eastern Railway Company, also, to the best of the deponent's knowledge and belief, had entered into private contracts or agreements with certain particular persons trading in coal or coke on their said line of railway, for the carriage of coal or coke at a less rate per ton per mile than they charged the complainant or other merchants who might not have such private agreements with the company for the carriage of the same description of goods on the same portions of their line of railway: That the said North Eastern Railway Company refused to provide for the complainant, as a coke and coal-merchant, depôts for depositing or for receiving his coal and coke at the different stations on their line, in like manner that they did for those merchants who had a private agreement with the company: That the said company, by themselves or by their agents, made arrangements or agreements with certain coal and coke merchants or owners, to consign all the coal and coke belonging to them to the company, or their agents, at a certain fixed price, or otherwise: and the company would not provide depots at their stations on their said line of railway for receiving the coal and coke belonging to the complainant and other merchants who traded on their line of railway, and who declined to consign coal and coke to the said company or their agents, in the same manner or on the same terms as they provided depots for the coal and coke of those coal and coke merchants or owners who consigned their coal and coke to the com-**[458]**-pany or to their agents at a fixed price or otherwise, and would not and did not afford to the complainant and such other coal and coke merchants as aforesaid the same facilities for the receiving and forwarding and delivering of their goods and traffic upon and from their said line of railway, as the company afforded to such coal and coke merchants or owners who consigned their coal and coke or traffic to the company or their agents as aforesaid, but subjected the complainant and such other merchants as aforesaid, and his and their coal and coke and traffic, to an undue and unreasonable prejudice and disadvantage in respect thereof, and in respect of the receiving and forwarding and delivering of his and their said coal and coke and traffic upon and from their said line of railway: That the said North Eastern Railway Company would not provide and refused to provide the complainant (being a merchant trading on the Midland line of railway as well as on their own line of railway, and not having entered into any private agreement with the said company, and declining to consign his coal and coke to them or to their agents) with waggons or carriages or trucks for the conveyance or carriage of his said coal and coke or for forwarding the same upon their said line of railway; and the said North Eastern Railway Company refused to receive, convey, carry, forward, or deliver for the complainant (being such merchant as last aforesaid) his said coal and coke upon and from their said line of railway, and, in consequence thereof, he was unable properly to carry on his said trade, or to supply his customers with coal and coke. [The affidavits then set out certain correspondence between the complainant and his solicitors with certain agents of the company, relative to the alleged causes of complaint.]

Byles, Serjt., and J. Addison, in Hilary Term, 1856, shewed cause, upon the affidavits of the general traffic **[459]** manager and the secretary and general manager of the company. The former was in substance as follows: The North Eastern railway comprises the main line of railway, which, leaving the North British railway, with which it is united, at Berwick, passes through the counties of Northumberland and Durham, and is there continued forward direct to York, from whence it proceeds southwards, and, dividing into two main lines at a station called Burton Salmon, joins the Midland railway in the parish of Altofts, in the county of York, about one mile north of Normanton, and the Lancashire and Yorkshire railway at or near Knottingley, in the said county, which last mentioned railway extends about ten miles further southwards from Knottingley to a place called Askern, where it unites with the Great Northern railway. There are numerous branch railways in each of the said counties of Northumberland and Durham and York which form part of the North Eastern railway, and many of those which are in Durham have been constructed principally in order to afford to the owners or lessees of many of the collieries or coal pits and coke ovens which have been sunk or erected in that county, the means of transit by railway for their coals and coke, either to the said main line of railway, and thence to the places of consumption, or to the places of shipment of such coals and coke on the east coast. Some of the said branch railways communicate directly with collieries or coke-

ovens situate upon or immediately adjoining them, and in other instances the means of access to the collieries or coke-ovens from such branch railways is by other public lines of railway, or by private branch railways or tramways constructed for that purpose by the owners or lessees of particular collieries or coke-ovens. The North Eastern Railway Company have also constructed at many of the stations along their railway, but not at all of them, coal-depots or cells, as places of de-[460]-posit for the coals which might probably be required by the district or locality where or near where such depots have been built. Such depots consist of separate cells, which are necessarily of limited and varying number and size, depending mainly upon the situation and probable estimated wants of the neighbourhood, and are so constructed as that the coal waggons may be readily pushed or hauled along a short siding or branch line passing over them; and the particular class or description of coal to which each cell is appropriated is then shot down from the bottom of the waggon containing it into its proper cell; after which, the empty waggon is returned to be re-loaded. The North Eastern Railway Company do not deal in or sell, and never have, either by themselves or by their agents or servants, directly or indirectly dealt in or sold, on their own account, coals at any of their stations or depots; neither do they require or have they required or made agreements or arrangements with any coal or coke-owners to consign all or any of the coal and coke belonging to any such owners, to them (the company) or their agents, at a certain or at any fixed price: but, on the contrary, the company have wholly abstained from any such conduct. The North Eastern Railway Company having only such limited and varying number of coal-depots or cells as aforesaid at their respective stations, have from time to time appropriated such cells to or for such of the different particular sorts or qualities of coal brought on to their railway as seemed most needed by, or best suited to the wants of, each particular locality or place, and have let such cells accordingly to the owners or lessees of the collieries or coal-mines producing such respective descriptions of coal, as a place for the deposit thereof, and from whence the same may, as required by the public, be loaded and removed. Except at York, Hull, and Selby, at which places the demand for coal is exten-[461]-sive, the North Eastern Railway Company do not allow any of the colliery owners occupying a cell or cells at any of their stations to have a separate agent or agents at any such station for the sale of their coal: and, at the stations at York, Hull, and Selby, the company allow only a limited number of persons to act as agents for all the owners or lessees of collieries sending coal for sale thereat. These arrangements and restrictions are necessary, partly in consequence of the limited demand for coal at the smaller stations, and at them and the stations at York, Hull, and Selby also in consequence of the great inconvenience which would result from having several agents, whose interests would be necessarily conflicting, at such places, and the necessity on the part of the company of keeping their coal-depots, and the yards within which the same are placed, in proper order, and under proper control, and free from confusion and disturbance; with which objects, the said company appoint at each such smaller station some one person on whom they can rely as the general agent for each and all of such colliery owners using the coal-cells thereat; by which agent each and all of the public are supplied with whatever quantity they may require of any of the particular qualities of coal brought to such station, at such price as the owner of the colliery producing the same may from time to time fix and direct to be demanded: each and all of such owners being at full liberty to fix, and in no way whatever restricted or prevented by the said company from fixing, such price for his coals as he thinks proper, and employing or having whatever number of persons or agents he or they may think proper for the sale of his or their coals elsewhere than at the said depots, and either in the immediate neighbourhood thereof or in or through the districts into which his coals may be brought or sent for sale. The several agents so appointed by the company [462] do not sell any of the said coals for or on behalf of such company, or as the agents thereof, but only on behalf of and as the agents for the respective owners of the several collieries the coals from which are brought to each such station for sale: and each of such agents accounts directly to each of such owners for whatever quantity of his coals may have been sold by such agent, and sends orders to the proper officer of the company for further supplies thereof from time to time when and as required, in order to keep up a constant supply to meet the demand for each quality of coal, which orders are thereupon transmitted to the respective collieries to which the same relate, the proceeds being remitted by

such agent direct to the colliery owners entitled thereto, or to their agents. The North Eastern Railway Company are not, and never have been, common carriers of coals or coke, but have always refused, and still refuse, to become such, or to undertake the carriage thereof as common carriers, or otherwise than under terms or arrangements to be from time to time entered into by them with each particular owner or lessee of a colliery or coal-pit and coke-ovens adjoining their railway, or with which the same communicates as aforesaid, and with each railway or other company or person who may be desirous of having coals transmitted thereby; but, occasionally, purchasers of coals in considerable or specified quantities have been accommodated by having a certain quantity of coal conveyed specially for them: such practice has, however, been found to be productive of much inconvenience, and detention of waggons, and has therefore been discontinued. Many of the colliery owners provide their own waggons, particularly such as are used for the transit of coals for shipment; but the company have also a stock of waggons of their own, and particularly of those which are used for transit upon their main line of railway: They also provide locomotive **[463]** power for hauling the same. Other railway companies with whose railways the railway of the North Eastern Railway Company communicates either directly or by means of intermediate lines, also provide waggons for the carriage of coals and coke to the districts through which such railways pass; and such waggons, if properly constructed, are allowed to pass over and along the North Eastern railway directly to the collieries and coke-ovens. The supply or number of coal and coke waggons belonging to the North Eastern Railway Company is necessarily limited, the cost of providing the same being very considerable, and the said company not being common carriers of such articles, and declining to become such, and only providing waggons to such extent as they think prudent. The coal waggons of the North Eastern Railway Company are principally employed upon their own lines in conveying for the owners or lessees of the different collieries aforesaid the coals required for the supply of the depots at the various stations upon the same. A large number of the company's coke-waggons are employed in conveying the coke required by them for the consumption of their own engines; and the remainder of such coal and coke-waggons are from time to time employed in carrying coals or coke for the owners or lessees of the collieries or coke-ovens aforesaid, or for other railway companies, or occasionally for private individuals or companies, to particular localities, or are sometimes specially hired for given periods by particular individuals for their own trade, and appropriated and marked accordingly. Some of such coke-waggons were also at one time employed in carrying coke consigned to the order of Oxlade. The North Eastern Railway Company have fixed general rates of charge for the carriage of coal and coke upon their railway from all the collieries and coke-ovens upon or adjoining their railway, and terms as to the use of **[464]** their waggons and depots, which general rates and terms are well known and apply to all owners and lessees of collieries and coke ovens alike; and, if any party refuses to accede to or act up to such rates or terms, the company thereupon decline to carry any further quantity of his coal or coke in their waggons. It, however, constantly happens that the owners or lessees of a particular colliery or coke-ovens, or a particular railway company, are desirous of having their coals or coke carried at rates below the ordinary and general rates; in all of which cases the carriage of such coals or coke by the North Eastern Railway Company, and the supply of waggons for the same, if not provided by the colliery owners, is always the subject of a special contract or arrangement with each particular owner or lessee of a colliery or coke-ovens, or railway company, or the respective agents for the same: in which contracts or arrangments the North Eastern Railway Company invariably require, as the ground and inducement of their accepting such lower rates, that such special contracts or arrangements shall extend over a given period, and be so made as to insure the transmission of the coals or coke (the carriage of which is so specially contracted for below the general rates) with regularity of dispatch and arrival, and the punctual return of their waggons from the respective places of their destination within a given number of days; the regular passage of such traffic over their railway in order to avoid interference with the general passenger and merchandize traffic thereon, and the constant employment of their waggons without loss of time by detention, being essential ingredients of each such special contract or arrangement, the non-adoption of which, or the omission to carry out the same, would prevent the proper and efficient working and management of the railway, particularly as a public main line of railway

between the other great systems or main lines of public **[465]** railway to the north and the south thereof. The applicant, Oxlade, was formerly a station-master in the employ of the North Eastern Railway Company (then called the York, Newcastle, and Berwick Railway Company); and, after leaving them, he acted as, and represented himself to be, the agent for different collieries, and particularly for the West Belmont Colliery, and in that capacity he applied for and used a periodical ticket or pass over the said company's railway, upon the same terms as those issued to other agents for collieries, which passes are issued by the company at a certain modified or lower rate of charge than to ordinary persons, because the parties to whom they are granted are acting as agents for the collieries transmitting their coal by the said company's railways. Large numbers of waggons for the carriage of coals and coke are supplied by the Great Northern Railway Company, and are sent by them over the North Eastern Railway Company's railway for such purpose by, and hauled along the same to York by, the engines of the Great Northern Railway Company; from which place such waggons are hauled along the line of the North Eastern Railway Company by their engines to the colliery where they have to be laden, if it be upon or adjoining such line, or otherwise, if such colliery be not on or adjoining such line, such waggons are so conveyed to some convenient place for standing near such line until they are removed to the colliery for the purpose of being loaded and thence returned to the North Eastern Railway. By the North Eastern Railway Company's Act, 1854, the company are authorised to charge, for the use of the railway, for all coals, coke, culm, and cinders conveyed thereon, tolls varying according to the distance such articles are carried thereon, viz.

"If 30 miles or upwards, per ton per mile . . . 1d.
If 20 miles, and less than 30, per ton per mile . . 1½d.
If less than 20 miles, per ton per mile . . . 1¾d."

[466] But, for all such articles conveyed for a greater distance than 40 miles, in waggons not belonging to the company, and consigned to any place south of York, the company are restrained from charging more than ¾d. per ton per mile. All the said charges include the toll for the use of carriages and of engines on the said railway: and, in case any person employs his own waggons (except for the aforesaid articles conveyed as aforesaid south of York), the company are required to make him an allowance equal to the sum for the time being allowed by or according to the railway clearing-house regulations to one company for the use by another company of the like waggons belonging to such first company employed for a similar purpose. The North Eastern Railway Company are also authorised by their said act to charge a reasonable sum for loading, unloading, collecting, receiving, or delivering, and for providing covers for minerals, goods, articles, or animals.

The affidavit of the secretary and general manager, besides going over the details already given in the former affidavit, set out a resolution, dated May 26th, 1854, by which the company agreed, in answer to an application on the part of the owners of the West Belmont Colliery, to the following effect,—"that, assuming the waggons are provided by the Great Northern Company, the companies (*a*) will agree to convey 1000 tons per week for one year, at the rate of ½d. per ton per mile; the companies, however, retaining the right to increase the rate to ⅝ of a penny per ton per mile during the months of November, December, January, and February next, should such an advance be made generally to other coal-owners." It further stated as follows: — The North Eastern Railway Company are not common carriers of **[467]** coals or coke, and decline to undertake the carriage thereof by their engines and waggons, or the haulage thereof by their engines along their railway, except under special arrangements and conditions: and, in case the waggons of the said company are allowed to be sent beyond their own railway, they make a charge against the parties for whom the same are so sent, by way of and as demurrage, in the event of the detention of any of such waggons after a regular given time. Such charge for demurrage is a well know and recognized charge, and one which is made by all railway companies in similar circumstances, and is necessary to insure the prompt return of the waggons sent, inasmuch as the company in such case part with the temporary control over

(*a*) The companies now incorporated by the name of the North Eastern Railway Company.

such waggons, and, without such charge being made, would have no sufficient security for the return of their waggons within a reasonable time, and for the loss of hire or use thereof during such detention, and the consequent injury to their business and engagements. There is no merchant who trades on the Great Northern railway for whom the North Eastern Railway Company carry coal or coke over their railway, unless an owner or lessee of a colliery or coke-ovens be so called: and all colliery owners, or other persons, if any, for whom coals or coke are so carried over the same portion of the North Eastern railway, and under like circumstances, are all charged tolls equally and at the same rate per ton per mile. The company charge the same rate of toll to every owner or lessee of a colliery or coke-ovens for the carriage of coal or coke to the same station or place on their own railway, and have never charged less than 1d. per ton per mile for any coal or coke carried on their railway, unless the same has been for shipment or for manufacturers on the rivers Tyne or Wear, or for some place south of York; in which excepted cases, a less rate has been charged, if the company has not supplied the [468] waggons, or the length of lead upon their railway, or the inferior quality or description of the coal or coke so conveyed, has rendered some less charge necessary, in order to allow of such coals or coke being carried at all; or if there have been other special circumstances in the particular case rendering a less rate than that necessary and fair. The company have not entered into any contract or agreement with any person trading or trafficking in coal or coke on their railway, for the conveyance or carriage of any such coal or coke on their railway at a less rate per ton per mile than they charge to any other person for the conveyance or carriage of the same description of goods on the same portion of their railway, and under like circumstances. The company have not provided, and do not profess to provide, depots for receiving the coal or coke of all persons who may think fit to start in and carry on business as coal-merchants, and be desirous of trading and trafficking in those articles on their railway; and they deny their liability so to do: but the company have afforded and do afford to Oxlade and all other persons, whether coal and coke-merchants or not, the same facilities for the receiving and forwarding and delivering of his and their goods and traffic upon and from their said line of railway, as they afford to all other parties under similar circumstances; and the company have not subjected Oxlade and his coal or coke or other traffic to any prejudice or disadvantage in respect thereof, or in respect of the receiving, forwarding, or delivery of his coal or coke or other traffic upon or from their railway. The North Eastern Railway Company do not provide waggons, carriages, or trucks for the conveyance of coal or coke upon the Midland or any other railway beyond their own line of railway, except upon the special understanding or rule, that, in case any such waggons, carriages, or trucks are not returned to them within a given number of days which are allowed for the [469] journey and for unloading and the return thereof, demurrage shall be paid for every day any of the same are detained beyond such given number of days. Mr. Oxlade refused to abide by such rule, and therefore the company declined to allow any of their waggons, trucks, or carriages to go beyond their railway with coals or coke for him, or to be laden for such purpose,—of all which the company gave him timely notice, and stated that such his refusal was the cause of their so declining. The North Eastern Railway Company have not standage ground, or any place for waggons to remain, at or near the point of junction of their railway with the Midland railway, which is on a considerable embankment in the parish of Altofts, in the county of York, at the distance of about one mile northwards of Normanton, and therefore they cannot and do not allow any of their waggons, carriages, or trucks to be deposited at or near the point of such junction, for the purpose of being unloaded, and such coals or coke loaded into other waggons, carriages, or trucks to be brought there by any other company or person, or for any other purpose; neither is there room or accommodation for such other waggons, carriages, or trucks to be placed and remain for the purpose of being loaded with such coals or coke at or near such point of junction; and therefore the North Eastern Railway Company have since such refusal of Oxlade as aforesaid declined to allow any of their waggons, carriages, or trucks laden with coke or coal for him, and addressed for him or to his order, at some place south of and beyond their railway, to go or be taken beyond York, the company having no convenient place south of York where to allow their waggons, carriages, or trucks so laden as aforesaid to stand or be unloaded. The said North Eastern Railway Company have never refused to receive, convey, and carry, forward, and deliver for Oxlade any coals or coke desired

by him to be so conveyed and [470] carried in waggons, carriages, or trucks properly constructed and supplied by him for such purpose: but the said company decline to allow their own waggons to be so used by or for him, because of his refusal to comply with the rules of the company as to the payment of demurrage for the detention of their waggons, carriages, or trucks, and because, as regards any of such coals or coke which may have been consigned to Oxlade at any station on their railway, the company have not standage ground at their stations whereat to allow waggons, carriages, or trucks to stand until unloaded, or cells or depots wherein to deposit coals or coke for any and every merchant or person who may think fit to order the same.

There were also four other affidavits by the general manager of the company, verifying a long series of correspondence in reference to the disputes between the complainant and the company.

The substance of the complaint,—which is of the most vague description possible,—is, that the Eastern Counties Railway Company have given undue preference in the carriage of coals and coke to other persons, and have subjected the complainant to undue and unreasonable prejudice. In order to make out a case against the company, it should have been shewn distinctly that they have refused to carry coals or coke for the complainant on their own railway upon the same terms as they carry for others, and under what circumstances such refusal took place. [Cresswell, J. It is suggested that the company carry cheaper to one line than to another.] The complaint in effect is, that the company give a preference to the great coal-owners and to the Great Northern Railway Company. There is nothing, however, in the affidavits on which the rule was founded to bear that out: and the affidavits in answer distinctly deny it. To warrant the complaint, it should be shewn that the complain-[471]-ant was proposing to travel over the same portion of the railway, and under similar circumstances with those whose goods are said to have been carried at a lower rate. The amount of tolls which the company are authorised to take for the use of their railways, by the 17 & 18 Vict. c. cxxi., s. 32, is as follows: —"For all coals, coke, culm, and cinders which shall be conveyed for a distance of 30 miles and upwards, per ton per mile, 1d.: for the like articles, goods, and things which shall be conveyed for 20 miles, but for a less distance than 30 miles, per ton per mile 1½d.: for the like articles, goods, and things which shall be conveyed for a less distance than 20 miles, per ton per mile, 1¾d.: for the like articles, goods, and things which shall be conveyed for a less distance than 40 miles, and shall be intended for shipment, per ton per mile 1¼d. Provided always, that, for all coals, coke, culm, and cinders which shall be conveyed for a greater distance than 40 miles in waggons not belonging to the company, and consigned to any place or places south of the city of York, it shall not be lawful for the company to demand or receive any greater sum than ¾d. per ton per mile." And the 35th section provides, "that, in case any person shall employ his own waggons or trucks for the carriage or conveyance of goods, animals, or minerals on the said railways (other than for coals, coke, culm, and cinders conveyed as aforesaid for places south of York), then and in every such case the company shall and they are hereby required to make an abatement or allowance to such person from the tolls hereinbefore authorised to be received for such goods, animals, or minerals, equal in amount to the sum which shall for the time being be allowed by or according to the railway clearing-house regulations to one company for the use by another company of the like waggons or trucks belonging to such first company employed for a similar purpose." [Cresswell, J. The 35th section does not apply to coals at all.] The [472] 90th section of the 8 & 9 Vict. c. 20, reciting that "it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties," enacts that 'it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorised to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall

be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." And by the interpretation clause, s. 3, it is enacted that the word "toll" shall include any rate or charge or other payment payable under the special act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway. One specific ground of complaint is, that the North Eastern Railway Company charge Mr. Oxlade toll for the carriage of his coal and coke on their railway 1d. per ton per mile and upwards, and charge merchants who trade on the Great Northern railway for the carriage of coal and coke over the same portion of the railway, and, under like circumstances, ½d. per ton per mile only. The answer to that is, that the charge there complained **[473]** of is made under different circumstances. The lower rate is charged to persons who provide their own waggons, and who traverse the whole line, providing their own locomotive power beyond. Further, it is said the company deal on more favourable terms with persons who have private agreements with them. The affidavits in answer shew the nature of these private agreements, the persons with whom the company so contract being under an engagement to send 1000 tons per week, and at stated periods. Are the company bound to afford the same facilities to one who sends but a single waggon-load at a time, that they do to one who sends the larger quantities? [Cresswell, J. That is a question not free from difficulty; for, if a large dealer is to have his coals carried at a lower rate than a small one, he will be enabled to monopolize all the trade. It may be, however, that the company are enabled to carry at a lower rate in the one case than in the other, by reason of the difference of cost.] Of necessity, where the supply is so regulated as to enable the company to send forward an entire train for one merchant at regular stated intervals, the company gains by the convenience of the arrangement more than any equivalent for the reduced charge. The act says that the company shall not give undue or unreasonable preference. The onus of shewing that it is an undue and unreasonable preference is cast upon the complainant. Besides, it must be borne in mind that the company are not common carriers of coal and coke: *Palmer* v. *The Grand Junction Railway Company*, 4 M. & W. 749; *Johnson* v. *The Midland Railway Company*, 4 Exch. 367. Then it is insisted that the company are bound to find depots for the use of the complainant. To find that sort of accommodation at every station on the line for every person who chooses to ask for it, would obviously be impracticable. [Cresswell, J. Mr. Oxlade does not complain that there is any depot the use of which would be **[474]** applicable to him, and which the company refuse to allow him the use of: but simply that they refuse to find him depots.] The capabilities of the company to afford such accommodation must necessarily be very limited; and they are clearly justified in allotting the few depots they have to those persons who send coals and coke in large and regular quantities. The suggestion that the company receive consignments of coals and coke for sale, is answered by the affidavits. Then, as to the last branch of the rule, the answer is, that the company are not bound to furnish waggons or trucks at all. [Jervis, C. J. The 34th section of the 17 & 18 Vict. c. ccxi., which provides "that (except as in the act otherwise provided) the said tolls shall include the toll for the use of carriages and of engines for propelling the carriages on the said railways, and that no further charge than is thereinbefore stated shall be made by the company for the use of such carriages and engines," supposes that the carriages shall be supplied by the company.] Not beyond their line.

Bovill, Q. C., and T. Jones, in support of the rule. Early in the history of railways, there had been disputes between the companies and persons for whom they carried goods; and the importance of the subject, inasmuch as the railways were rapidly becoming the only means of transit, attracted the attention of the legislature; and attempts were made to secure equality of charge. This was done by the 90th section of the 8 & 9 Vict. c. 20, which provided that all tolls "should be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be **[475]** made, either directly, or indirectly in favour of or against any particular company or person travelling upon or using the railway." That gave a loophole to the companies: and the facility with which a variation could be effected in the circumstances soon rendered the provision a dead letter. This being the state

of things, and it being found that the railways had monopolized all the carrying trade of the country, the legislature, with a view to the just interests of the public, and after it had been found by experience that the former provisions were not sufficiently stringent, passed the statute now under consideration. The act, in s. 2, begins with providing that "every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies." *Parker* v. *The Great Western Railway Company*, 7 M. & G. 253, 7 Scott, N. R. 835, shews that acts of this description, which are passed for the benefit of the public, are to be so construed as best to attain that object. The object of this act was, to deal with railways and canals as great public highways. It provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The complaints made on the part of Mr. Oxlade are, that the company refuse to carry coal and coke for him upon the same terms as they carry for other persons; that they refuse to carry for him to the point of junction of their railway with the Midland railway, or to allow their waggons to convey his coal and coke on the Midland railway; and that they **[476]** refuse to provide him the same accommodation for unloading at the various stations at which he wants to unload, as they provide for others. The general as well as the special act contemplates that the company shall provide carriages as well as engines: 8 & 9 Vict. c. 20, ss. 86, 90, 118, 119; 17 & 18 Vict. c. cexi., ss. 32, 34, 35. By their affidavits, the company's officers admit that they make a distinction between Mr. Oxlade and persons with whom they contract for the carriage of large quantities of coal. The effect of this preference is, entirely to destroy the trade of the smaller dealer,—the very thing the legislature intended to guard against. The language of this act is far more stringent than that of the acts of parliament upon which the cases of *Pickford* v. *The Grand Junction Railway Company*, 10 M. & W. 399 (3 Vict. c. xlix., s. 26), and *Edwards* v. *The Great Western Railway Company*, 11 C. B. 588 (7 & 8 Vict. c. iii., s. 50) turned. [Crowder, J. What effect do you give to the words "undue or unreasonable," in the 17 & 18 Vict. c. 31, s. 2?] It is submitted that it is giving an undue and unreasonable preference to charge less to the large dealer than to the complainant. Then, as to the depots, it is as essential that there should be a convenient place for unloading coals, as that accommodation should be provided for landing passengers. Is it not an undue preference to provide that sort of accommodation for some, and to exclude others? [Jervis, C. J. It seems that there is no place provided for unloading except the cells or depots, which are allotted exclusively to certain colliery owners?] Precisely so: and this is a substantial ground of complaint. [Cresswell, J. That opens out a very wide field of inquiry, and one that is of vital importance to railway companies. Jervis, C. J. If the company carry coal to a particular station, surely they must provide the means **[477]** of unloading it. Williams, J. Neither the rule, nor the affidavits, suggest a total absence of places for unloading.] The court may mould the rule, and direct an inquiry. The company have no right to refuse to carry Mr. Oxlade's coal to the extremity of their own line, -to Altofts. [Cresswell, J. They say they have no means of unloading at the junction at Altofts: and they refuse to carry on Oxlade's coal to places beyond their own line, because Oxlade refuses to pay demurrage.] The dispute as to demurrage was a matter between the Midland Railway Company and the North Eastern Railway Company. *Crouch* v. *The London and North Western Railway Company*, 14 C. B. 255, is an authority to shew that the company's liability as carriers is not limited by the extent of their own railway.

Cur. adv. vult.

Jan. 31, 1856.—JERVIS, C. J. We have considered this case a little; and we think that, from the form of the rule, there is one point which the company have not had an opportunity of answering. We therefore think that the rule should be amended in that respect, and that the matter should be referred to one of the masters to inquire,—"First, whether any and what accommodation and facilities are provided or afforded at any and what stations on the line of the said company's railway for the unloading of coal and coke, and for what persons, and under what circumstances,—Secondly, whether the said company carry coal and coke for persons other than the

said William Oxlade on any and what terms different from the terms on which the said company have carried or have offered to carry coals and coke for the said William Oxlade,—Thirdly, whether there is any and what difference between the circumstances under which the said company have so carried coals and coke for such other persons, and the circumstances under which the said company have carried or have offered to carry coals and **[478]** coke for the said William Oxlade, -Fourthly, whether and in what manner and how the company are enabled by reason of such difference of circumstances so to carry such coals and coke for such other persons at a cost to the said company less than the cost to the said company of carrying coals and coke for the said William Oxlade;" the master to report thereon to the court forthwith, and to be at liberty to examine the parties to be produced before him, on oath, to be administered by him.

The rule was accordingly amended by adding the following: -"Sixthly, to afford to the said William Oxlade all reasonable and proper facilities and accommodation for the unloading of his coals and coke at the various stations of the said railway, and to afford to the said William Oxlade at the said stations the same facilities and accommodations for the unloading of his coals and coke as the said company afford to colliery owners or lessees of collieries, or to any other person."

Jan. 21. In Hilary Term last, the master, having heard a vast deal of evidence as well on the part of the complainant as of the company, reported to the court as follows:—

This was an application for an injunction against the North Eastern Railway Company, under the 17 & 18 Vict. c. 31, "An act for the better regulation of the traffic on railways and canals," and, upon the hearing, the court, by a rule of the 31st of January last, referred it to me to inquire into four questions, and to report thereon to the court.

The inquiry has been a very protracted one; and a great quantity of irrelevant matter was brought forward. I have endeavoured to extract such parts of the evidence as bear upon the inquiry: and the result appears to me to be as follows: -

On the first point, viz. as to accommodation afforded **[479]** for unloading coals and coke at the different stations, there is the uncontradicted evidence of Mr. Sheriffe, the general manager of traffic, that, as far as the public are concerned, there is ample accommodation at all the stations for the unloading of coal and coke, and that there are no complaints of a want of supply. There are one hundred and twenty-four collieries in Durham and Northumberland, fifty-six of which send most of the two sorts of coals to the south; and thirty-one collieries in Yorkshire. As it would be utterly impossible to find accommodation for so many to send coals, and would lead to no beneficial result, but only produce a glut in the market, and materially interfere with the general traffic of the railway, the plan the company adopt for carrying on the coal and coke* trade is this, -they ascertain as near as possible the amount of population in the neighbourhood of each station, and calculate the consumption of coal at two tons a year for each individual, and build cells or depots accordingly. They then find out what kind of coal is most in request at the several stations, and enter into terms with those collieries which furnish the particular coal, to supply the required quantity. They appoint a depot agent, whose duty it is to manage the sale of coals: and, whenever any particular coal is getting low, he sends an order to the general agent at Darlington, who sends up the required number of waggons to the particular colliery, where they are filled, and returned in due course. By this means, the depot agent knows when he may expect the waggons, and makes arrangement for their immediate unloading; and thus all confusion is avoided, and all interference with or risk to the general traffic prevented. This is a universal rule; and, though instances have occurred in which parties have departed from it, the practice has always been stopped when it has been discovered. Mr. Sheriffe says "the order must go through the depot **[480]** agent. I apprehend this is a principle which cannot be departed from without injuring the traffic of the line, and hazarding the public safety:" and, as a proof of the utility of the rule, he mentions a case where Mr. Oxlade, as agent for the West Belmont Colliery, got more coals sent to the Slingsby Station than the station master, who acted there as the depot agent, had ordered, and they had to be unloaded on the main line. Mr Sheriffe goes on to say,

* [Carrying.]

"The matter was reported to me, and I stopped the practice: I could not have continued the responsibility, for all the coals in Durham. The traffic could not have been carried on without restriction. The incidents at this station convinced the directors that the only way of doing business was, through depot agents."

It was proved, however, that most of the Yorkshire coal-owners employ their own agents. This was their practice before the amalgamation of the companies, in 1854; and they have continued it: and Mr. Sheriffe says, that, though it does interfere in some degree with the traffic, yet, as all their coals come to York, and the station there is large, and at head quarters, and under the immediate eye of the managers, all hazard to the public is prevented.

Mr. Sheriffe says, —"We do not know private coal-merchants. We have only carried coals for Mr. Oxlade as the agent for the West Belmont Colliery, or some other colliery. We only treat with coal-owners and their agents." He was asked if they (the company) had not appropriated some cells at York to private coal-merchants. He says,—"We have not appropriated any cells to private coal-merchants. They (the coals) are sold to the public by the depot agent: the public are satisfied. All coal-merchants are treated as the public, and may get what coals they please, by sending a proper order. The agent acts for the collieries. He simply sells whatever coal is asked for. It makes no difference to the [481] railway company. He renders the account to the colliery owners." He was also asked if one or two private individuals had not occasionally had a waggon down unknown to the agent. He says he has no doubt it has been done; but it is in every case an exception to the rule, and is stopped if discovered.

At Thirsk Town station, it appears that there are seven cells for coal, and two for lime, which are all let to one person: and it was endeavoured to be shewn that he was a private coal-merchant. But Mr. Sheriffe says,—"We only knew him as agent to the coal-owners; and all his orders went through the general agent of the company."

At Malton station there are twenty cells; and also some private sidings belonging to Lord Fitzwilliam. By arrangement between the company and him, he carries coal for himself. The cells are let to different colliery owners, at 5l. or 6l. a year. The coal-merchants here make an agreement with some colliery owner, that they may come and take what coal they like, and render an account to the owner. They can get any quantity they think fit from any of the collieries having cells at the depots. Mr. Oxlade might do the same. But here also all the orders must go through the agent: and Mr. Oxlade refused to conform to the rule.

Mr. Oxlade, in reply, says, —"I know Mr. Walker, of Bridlington. I have seen the depots he occupies. There is a board up with these words 'Walker, Lime and Coal Merchant.' I obtained an invoice from him; it was 'Bought of J. Walker, Lime and Coal Merchant.' In 1854, I had dealings with him. I sold him coals. The invoice was in my own name. I fixed the price with him. The coals were sent from different collieries. I ordered them at the different collieries. At Thirsk, there was one Kirby, with whom I dealt under the same circumstances; and at Hull. I sent the orders direct to [482] the collieries. I did not send for the coals through the company's agent. I only ordered the waggons through the agent. I should say, order waggons to be sent up to particular collieries."

It would appear, that, in these instances, the agent at Darlington knew the number of waggons ordered: and Mr. Sheriffe says, in reply,—"We only know these parties as agents for the collieries. They sell coals for the coal-owners, and are allowed 4d. to 9d. a ton for their profit, according to agreement." In fact, there appears to be one principle throughout, by which the company are governed, viz. to provide an ample supply of coals for the public, and to prevent by their rules any obstruction of the general traffic of the railway.

On the remaining points referred to me, there is the following evidence:—Mr. Quelch, the mineral manager for the northern district of the North Eastern railway says:—"The quoting of rates from the collieries in Durham, is in my management. The local rates, or rates to places on our own line, differ from the through rates. As a general principle, for the through rates, or rates off our own line, if carried in other waggons than the North Eastern railway's waggons, the rate is $\frac{3}{4}$d. per ton per mile for coal and coke going south. If they have our waggons, there is an additional charge of $\frac{1}{8}$ of a penny per ton per mile for the first hundred miles, and $\frac{1}{16}$ for any

distance beyond, with demurrage for the waggons, of 3s. per day per waggon, if detained beyond the time allowed, that is, four days after they leave our line. This is quoted to all persons, and acted on, except when a special agreement is made (as hereinafter mentioned). The act authorises us to charge 1d. a mile per ton, including waggon-hire; but we have never charged the full amount for through traffic. The local rates are on a graduated scale, regulated by distance, universally applicable and universally applied. He then goes into a **[483]** statement of the rates charged for local traffic: but, as they are universal, and applied equally to every one without exception, it is unnecessary further to allude to them.

Mr. Sheriffe's evidence on these points is as follows:—"The rates, as regards local stations and stations off our line, are different. I am not aware that we ever carried for Oxlade. We knew him only as agent for collieries, and never debited him for rates. We debited the coal-owners always for rates. There is no difference in terms to any one. The coals that are carried a longer distance on our line are charged a lower rate than for a shorter distance. On the 24th of July, 1854, Oxlade applied by letter for a rate per ton per mile for small coal in train loads. In reply, we quoted the same rate to him as to others, viz. $\frac{5}{8}$ of a penny, the lowest rate the company charges. As to places off the line, there is one uniform rate of $\frac{3}{4}$d. per ton per mile to every one. But we carry coals in connection with the Great Northern railway at $\frac{1}{2}$d. per ton from the colliery to London. The Great Northern find the waggons for the entire distance. Our haulage ceases at York; and we take our proportion of the rate. One of the principal reasons for taking it at so low a charge is, that it is taken in full train loads, and very large quantities. Another reason is, that it must be taken at a low rate, or not at all. The rate is taken as a through rate to London. The fact of full train loads brings great advantages. We can run between York and the sidings where the Great Northern coals are deposited, with almost as much regularity as with passenger trains. There are no stoppages, and no shunting; and the engines are fully and uniformly loaded. Regularity is of the greatest consequence. Our object is, to get as much work out of an engine as we can: and it is apparent that an engine going forty or sixty miles without stopping, can do it in less time that an engine which is always stopping. When the quantities are smaller, and sent indiscriminately **[484]** from several collieries, we have to stop at all the places, and have to marshal the waggons accordingly. Constant stopping and shunting increases the expense, by the detention of the engine, and also from the fact, that, whenever an engine has to shunt, it stops any other engine coming up. The fundamental consideration is, the amount an engine can earn by the number of miles it goes. That forms an element in the calculation of the profits of the company. The amount of work we get out of the waggons is also a consideration. When they go off the line, we charge for the hire of them $\frac{1}{8}$ of a penny per ton for the first hundred miles, and $\frac{1}{16}$ afterwards. We allow four days: and, if detained beyond that time, we take demurrage alike from all parties, 3s. a waggon per day. We do not consider that this pays us, as we have only a certain number of waggons; and, if they are unduly detained, the loss is greater than the price of demurrage.

"A trade is carried on with the Midland railway: but not under the same circumstances. A desire to introduce northern coke into Staffordshire made us do it, in conjunction with the Midland Counties Railway. It is carried at $\frac{1}{2}$d. per ton per mile, exclusive of waggon hire, in large quantities.

These are the special agreements before alluded to:—

The first is with one Barrat, who is agent for Robson, a coal-owner in Durham. It is dated the 24th of October, 1855, and is as follows: "Thomas Barrat, as agent for John Robson, and the owners of Byers Green, Hunwich, and Newfield collieries, hereby agrees to send over the North Eastern railway, from Ferry Hill to Altofts, in twelve months commencing 1st November, 1855, and ending 1st November, 1856, 30,000 tons of coke manufactured from coals wrought out of Byers Green, Hunwich, and Newfield collieries; such coke to be sent south of Derby, and to be used only for manufacturing purposes and blast furnaces. The coke to **[485]** be sent in equal or as nearly as may be equal monthly quantities; and satisfactory evidence to be produced from time to time by the owners of the said collieries, of the places at which the coke is delivered, and the purposes for which it has been used, should such evidence be required by the North Eastern company, in consideration of the North Eastern Railway Company have agreed to convey the said quantity of 30,000 tons of coke

over their railway from Ferry Hill to Altofts at the rate of ½d. per ton per mile; such rate being exclusive of the charge for waggons, in case the said North Eastern railway provide any for this purpose. Payment of each month's dues to be made at the usual times, that is to say, on the 20th of the following month. And it is expressly agreed by the said Thomas Barrat, for John Robson and the owners of the above-named collieries, that, in case the stipulated quantity of 30,000 tons of coke be not sent within the period of twelve months commencing the 1st November, 1855, and ending 1st November, 1856, the said North Eastern Railway Company shall be entitled to charge an additional rate of ½d. per ton per mile on such portion of the 30,000 tons of coke as may have been sent; and that the said John Robson and the owners of the aforesaid collieries will pay to the North Eastern Railway Company the said additional rate."

Another agreement was with Mr. Pease; and the minutes of the meeting of the directors at York at which the terms were stated, is as follows:—"Minutes of meeting held at York on Tuesday, July 24th, 1856. Present Mr. Sheriffe, Mr. Clark, Mr. Brown. Mr. Sheriffe stated that the North Eastern Railway Company were willing to agree to the following arrangements with Mr. Pease, for the carriage of coke from Darlington to the South Staffordshire district and places beyond Derby: the minimum quantity to be conveyed upon the after-mentioned conditions to be 20,000 tons per annum. The rate to be [486] ½d. per ton per mile to Normanton. The coke not to be used for locomotive purposes. If any portion of it is found to be so used, the parties to pay 1d. per ton per mile for its conveyance over the North Eastern Railway. Any quantity of coke to be sent, so long as it is strictly confined to iron manufacture. Coals to be conveyed on the same terms. As respects waggons, the North Eastern Railway Company to supply at the ordinary charge as much of their own stock as may be found convenient, in the event of Mr. Clare's (the agent's) waggons being found insufficient. The company to have the use of Mr. Clare's waggons to load back to York, or stations north of York, at 6d. per ton. The waggons to be sent to any stations where such loading turns up. The waggons when loaded to be under clearing-house rules. Salt in return coke waggons to the alkali works in the Newcastle district, to be carried for the next three months at ½d. per ton per mile. Arrangements to date back from the 1st June, 1855."

"The third agreement is with a person of the name of Sparkes, for carrying 15,000 tons per annum. He first offered 10,000, which I refused. I named 15,000 as the lowest amount we could carry at ½d. per mile." His agreement was for three years; and it appears that for the first two years he did not send the specified quantity, and was charged ¾d. per ton per mile, as every one else, and was only allowed the drawback on the last year, when he did send the specified quantity.

These were the only special agreements the company had: and they charge every one else the universal rate of ¾d. per ton per mile.

Mr. Sheriffe continued,—"We have carried coke for Oxlade on the Midland line: I think, from East Hetton. It was carried at the usual charge of ¾d. per ton. They were not full train loads. He was in the habit of detaining our waggons at a place called Great Bridge, in Staf-[487]-fordshire, and refused to pay demurrage." This led to a correspondence between the South Staffordshire railway and the North Eastern; in which the former refused to receive any more waggons of coke consigned to Oxlade: and, in consequence, Mr. Sheriffe, on the part of the North Eastern Railway Company, gave him notice, by letter of the 25th of September, 1854, that they must cease to send any more waggons for him to the collieries. A letter from the South Staffordshire railway of the 16th of October, 1854, addressed to Mr. Sheriffe is as follows:—

"Oxlade's coke.

"Dear Sir,—In reference to our former correspondence, this man, by his letter of the 14th, advises us,—'Your's of the 12th instant to hand; and, to save further trouble respecting the demurrage, please note I will not pay any demurrage to any railway company.' We have a declaration from him, dated 10th, for trucks 1054, 323, 3211, 544, and 3262; so that your people are very evidently still letting him have waggons for here. I need only refer you to our previous correspondence.

"T. C. Marshall."

Mr. Sheriffe further says, that the whole cause of Mr. Oxlade's trade in coke being

stopped, was his refusal to pay demurrage; that, if any one else had refused to pay demurrage, the company would have refused to carry for him; and that the parties hiring the waggons are liable for the demurrage.

Mr. Oxlade says,—"My reason for refusing to pay demurrage was, that I had no control over the account: and, if I were to agree to it, it would ruin me, as they might charge me what they pleased and when they pleased. No demurrage occurred through my neglect. I know the waggons were detained at Great Bridge; but it was by the South Staffordshire railway. I have no doubt they have been detained, loaded, and unloaded, many days. When the company refused to let their [488] waggons go off their line, I applied to them, by a letter of the 6th November, 1854, to let their waggons take the coke to the end of their line, and I would provide other waggons to carry it on; but they gave me no answer. I have applied personally; but they would only do it their own way."

He further says,—"I have refused to pay the waggon hire, because it is not mentioned in the act. I refuse to pay the $\frac{1}{8}$ of a penny, in addition to $\frac{3}{4}$d. per ton, on the North Eastern railway. It is less than the legal charge; but I object to its being divided. I object to pay $\frac{3}{4}$d. per ton per mile, when other people pay $\frac{1}{2}$d. I know the $\frac{1}{2}$d. is only charged to persons having their own waggons. I have a dispute with the South Staffordshire. In 1854 I know that parties were underselling me at Great Bridge, both in coal and coke; and elsewhere on the Midland line. I told the North Eastern railway people of it, and they said they could not explain it; they had no advantage."

This evidence appears to me to be all that relates to the questions referred to me, viz. whether the company carry coals and coke for persons other than the said William Oxlade, on any and what terms different from the terms on which the said company have carried, or have offered to carry, coal and coke for the said William Oxlade,—secondly, whether there is any, and what, difference between the circumstances under which the said company have so carried coal and coke for such other persons, and the circumstances under which the said company have carried, or offered to carry, coals and coke for the said William Oxlade,—and, lastly, whether and in what manner and how the said company are enabled by reason of such difference of circumstances, so to carry such coals and coke for such other persons at a cost to the said company less than the cost of carrying coals and coke for the said William Oxlade. And it evidently appears, from [489] this uncontradicted evidence, that, with the exception of the three agreements mentioned, there is one universal rate of carriage charged to every one, both on the local stations and on the through traffic, and is quoted alike to every one who applies for it.

The Master's report having been read, a discussion took place as to which side should begin; and, in the result, the court decided that the counsel for the company should be considered as shewing cause, the report of the Master being treated as substituted for the materials upon which the motion was founded, and the argument being limited to the matters referred to the Master.

Byles, Serjt., and J. Addison, for the company. All that the statute 17 & 18 Vict. c. 31, s. 2, prohibits is, the giving undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, or the subjecting any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. The statute which defines the duties of the company as to the imposition of tolls, 8 & 9 Vict. c. 20, s. 90, provides that all such tolls "shall be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." Of the matters referred to the Master, all are disposed of by his report, except that which relates to the special agreements. It would be manifestly impossible for the company to provide depots for every coal merchant, who might choose to carry coals on their line. [490] And, if the complainant were allowed to unload his coals at every station as and when he pleases, the entire traffic of the line would be stopped. The company are not, and do not profess to be, common carriers of coals: *Johnson* v. *The Midland Railway Company*, 4 Exch. 367. The Master's report shews that they do even more for the accommodation of the public than they are bound to do. The complaint of excessive charges made to Mr. Oxlade, as com

pared with the charges made to the Great Northern Coal Company, is disposed of by the Master's report. All, therefore, that remains to be considered is, that part of the rule which refers to the special agreements. These were for the carriage of coals and coke from the collieries and coke-ovens in large quantities and at stated periods. The company might, therefore, well be enabled to carry for those persons on terms somewhat more favourable, without being guilty of any breach of the duty imposed upon them by the statute; and their so doing was clearly not giving a preference or advantage that could be considered as undue or unreasonable. In every trade it is the universal practice to make a difference in favour of one who deals largely. Upon this principle it is that return tickets and family tickets are issued by nearly all the railway companies. As to the company's refusal to permit their waggons to go beyond the limits of their line with Oxlade's coals, two answers may be given: in the first place, they are not bound to travel out of their line; and, in the next place, their refusal was warranted by the conduct of Oxlade himself, who refused to pay the amount of demurrage for the detention of the waggons which was uniformly charged to all. The refusal to carry to Altofts is justified by the absence of accommodation at the place (which is a mere junction) for unloading. Upon the whole, it is submitted that there is nothing in the Master's report **[491]** to sustain any part of the charge which has been made against the company.

Bovill (with whom was T. Jones), contrà. The very object of the recent act was, to discourage monopolies. Various contentions having arisen between railway companies and persons for whom they carried, and the provisions of the special acts not having been found sufficiently stringent,—see *Pickford* v. *The Grand Junction Railway Company*, 10 M. & W. 399; *Parker* v. *The Great Western Railway Company*, 7 M. & G. 253, 7 Scott, N. R. 835, and 11 C. B. 545, and *Edwards* v. *The Great Western Railway Company*, 11 C. B. 588, equality of charge was sought to be enforced by the 90th section of the 8 & 9 Vict. c. 20 (ante, p. 472). It was very soon found that this provision was inefficient to cure the evil; and that led to the passing of the 17 & 18 Vict. c. 31. The company are clearly guilty of an infraction of the provisions of that statute, if they give any undue or unreasonable preference or advantage to, or impose any undue or unreasonable prejudice or disadvantage upon, any particular person. That the company are common carriers of coals on their lines of railway, is clear from the cases of *Palmer* v. *The Great Western Railway Company*, 4 M. & W. 749, and *Johnson* v. *The Midland Railway Company*, 4 Exch. 367. Indeed, this case would not have been referred to the Master, unless the court had been satisfied that they are so. And *Crouch* v. *The Great Northern Railway Company*, 14 C. B. 255, shews that they are even bound to carry beyond their own lines. As to the first point referred to the Master, it appears, that, although ample accommodation and facilities are afforded at every station for the unloading of coal and coke for certain persons to whom **[492]** the company choose to give a preference, none whatever are afforded to Mr. Oxlade. He is altogether precluded from obtaining coals by means of their railway. The only answer they give is, that it is more convenient to them that he should buy his coals of their depot agent. Is that to be tolerated? Then, as to the second, point,—the terms of carriage,—the Master finds, that, with respect to the coals and coke carried by the North Eastern Railway Company in conjunction with the Great Northern, there is a saving of time and expense to the company, which justifies the diminished charge. That Mr. Oxlade cannot fairly except to. But the case stands upon a totally different footing with regard to the three private agreements referred to. There is no difference between one colliery owner or coke-merchant and another to justify this different treatment. [Addison. The North Eastern Railway Company carry coals for no one off their own line. Cresswell, J. Or contract to do so? Addison. No.] The charge they make is, for carriage of the coals and coke to the end of their line, and for the use of waggons beyond. With Mr. Pease,—one of the persons with whom they have a private agreement,—they agree to carry to Normanton, which is some thirty miles off their line. [Byles, Serjt. The company have running powers to Normanton.] The Master finds that the company charge to these three persons for the carriage of coke and coals to South Staffordshire, 2s. a ton less than they charge Mr. Oxlade: and for this he finds no justification whatever. The excuse now set up is, that these contracts or agreements are made with colliery owners. But coke is a manufactured article: and colliery owners stand in no different position as to that than any other person. The carriers' cases already referred to shew that the trade of the customer makes no

difference. Then, it is said that, in these three instances, the contracts are for the con [493] veyance of large quantities at regular times. To allow this argument to prevail would be to give effect to a monopoly of the large dealers. The courts have always repudiated the notion that carriers have any right to make a distinction in respect of quantity. In the case suggested of return tickets and family tickets, there is no preference given; all who choose to avail themselves of the regulation, are treated alike. With regard to the loading back, there is nothing in the report to shew that there is any advantage to the company corresponding with the difference of charge. [Cresswell, J. I observe that all the agreements are for the carriage of coals and coke over the whole of the North Eastern line, and beyond it.] The company refuse to carry for Mr. Oxlade to the end of their line: they refuse to carry his coals and coke to Altofts. [Cresswell, J. Nor is it reasonable that they should, under the circumstances stated in the report.] At all events, they are bound to carry on to Normanton, instead of stopping, as they do, at York, which is thirty miles short of it. The agreement with Barrat is, to carry from Ferry Hill to Altofts. The 2nd section of the 17 & 18 Vict. c. 31, enacts that every railway company having or working railways which form a continuous line of railway communication, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways, by the other, without any unreasonable delay, and without any such preference or disadvantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf. [Cresswell, J. That part of the section which applies to the traffic as a con tinuous line refers to the company which is to carry [494] on. Crowder, J. Does it appear that the company have accommodation for unloading at Altofts?] They do not say they have not. [Crowder, J. It is for you to shew a reasonable ground of complaint.] It is submitted that ground enough has been shewn to induce the court to make this rule absolute. [Cresswell, J. What is it that you ask us to order the company to do? When we are asked to order something to be done at the peril of an attachment for non compliance with our order, I think it should be presented to us in precise terms.] Mr. Oxlade is entitled to have his rule absolute upon all the three points which have been made. Crowder, J. Your argument materially qualifies what you ask by the rule.]

Byles, Serjt., proposed to reply.

Cresswell, J. You have already been heard upon the Master's report. We do not think there should be a reply.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This was a rule obtained by Mr. Oxlade, calling upon the North Eastern Railway Company to shew cause why a writ of injunction should not issue against them, under the 17 & 18 Vict. c. 31, enjoining them to do various things: [His Lordship read the rule, as amended.]

When cause was shewn against the rule, before the late Lord Chief Justice and my Brothers Crowder and Williams and myself, it was referred to the Master to inquire into four questions, and report thereupon to the court.

The questions so referred to the Master were,—first, whether any, and what, accommodation and facilities [495] are provided or afforded at any, and what, stations on the line of the said railway for the unloading of coal and coke, and for what persons, and under what circumstances; secondly, whether the company carry coals or coke for persons other than the said William Oxlade on any, and what, terms different from the terms on which the said company have carried, or have offered to carry, coals and coke for the said William Oxlade; thirdly, whether there is any, and what, difference between the circumstances under which the said company have so carried coals and coke for such other persons, and the circumstances under which the said company have carried, or have offered to carry, coals and coke for the said William Oxlade; and, fourthly, whether, and in what manner, and how, the said company are enabled by reason of such difference of circumstances so to carry coals and coke for such other persons at a cost to the said company less than the cost to the said company of carrying coals and coke for the said William Oxlade.

The report was made on the 21st of January, when my Brother Crowder and I

were the only judges present,—a circumstance which we much regret, considering the novelty and difficulty of the matter which we are called upon to decide. Those matters were fully and ably discussed before us by counsel; and we have endeavoured to ascertain what we ought to do, in order to give effect to the statute on which the rule was founded.

The Master's report upon the first question was as follows:—[His Lordship read it.]

This being the principle by which the company have been governed, we do not find, that, by the regulations made for carrying it into effect,—and which are fully detailed in the Master's report, any undue or unreasonable preference or advantage has been given to or in favour of any particular person or company; nor has any particular person or company, or any particular de-[496]-scription of traffic, been subjected to any undue or unreasonable prejudice or disadvantage.

This disposes of the fourth and last branches of Mr. Oxlade's rule, viz. those which call upon the company "to afford to the said William Oxlade the same facilities for the receiving and forwarding and delivery of his coals and coke upon and from the said railway, as the said company afford to persons who consign their coal or coke to the said company," and "to afford to the said William Oxlade all reasonable and proper facilities and accommodations for the unloading of his coals and coke at the various stations of the said company, and to afford to the said William Oxlade at the said stations the same facilities and accommodations for the unloading of his coals and coke, as the said company afford to colliery owners, or lessees of collieries, or to any other person."

The Master then states the circumstances relating to the carriage of coals by the North Eastern Company, which are conveyed forward from York on the Great Northern line, by that company: and we think that it is made out that such circumstances enable the company to carry such coals at a cost to them less than the cost of carrying coals and coke for Mr. Oxlade; and that it is not shewn, that, by carrying them at a lower rate, any undue or unreasonable preference is given, or any undue or unreasonable disadvantage imposed.

This disposes of so much of the second branch of the rule as relates to carrying coals for persons for whom the same are also carried on the Great Northern railway.

The Master then proceeds to report upon the other part of that branch of the rule, viz. the charge made by the company for coals carried for persons with whom they have private agreements for the carriage of coals and coke. It appears that "a desire to introduce the northern coke into Staffordshire" induced the company to make three special agreements with different parties [497] for the carriage of coal and coke at a rate lower than their ordinary charge. We think that the desire to introduce the northern coke into Staffordshire was not a legitimate ground for making such agreements. Lowering their rates for that purpose was giving an undue preference to that traffic. Other special circumstances are stated in the agreements, which, had they affected the pecuniary interests of the company, might have furnished ground for contending that the preference was not undue or unreasonable: but the Master has not found or stated that there was before him any evidence to shew that the pecuniary interests of the company were affected.

Upon this state of facts, we are of opinion that such agreements could not be made after the passing of the 17 & 18 Vict. c. 31, without violating its provisions. Two out of the three agreements were made after the act passed; one of them before: but all have now expired. It would, therefore, be futile to enjoin the company to charge Mr. Oxlade for carrying coals tolls not higher than those charged to persons with whom they have private agreements; but we think, that, acting upon the same view of the statute as we expressed in the case of *Ransome* v. *The Eastern Counties Railway Company* (ante, p. 437), we ought to enjoin the North Eastern Railway Company not to charge Mr. Oxlade for the carriage of coals at a higher rate than they charge other persons, having a due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other.

The Master was not directed to inquire into the fifth branch of Mr. Oxlade's rule, viz. his demand to have waggons and trucks provided by the company for the carriage of his coal and coke. When the matter was referred to the Master, it appeared to the court that Mr. [498] Oxlade, having refused to pay demurrage charged to him at the same rate as to all others under similar circumstances, had no right to ask the

company to find trucks: and we continue of that opinion. Nor has he any just ground of complaint, because the company will not carry his coals to Altofts for the purpose of being there shifted into other trucks. They have no convenience for that purpose, and do not give such facility to any other person.

The first branch of the rule remains to be dealt with, viz. that which calls upon the court to enjoin the company "to carry upon their said railway for the said William Oxlade such coal and coke as may be offered by the said William Oxlade for that purpose."

When the rule was first before the court, it was considered that Mr. Oxlade had no right to call upon the company to carry all coal and coke that he might offer for that purpose: and since then an opinion has been expressed by the court of Exchequer, in an action between these very parties, that the company are not common carriers of coal,—thus confirming our view of the claim in question.

Upon the whole, then, we are of opinion, that, as to all the matters in the rule, except the latter part of the second branch, which relates to special agreements, it must be discharged: but that, as to special agreements, an injunction must issue as above suggested.

Had Mr. Oxlade confined his demand to that matter, the company might possibly have complied with it. But he has asked a great deal more than he is entitled to. We think, therefore, that we ought not to grant him the costs of his application.

On the other hand, the company have been partially in the wrong: they, therefore, must bear their own costs.

Rule accordingly.

[499] IN THE MATTER OF THE COMPLAINT OF WILLIAM ADOLPHUS MARRIOTT AGAINST THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. Jan. 30, 1857.

[S. C. 26 L. J. C. P. 154; 3 Jur. N. S. 493; 5 W. R. 312. Distinguished, *In re Beadell and Eastern Counties Railway*, 1857, 2 C. B. N. S. 510. See *West* v. *London and North Western Railway*, 1870, L. R. 5 C. P. 629, 632.]

A railway company made arrangements, at one of their stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers by any of their trains to and from K., and allowed A. the exclusive privilege of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office:—Held, that, in the absence of special circumstances shewing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to another who also brought passengers from K. as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences, contained in the 17 & 18 Vict. c. 31, s. 2.

Quain, on a former day in this term, on behalf of William Adolphus Marriott, obtained a rule calling upon the London and South Western Railway Company to shew cause why a writ should not issue "injoining them to admit the omnibus of the said W. A. Marriott into the yard of the Kingston station of their railway at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from their said railway, and in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose;" and why the said company should not act in compliance with the Railway and Canal Traffic Act, 1854.

The rule was moved upon the affidavits of the applicant himself, of his driver, his attorney, and of a gentleman who was a frequent passenger by the applicant's omnibus.

The applicant in his affidavit stated that he was the owner and proprietor of a certain omnibus running from Twickenham station on the Richmond and Windsor line of railway to the Kingston station on the London and South Western railway, and that the said omnibus commenced running on the 27th of October last, and daily received passengers and luggage, and also goods and parcels of persons not passengers, and forwarded the same from the said Twickenham station and intermediate **[500]** places by his omnibus, and delivered the same at the said Kingston station for the

purpose of being conveyed by the said London and South Western railway, without any hindrance or molestation on the part of the said London and South Western Railway Company or their servants, from the said 27th of October up to Saturday the 15th of November last: That the said Kingston station is surrounded by a large yard inclosed by a brick wall on the south side, the Railway Tavern on the north side, and by an iron railing on the west side or front thereof, which iron railing has three sets of double gates for the ingress and egress of carriages and vehicles bringing traffic to the Kingston station; and the said station is approached by carriages passing through the said gates and over the said inclosed yard up to the said station, and in no other way: That, on several occasions, the complainant's omnibus was excluded from the said yard by the company's servants, and on one occasion his passengers in consequence lost the train: That the said yard is of considerable extent, and more than sufficient for the accommodation of all the public and private carriages using the same, and taking up or setting down and delivering passengers and luggage, &c. there, to be forwarded by the said railway; and the said yard is used by the public generally approaching the said Kingston station either on foot or in carriages public or private for the purpose of forwarding passengers and luggage, goods, and parcels by the said railway, without any hindrance or molestation on the part of the company, and such yard has been so used by the public for several years without the gates being ever closed: That there is a public coach running daily from Horsley and Leatherhead to the Kingston station, for the conveyance of passengers and luggage, goods and parcels, from Horsley, Leatherhead, and intermediate places, to the Kingston station, to be forwarded by the said railway, and also for [501] the conveyance of passengers from the Kingston station to those places; and such coach delivers and takes up such traffic as aforesaid at the said Kingston station, and passes through the said iron gates, and over the said yard, for that purpose, without any hindrance or molestation on the part of the company or their servants, and has done so for a long space of time; that there is also an omnibus running from the old town of Kingston-upon-Thames for the conveyance of passengers, luggage, &c., therefrom to the Kingston station, and vice versâ, which omnibus runs to some of the up and down trains stopping at the Kingston station in the course of the day, and delivers and takes up such traffic as aforesaid at the said Kingston station, and passes through the said iron gates, and over the said yard, for that purpose, without any hindrance or molestation on the part of the company or their servants, and has done so for a long space of time, receiving from the company pecuniary and other assistance and accommodation; and that the complainant's omnibus is the only carriage or vehicle, public or private, that is ever hindered or molested in its approach to the said Kingston station for the purpose of delivering and taking up passengers, luggage, &c., thereat, and that is refused admittance into the yard for that purpose: That the complainant's omnibus has continued running to and from the Kingston station daily from the 15th of November last down to the present time, and the company's servants upon his approach invariably closed the gates of the yard, and the passengers were obliged to get out and walk with their luggage from the gates to the station, a distance of about seventy-five feet, to their great inconvenience and annoyance: That the complainant's omnibus was a great convenience and accommodation to passengers residing at Twickenham, Teddington, Hampton Wick, and Kingston, and intermediate places, more particularly to Teddington and Hampton Wick, [502] in which latter place were several residents who were constant passengers by the railway to and from the Kingston station, and holders of season-tickets, and who travelled constantly by the complainant's omnibus to and from the said station, being taken up and set down thereby at their own residences or immediately adjoining thereto, the complainant's omnibus being the only mode of conveyance from Twickenham, Teddington, and Hampton Wick to and from the said Kingston station. The affidavit then proceeded to set out a correspondence which the complainant had had with the secretary of the company upon the subject of his exclusion from the station yard, in the course of which such exclusion was attempted to be justified by the company on the ground that the station yard was their private property, and that they were of opinion that the rival omnibus above referred to afforded ample accommodation to the public: and it concluded with a general allegation "that the company, by reason of their closing the gates of the yard of the said station against the complainant's omnibus as aforesaid, did not afford him such reasonable facilities for the receiving and forwarding and

delivering of traffic upon and from their said railway as he was entitled to; and that the company made and gave an undue and unreasonable preference and advantage to and in favour of the rival omnibus and the other public coaches and vehicles going to and from the said Kingston station, by allowing them free access to the yard of such station and refusing him admittance thereto; and that they thereby subjected him and the traffic conveyed by his said omnibus to an undue and unreasonable prejudice and disadvantage."

The above affidavit was confirmed in all material particulars by that of the driver of the complainant's omnibus; and the affidavit of the complainant's attorney stated a refusal on the part of the company to afford him [503] the accommodation which he (the deponent) had demanded of them on his behalf.

The affidavit of R. W. Lack, a resident at Hampton Wick, and a constant traveller by the railway to and from the Kingston and Waterloo stations, stated that the deponent had for some time past been in the habit of travelling by an omnibus belonging to Marriott, running from the Twickenham station on the Richmond and Windsor line, through Hampton Wick, to the Kingston station; that such omnibus was a very great convenience to the deponent and the residents in Hampton Wick generally, as it was the only public conveyance existing for passengers and traffic from Hampton Wick to the said Kingston station; that, on the 17th of November last, the deponent was proceeding in the said omnibus to the Kingston station, for the purpose of travelling by the railway to London, and, on the said omnibus approaching the Kingston station, the gates forming the means of ingress into the yard of the station were closed, and the servants of the company refused to admit the said omnibus into the said yard for the purpose of delivering the passengers, luggage, and parcels carried thereby, and, in consequence of the delay and confusion caused by such conduct on the part of the said servants of the company, the deponent lost the train, whereby he was greatly damaged and inconvenienced; that this conduct on the part of the servants of the company had been persisted in on several occasions, to the great inconvenience of the deponent and other parties passengers by the said omnibus, and, from the fact of the outer gates of the yard of the said station being at a distance of about seventy-five feet from the station, passengers by the said omnibus were greatly annoyed and inconvenienced; and that this inconvenience was greatly increased by rainy weather, and more particularly so in the case of females.

[504] The case of *Barker, App., The Midland Counties Railway, Resp.*, 18 C. B. 46, was referred to.

Bovill, Q. C., and Hawkins shewed cause, principally upon the affidavits of Archibald Scott, the traffic manager of the South Western Railway Company, and John Dudman, the inspector of police at the Kingston station. The affidavit of Mr. Scott stated, that the station yard and approaches at the Kingston station were the property of the company, subject only (as to a portion of it) to a right of way on foot and on horseback, and with or without carriages or horses, and for all purposes, in, over, through, across, or along the same, for the present and all future occupiers of the Southampton Railway Hotel and his and their customers, servants, and agents, and all persons going to and from the said hotel, and the garden, stables, and other premises held and occupied therewith, for the proper and complete enjoyment of the said hotel and premises: That the complainant did not, before commencing to run his omnibus, ask permission to enter the station yard with his omnibus: That the directors of the company, after consultation and due consideration of all the circumstances, not being willing to allow the complainant's omnibus to enter the yard, gave instructions to their servants to exclude him: That it is highly necessary for the proper working and management of the traffic upon the said railway, and for the avoidance of discomfort and inconvenience to the passengers travelling upon the said railway, that the admission of public conveyances to the stations of the company, and their proper regulation while in the station yards, should be under the entire control of the company and their officers, for the purpose of enabling the company to regulate the charges to be made by the proprietors of the said public conveyances, and for preventing unseemly rivalry between such proprietors of public conveyances, to the annoy-[505]ance of the passengers travelling upon the railway, and that this control is particularly needed at the Kingston station, not only from its vicinity to London, and the number and respectability of its inhabitants, but also from its proximity to Epsom race-course, and the necessity of duly regulating the great increase of traffic

to and from the said station at the periodical occurrence of such races: That there had been from time to time, and there was, an omnibus running between the said Kingston station and Kingston and Norbiton, of which one John Williams was the proprietor: That the omnibus accommodation at the Kingston station provided by Williams was ample and sufficient for all the present traffic to and from the said station: That, by the terms of an arrangement made between the company and Williams, the latter was bound to find and provide any additional omnibus or omnibuses to run to and from the said Kingston station as should be required to accommodate the traffic to and from that station and its vicinity: That no complaint had been made of the deficiency or insufficiency of the present omnibus accommodation at the Kingston station: That Williams did not receive any pecuniary or other assistance and accommodation from the company in working his omnibus: That the complainant formerly worked the said omnibus to and from the said Kingston station and Norbiton, as the same is now worked by Williams: That the said omnibus so started by the complainant, so far as it runs between Kingston station and Kingston, is not required for public accommodation so far as respects Kingston or Norbiton or any place between Kingston and Norbiton and the said station: That, so far as the complainant's omnibus ran from Twickenham station, on the Richmond and Windsor line, to the Kingston station, it was in competition with the traffic of the London and South Western Railway Company to and from Twickenham station, and was not required for public accom-[506]-modation: That the deponent verily believed that the said omnibus was started by the complainant to run between the Twickenham and Kingston stations, not for the bonâ fide purpose of providing better or more extended accommodation for the public and passengers travelling upon the said London and South Western railway to and from the said stations respectively, but for the purpose of annoying the company and Williams, and interfering with the traffic upon the said railway, and of the said omnibus of Williams. The affidavit then went on very irrelevantly to allege that the complainant was a very ill regulated and troublesome fellow, and that therefore, and for other reasons, the directors "were not disposed to grant him any favour or indulgence."

The affidavit of Dudman stated, amongst other things, that the deponent had the superintendence of the porters at the Kingston station; that, to the best of his belief, the porters at that station carried the luggage and parcels of, and attended upon, the passengers arriving by the complainant's omnibus in the same way and to the same extent as they carried the luggage and parcels of, and attended upon, the other passengers arriving at the Kingston station by any other omnibus or public or private conveyance; and that, so far as he was aware, no goods had ever been brought by the said omnibus to the Kingston station for carriage on the said railway, other than the luggage of passengers, and small parcels; and that no complaint had ever been made to the deponent by any passengers travelling upon the said railway to and from the Kingston station, of the insufficiency of the omnibus accommodation provided at the station; and that, in the judgment of the deponent, the omnibus worked by Williams to and from the said station and Kingston and Norbiton, afforded ample accommodation for all passengers and traffic to and from the said station and Kingston and Norbiton.

[507] Several other affidavits were produced, which, besides containing a vast deal of irrelevant matter, reiterated in every conceivable shape the denial that any passenger had sustained or could sustain inconvenience or annoyance from any want of attention or accommodation at the station; and one of them gave the particulars of a pugilistic contest which had occurred at the gates of the station, between the driver of Williams's omnibus and the conductor of Marriott's, and which resulted in the fracture of the conductor's leg. Williams also made an affidavit vehemently protesting that his conveyance gave the public all the accommodation that could be desired, and that there was not throughout the year more than sufficient traffic to and from the Kingston station to afford a fair remuneration to one omnibus.

The above affidavits having been read,

Lush, on behalf of the complainant, proposed to file additional affidavits in answer to "new matter" therein contained. The affidavits so proposed to be filed were those of four inhabitants of Hampton Wick and four of Kingston, complaining of inconvenience which they had sustained from the conduct pursued towards Marriott by the company.

Bovill, for the company, objected that these affidavits were not in answer to new matter, but merely contained allegations confirmatory of the matters already stated in the affidavits upon which the rule was moved.

The Court seemed to think that the affidavits ought not to be received; but it became unnecessary formally to decide the point. The affidavits, however, were handed in, and filed.

Bovill and Hawkins proceeded to shew cause. This [508] is a question of serious importance to railway companies; for, if Mr. Marriott can insist upon driving his omnibus into the station yard of the South Western Railway Company at Kingston, what is to prevent every Paddington omnibus from being driven into the station of the Great Western railway to ply for passengers? Seeing that competition must necessarily be productive of confusion and riot, the company have thought fit to make arrangements with Mr. Williams to provide sufficient accommodation by means of omnibuses for passengers coming to and going from the railway. [Cockburn, C. J. According to your affidavits, the company provides that sort of accommodation for the people of Kingston and Norbiton only; whereas, it appears that there are persons who come from Twickenham and Hampton Wick whose sole reliance must be on Marriott's omnibus. The avowed object of excluding Marriott is, to avoid competition, which is generally supposed to be beneficial in all other matters. It may be that the company would not be bound to admit all vehicles of this description; but here, it seems, they exclude all but one. Cresswell, J. The words of the statute are, "undue or unreasonable preference," or "undue or unreasonable prejudice" (*a*)[1]. If the wants of the public, or the convenience of the company, make it desirable to admit or to exclude omnibus A. or omnibus B., it may be that they would be justified in so doing.] Williams being under the more immediate control of the company, a preference is given to him, in return for his undertaking to secure ample accommodation for the public. [Cresswell, J. That is granting him a monopoly for certain considerations. Unless you can shew that it is reasonable, with reference to the safety of the public and the maintenance of order in the station, you are directly within the prohibition of the statute [509] against the giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company."] It is sworn that there never has been any complaint of want of accommodation on the part of the company. [Cresswell, J. Suppose there is not any want of accommodation, how does it appear that the admission of the complainant's omnibus would impose any undue or unnecessary trouble or inconvenience upon the company?] The affidavits shew that in one instance at least serious mischief has resulted from the rivalry. [Cresswell, J. Rather from the exclusion of Marriott.] It is submitted that it is not unreasonable for the company to do as they have done, inasmuch as it tends to secure a regular and unfailing accommodation to the public. [Cockburn, C. J. How does it appear that the public will be better served by confining the facilities to one individual than by open competition? Every monopoly might be upheld upon the same grounds as you suggest. Cresswell, J. You do not shew that any other person besides Williams and Marriott wishes to drive his omnibus into the station.] Are the company to have no power to make regulations giving an advantage to one who contracts with them, and for their advantage, to supply accommodation at all times to the public? They might, if so minded, exclude every public vehicle from their premises. [Cockburn, J. Then they would possibly not be affording reasonable facilities for receiving and forwarding the traffic, and so might fall under the lash of the other branch of the clause" (*a*)[2]. The object is, to accommodate the public, not to give a preference to Williams. [Cockburn, C. J. The effect is so. The only question is, whether there is a corresponding benefit to the public. I see none.]

[510] Lush and Quain, in support of the rule, were not called upon.

Cockburn, C. J. I am of opinion that this rule must be made absolute. It seems that the South Western Railway Company have entered into an arrangement with one Williams, whereby they admit his omnibus to the door of the station at Kingston for the purpose of letting down and taking up passengers and their luggage,

(*a*)[1] See the section, ante, p. 410.

(*a*)[2] Ante, p. 411. As to this, see the observance of Cresswell, J., in *Orlade's case*, ante, p. 493.

and that they exclude all others. The effect is, that, while Williams conveys his passengers coming from Kingston and Norbiton to the door of the booking-office, Marriott's passengers, some of whom come from Hampton Wick and Twickenham, being excluded from the station yard, are subjected to the inconvenience of being set down with their luggage in all weathers at the gate, which is about seventy-five feet distant from the door of the booking-office. I am of opinion that that is giving an undue and unreasonable preference and advantage to and in favour of Williams, and brings the company within the provisions of the statute in question. I see no sufficient reason why this preference should be given to one omnibus, to the exclusion of another. I can very well understand that a case might arise, where, by reason of the limited extent of their premises, a railway company might be justified in making arrangements for the admission of a certain number only of public vehicles. But nothing of the kind is suggested here. It is said that the arrangement entered into by the company with Williams enables them to secure better accommodation for the public. But, in the first place, the company do not shew facts, even as regards the inhabitants of Kingston and its vicinity, whence we can infer that reasonable accommodation would not be secured at least as well without this arrangement; and, in the next place, assuming that it may be a convenient arrangement as far as **[511]** the Kingston people are concerned, it does not apply to the rest of the public. Looking at all the circumstances, it does not appear to me that any public benefit is shewn, to justify the course pursued by the company. But, on the contrary, I am of opinion, that, as the result of the arrangement, the balance of convenience is against the public, and that this is a case of undue and unreasonable preference within the meaning of the statute, without any corresponding advantage to the public to justify it. I therefore think the rule should be made absolute to the extent of enjoining the company to admit the complainant's omnibus into the station of their railway at all reasonable times, for the purpose of receiving and setting down passengers and goods, in the same manner and to the same extent as other public vehicles of a similar description are admitted into the yard for that purpose. But, as to the rest of the rule, that which is asked is too vague, and should be omitted.

Cresswell, J., I am of the same opinion. It appears to me, that, by the course pursued by the company in arbitrarily excluding Marriott's omnibus from the station yard, the passengers are subjected to an undue inconvenience, and that therefore the rule should be made absolute.

Williams, J. I am of the same opinion, though I should have thought differently if it were to be taken, that, in coming to this conclusion, we must lay it down as a general rule that all public vehicles have a right to enter any railway station for the purpose of receiving or taking up or setting down or delivering passengers and goods. The present case is decided upon its own special circumstances.

Crowder, J. I also am of opinion that this rule **[512]** should be made absolute to the extent stated by the Lord Chief Justice, on the ground that the company, by the course of conduct pursued by them towards the complainant, have subjected him and his passengers to a greater degree of inconvenience than the passengers by Williams's omnibus have been subjected to. For instance, all passengers who come from Teddington and Hampton Wick by the complainant's omnibus are subjected to the inconvenience of being set down at the gate of the station yard, whereas Williams's passengers coming from Kingston and Norbiton are allowed to be driven into the yard and up to the door of the booking-office. That is clearly giving the one set of passengers an undue and unreasonable preference and advantage over the others, and constitutes one of those cases in which the legislature has by the recent statute authorised us to interfere.

Lush asked for the costs of the application.

Bovill, Q. C., objected that the rule did not ask for costs.

Cresswell, J. If the rule had asked for the costs, I do not know that we should have given them, under the circumstances. But, is there any instance of costs being given where they are not asked for in the rule?

Williams, J. Can the complainant be in a better position than he would have been in if the rule had been made absolute without any cause shewn?

Prentice, Amicus Curiæ, mentioned a case where upon a motion for a mandamus to justices under Jervis's Act, 11 & 12 Vict. c. 44, the court of Queen's Bench a **[513]** few days ago told him that he must not ask for costs on the rule nisi.

CRESSWELL, J. It will be well for Mr. Prentice, when cause is shewn against that rule, to be prepared to meet an argument that he is too late to ask for costs when the rule is made absolute.

Bovill. The case referred to is totally different from the present. There, the act gave the court a statutable power, s. 5 providing, "that, if, after due service of such rule, good cause shall not be shewn against it, the said court may make the same absolute with or without or upon payment of costs, as to them shall seem meet."

COCKBURN, C. J. What more is that than giving the court the power it has in all cases to give or to withhold costs? A general rule of practice has been laid down, that costs shall not be given unless they are asked for by the rule.

Lush. The motion is for a writ of injunction. Upon the argument, the court might find it necessary to refer the matter to an engineer or barrister. The case differs, therefore, from the ordinary case of a motion which may be disposed of on cause shewn. If costs were asked for on the motion, they could only be the costs of the rule, and not costs of any ulterior proceedings.

CRESSWELL, J. Why not? The usual way of asking for costs is, "together with the costs of and occasioned by this application." In *Ransome's case*, ante, p. 437, costs were asked by the rule.

WILLIAMS, J. If you had moved the rule with costs, you would have incurred the risk of paying costs in the **[514]** event of its being discharged; for, though the court may discharge with costs a rule which does not ask for costs, it is by no means a matter of course to do so.

COCKBURN, C. J. (after a short conference with the rest of the court). Although the power to give costs in these cases arises upon the statute, we think it is better to adhere to the general rule, not to give them where they are not asked for by the rule, unless there are special circumstances.

Rule absolute, without costs (*a*).

[515] BAKER *v.* THE BANK OF AUSTRALASIA. Jan. 29, 1857.

[S. C. 26 L. J. C. P. 93; 3 Jur. N. S. 187; 5 W. R. 253.]

A bill was drawn by the Melbourne branch of the Bank of Australasia upon their house in London, in favour of a married woman, and remitted to her by her husband, and duly accepted by the London house. After the bill had been so accepted, and had been indorsed by the wife for value, but before its maturity, the husband (who had in the meantime arrived in this country) gave notice to the bank not to pay it, his wife having eloped. The bill becoming due, and the bank being sued by the indorsee:—Held, not a case for an interpleader,—defendants having an interest in the subject-matter of the suit, and the question whether or not they were estopped from contesting the payee's right to indorse not being one which could be tried in an issue between the plaintiff and the claimant.

Coleridge, on a former day in this term, obtained an interpleader rule, under the following circumstances:—

The Bank of Australasia carries on its business at No. 4 Threadneedle Street, London, having branches in the several Australasian colonies, and, amongst others, one at Melbourne. On the 4th of August, last, a bill for 54*l.* was drawn upon and directed to the Bank of Australasia in Threadneedle Street, by the branch bank at Melbourne, payable thirty days after sight to the order of Sarah Ann Abraham: which bill was accepted by the said Bank of Australasia in Threadneedle Street on the 21st of November, and was indorsed by Sarah Ann Abraham. The bill when accepted was given up to Sarah Ann Abraham, the payee. A few days after the bill

(*a*) The rule was drawn up as follows: "It is ordered that a writ of injunction do issue against the said London and South Western Railway Company, injoining them to admit the omnibus of the said William Adolphus Marriott into the yard of the Kingston station of their railway at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from their said railway, and in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose."

had been accepted, a person called at the office of the bank in Threadneedle Street, who represented himself to be the husband of the said Sarah Ann Abraham, the payee, and stated that he had remitted the said bill to her from Melbourne, in a letter, and that he had arrived in London shortly after the receipt of the bill by her, and found her co-habiting with another man; and that he had called in consequence at the office to stop payment of the bill. A written notice to the same effect was subsequently served upon the bank. On the bill becoming due, viz. on the 24th of December, it was duly presented at the bank for payment, and refused, and notice thereof was given to Abraham's attorney. On the 6th of December, a demand of payment was made upon the bank by an attorney on behalf of one William Baker, [516] who was represented to be the holder thereof; and on the 30th the bank was served with a writ of summons, and with a declaration on the 8th instant.

The affidavit upon which the motion was founded, after setting forth the above facts, stated that the bank were threatened with proceedings at the suit of Abraham if they paid the amount of the bill to Baker, and negatived collusion.

Regan v. *Serle*, 9 Dowl. P. C. 193, was referred to.

Prentice shewed cause on behalf of Baker, upon an affidavit alleging that he was the bonâ fide holder of the bill for value, having discounted it for the payee on the 22nd of November last, who then indorsed it to him; that he took the bill upon the faith of the defendants' acceptance, and in the bonâ fide belief that Sarah Ann Abraham, the payee thereof, had authority to indorse it; and that there was no collusion, agreement, or understanding, either directly or indirectly, between the said Sarah Ann Abraham and himself, or between any other person acting on her behalf and himself, in reference to the bill. This clearly is not a case for relief under the interpleader act. A defendant is only entitled to call upon the plaintiff and a third party to interplead, where he can shew by affidavit "that he does not claim any interest in the subject-matter of the suit." Here, the defendants do claim an interest in the subject-matter. [Cockburn, C. J. They are interested only to the extent of seeing that they pay the money to the right person.] This is a case of contract: and there are many authorities to shew that it is not within the act. Thus, in *Grant* v. *Fry*, 4 Dowl. P. C. 135, it was held that a contested claim to a reward advertized for the apprehension of a felon, cannot be made the subject of a motion under the act. So, in *Newton* v. *Moody*, 7 Dowl. P. C. 582, it was held, that, where a party has given a promissory [519] note for money due by him and which is deposited with a third person for the benefit of a creditor, and an action is brought upon it by the trustee, it is no ground for obtaining relief under the interpleader act, that an action is anticipated at the instance of the creditor: and Coleridge, J., observed, —"It cannot be said that the defendant 'does not claim any interest in the subject-matter of the suit' It is a matter of interest to him to know to whom he is to pay the money." Again, in *James* v. *Pritchard*, 7 M. & W. 216, the defendant, having bought a rick of hay from the plaintiff (who was the executor de son tort of M. S.), before payment of the price received notice from a third party stating that he was administrator of M. S., and demanding payment of the sum for which it had been sold: the defendant being subsequently sued by the plaintiff for the price of the hay,—it was held that he was not entitled to relief under the interpleader act. And in *Dalton* v. *The Midland Railway Company*, 12 C. B. 458, an action having been brought by A. against a railway company to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A.,—it was held that the company were not entitled to relief under the interpleader act. *Turner* v. *The Mayor, &c. of Kendal*, 13 M. & W. 171, is an authority to the same effect. Besides, it is clear, upon the facts disclosed on the affidavits, that the bank can have no defence to this action; for, they are estopped from contending that Sarah Anne Abraham, in whose favour the bill was drawn by their branch bank at Melbourne, had no authority to indorse: *Smith* v. *Marsack*, 6 C. B. 486; *Halifax* v. *Lye*, 3 Exch. 446, 6 D. & L. 424; Byles on Bills, 7th edit. p. 171.

Bushby, for the claimant, submitted that the authority [520] of the wife to indorse the bill was revoked, and that the bank had no answer to his claim. It appeared from his affidavit that he arrived in England on the 23rd of November, and on the following morning, having discovered his wife's infidelity, gave notice to the bank not to pay the bill.

Coleridge, in support of the rule. No doubt, the authority of a wife to indorse may be revoked: and it was so here. The drawer of a bill by accepting it only admits what appears upon the face of it. Cockburn, C. J. Have you any authority to shew that this is a case within the statute?] The case of *Bogan* v. *Scrb*, 9 Dowl. 193, is an authority for that. There, actions were commenced by two persons claiming to be the lawful owners of a bill of exchange, against the acceptor: and an issue was directed to try who was lawfully entitled to recover on the bill, and the acceptor was relieved from all claim in respect of costs, on his bringing the amount of the bill into court. [Cockburn, C. J. The question does not seem to have been raised there.] It may be conceded that a party cannot obtain relief under the interpleader act, where he has contracted a personal liability to either of the contending parties: *Paterni* v. *Campbell*, 12 M. & W. 277, following the rule in equity, as laid down in *Crawshay* v. *Thornton*, 2 Mylne & K. 1. [Crowder, J. Is not the acceptance of a bill a contract to pay the amount to the holder?] In one sense it undoubtedly is. [Cockburn, C. J. What form of issue do you propose?] Whether or not the plaintiff had a right to be the holder of the bill. [Cresswell, J. It may be that the plaintiff may be entitled to be the holder of the bill, and yet the defendants may be liable to pay the amount to the claimant. Crowder, J. The question of estoppel could not be tried in an issue between the claimant and the present plaintiff.] It is in the discretion of the court to **[521]** grant an issue or not. [Cresswell, J. We have no discretion to grant an issue, unless, as my Brother Crowder suggests, it be to try the very question between the party seeking to interplead and the original party.] In *Crellin* v. *Leyland*, 6 Jurist, 733, a sum of money had been deposited by the plaintiff while sole with the defendants, who were bankers, and the latter were afterwards served with notice by one M'Gill that the plaintiff was married to him, and that they were not to pay over the money to her: the plaintiff disputed the marriage: and the court of Queen's Bench held that the case was within the interpleader act. In *Frost* v. *Hayward*, 12 Law Journ., Exch. 242, an action having been brought by the assignees of a bankrupt against a banker, to recover money deposited with him by the bankrupt, and the bankrupt claiming the money as trustee of a marriage settlement, alleging it to be part of the trust fund, the court on an interpleader rule directed an issue between the bankrupt and his assignees, to try whether the money was part of the trust fund or not. [Cresswell, J. The argument on the other side is, that the bank contracted to pay the money to the order of Mrs. Abraham. Crowder, J. In *Prestwick* v. *Marshall*, 5 M. & P. 513, 7 Bingh. 565, 4 C. & P. 594, it was held that the indorsement by a married woman, with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest in the bill to the indorser, so as to enable him to sue the acceptor.]

Cockburn, C. J. I am of opinion that this rule should be discharged. It is unnecessary to determine on the present occasion whether or not this is a case within the act. It is enough for us to say that it is one in which we ought not to interfere. It is impossible to frame an issue between the parties who are called upon to interplead, in which the real question could be tried, **[522]** viz. whether, the drawers of the bill having drawn it in favour of Mrs. Abraham, the acceptors (who are identified with the drawers) are estopped from denying her right to indorse. That is a grave question, which ought to be decided in such a manner as that the opinion of a court of error could be taken upon it; otherwise great injustice might be done.

Cresswell, J. I am of the same opinion. There is a good deal of authority for saying that this case is not within the act. The recital in s. 1 shews that the act was intended for the relief of persons who are sued without having any interest in the subject matter. Here, it is sought to make the defendants pay damages for not paying to the holder, according to their contract, the amount of the bill. The defendants, therefore, clearly have an interest in the subject matter of the suit. A question may arise whether the defendants have entered into an absolute contract binding them to pay the bill to the indorsee of Mrs. Abraham, or whether they have contracted to pay the amount to the proper owner, or both. That cannot be tried on a simple issue between the plaintiff and the claimant.

Crowder, J. I also think it is very doubtful whether this is a case within the contemplation of the act. But it is quite clear that, as a matter of discretion, the court ought not to grant the rule. There is much ground for saying that the defendants, by accepting a bill in this form, are estopped from denying the right of Mrs. Abraham to indorse it. I agree with my Lord and my Brother Cresswell in thinking

that it would be impossible to frame an interpleader issue so as to try the real question. The intention of the act was, to substitute the claimant for the original defendant so as to try the whole **[523]** question. If that cannot be done, the case is not within the act.

WILLES, J., not having heard the whole of the argument, pronounced no opinion.

Bushby asked for costs on behalf of Abraham, he having been compelled to appear.

Coleridge. Abraham is clearly not entitled to costs, he having, by telling the defendants that he would hold them responsible, compelled them to come to the court.

Per Curiam. The plaintiff's costs will be costs in the cause. Abraham's costs must be paid at once.

Rule accordingly.

[524] DOSSETT *v.* HARDING, the Official Manager of the Royal British Bank. Jan. 30, 1857.

[S. C. 26 L. J. C. P. 109; 3 Jur. N. S. 138. See *Oakes* v. *Turquand*, 1867, L. R. 2 H. L. 348.]

The 16th section of the 7 & 8 Vict. c. 113, which prescribes the form of memorial to be filed at the stamp-office is directory only; an inaccuracy, therefore, in the heading,—ex. gr. a reference to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113,—does not prevent its being evidence against the persons therein named as shareholders.—Whether s. 21 makes it conclusive evidence,—quære?—A shareholder whose name is properly inserted in the last return or memorial filed at the stamp-office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares.—It is no objection to the notice, under s. 13, that it intimates an intention to move against two persons, and the application is confined to one.

Byles, Serjt., on a former day in this term, obtained a rule calling upon Charles Bird Kelsham to shew cause why execution upon the judgment recovered by the plaintiff in this cause for 297l. 2s. should not be issued against the person, property, and effects of the said Charles Bird Kelsham as a shareholder of the said bank, to satisfy the plaintiff in the sum of 216l. 12s. 2d. now remaining due in respect of the said judgment, with interest thereon from the date of the said judgment, pursuant to the 7 & 8 Vict. c. 113, and why the said C. B. Kelsham should not pay to the plaintiff or his attorney the costs of the application and of the application to Willes, J.

The affidavits upon which the motion was founded, stated that the action was brought to recover the balance of moneys received by the Royal British Bank as the bankers of the plaintiff; that judgment was signed for want of a plea on the 12th of December last for 291l. 10s. 1d., and the costs had been taxed at 5l. 11s. 11d., and a fi. fa. issued on the 15th of December against the effects of the bank, and delivered to the sheriffs of London for execution, with a notice indorsed thereon that the Royal British Bank was an incorporated company lately carrying on business at the South Sea House, Threadneedle Street; that the writ had been returned nulla bona, and had therefore been ineffectual to obtain satisfaction of the amount recovered by the judgment; **[525]** that the place above named was the chief office of the bank, where the principal part of its business was carried on; that the officer, on proceeding to execute the writ there, saw Mr. Harding, who stated that he was appointed by the court of Chancery the official manager of the company, and that he claimed all the property and effects of the company as such official manager, and that the company had no effects whereon the writ could be levied; that, on the 24th of September, 1856, an order was made by Kindersley, V. C., to wind up the affairs of the company under the provisions of the Winding-up Act, 11 & 12 Vict. c. 46, and the said Mr. Harding had been appointed official manager thereunder; that a petition for adjudication in bankruptcy had been filed against the bank, whereunder the said company was on the 8th of October last duly adjudged bankrupt, and assignees were appointed on the 6th of November last; that the deponent had been informed by a clerk in the Inland Revenue Office, Somerset House, who has the custody of the returns made by

or on behalf of the Royal British Bank that the last return (*a*) made by the Royal British Bank was in or about the month of June last; that the name of the said C. B. Kelsham appeared therein as a shareholder; that the plaintiff had proved his debt in the court of Chancery against the company in pursuance of the requisitions of the Winding up Act, and had also proved his debt under the fiat, pursuant to the 7 & 8 Vict. c. 111, s. 10; and that the plaintiff had received under the bankruptcy a dividend of 80l. 9s. 10d. on account of his said judgment.

A notice of the plaintiff's intention to apply for execution, pursuant to the 13th section of the 7 & 8 Vict. c. 113, had been duly served upon Mr. Kelsham. This notice was as follows:—

[526] "In the Common Pleas.

Between, &c. &c.

"Whereas a judgment was obtained on the 12th of December, 1856, for the sum of 291l. 10s. 1d. debt, and 5l. 11s. 11d. costs, in Her Majesty's court of Common Pleas at Westminster, in a certain action at the suit of the above-named plaintiff against the said official manager of the Royal British Bank, being a company incorporated under and by virtue of an act, &c., intituled, &c.: And whereas due diligence has been used by and on behalf of the said plaintiff to obtain satisfaction of the said judgment against the property and effects of the said company: And whereas there is not nor are any property or effects of the said company out of which the said judgment, or any part thereof, can be satisfied: And whereas you William Fanner, of, &c., and Charles Bird Kelsham, of, &c., are shareholders of the said company for the time being: We hereby give you notice, that, upon the expiration of ten days next after the service of this notice upon you the said William Fanner and Charles Bird Kelsham, or so soon after the expiration of such ten days as conveniently may be, an application will be made in Her Majesty's court of Common Pleas for a rule, or to one of the judges of the said court for a summons, calling upon you to shew cause why execution should not issue against you upon the said judgment until the same shall be satisfied. Dated this 18th of December, 1856. "G. S. & F.,

"Attorneys for the above-named plaintiff."

"To William Fanner, of, &c., and Charles
Bird Kelsham, of, &c."

A summons had been taken out before Willes, J., pursuant to this notice, calling upon Mr. Kelsham to shew cause why execution should not issue against him. This summons came on for hearing on the 9th instant, when [527] that learned judge ordered, that, upon Mr. Kelsham bringing 100l. into court, and admitting the above notice in time and in other respects valid and subsisting to enable the plaintiff to move the court, the summons should stand adjourned until after such motion.

Upon the hearing of this summons, an affidavit of Mr Kelsham was produced, in which he stated, that he was not a shareholder of the Royal British Bank, nor had he been so since the 29th of August last; that the only shares which he ever held of and in the said bank were ten shares which were purchased in his name with the money and in trust for and for the sole and exclusive use and benefit of George Gillott, and which said shares he (Kelsham) bonâ fide sold on the Stock Exchange at the instance and for the benefit of the said George Gillott, in August last, for 32l. per share, and the same were then purchased by one Joseph Renfrey, and he (Kelsham) duly executed the deed of transfer from himself to Renfrey, and Renfrey accepted the same and paid the purchase-money, which he (Kelsham) always held at the disposal of, and had as to the greater part thereof paid over to, the said George Gillott; that he had not from or since the time of the said transfer (which was executed on the 29th of August aforesaid) been a shareholder of or in the said bank, nor in any way interested in the same, or in any shares thereof or therein; and that the only notice which had ever been given to him (Kelsham) of the intention to obtain the said summons, was by the notice above set out.

Phipson now shewed cause. 1. The first objection which was taken before the learned judge at Chambers was, that, being a proceeding under an act of parliament

(*a*) A copy of which (duly verified) was produced.

which gives new and extraordinary powers to a creditor for enforcing payment of a debt due to him from the bank, it was essential that every step should be taken in [528] strict conformity with the provisions of the act; and that it was incumbent on the party applying for execution against a shareholder to frame his application in the precise terms of the notice. Here, the notice is addressed to two persons, Fanner and Kelsham, and the rule is obtained calling upon Kelsham only. [Cockburn, C. J. How is he prejudiced by that?] The 11th section of the 7 & 8 Vict. c. 113, gives the shareholder against whom an execution issues for a debt of the company, in default of reimbursement by the company, a right to claim contribution from the other shareholders. If the application had followed the terms of the notice, the result of the rule might have been to establish that Fanner was a shareholder jointly with him: the omission, therefore, to join him in the application is, to remove Kelsham from one mode of proof against a co-contributor, which, in the event of a defective memorial being filed, might be material. [Crowder, J. You rely upon the chance of the other party appearing and making an admission.] The act of parliament requires a certain course to be pursued; and it must be pursued strictly. 2. The next objection was, that there was no evidence that Mr. Kelsham was a shareholder,—the memorial filed at the stamp-office not being in the form prescribed by the act. The 16th section of the 7 & 8 Vict. c. 113, enacts, "that, within three months after the grant of the said letters patent, and before the company shall begin to carry on their business as bankers, an account or memorial shall be made out according to the form contained in schedule A., wherein shall be set forth the true title or firm of the company, and also the names and places of abode of all the members of such company as the same respectively shall appear on the books of such company, and also the name and place of abode of every director and manager or other like officer of the company, and the name or firm of every bank or banks established or to be established [529] by such company, and also the name of every town or place where the business of the said company shall be carried on; and a new account or memorial of the same particulars shall be made by the said company in every year between the 28th of February and the 25th of March, while they shall continue to carry on their business as bankers; and every such memorial shall be delivered to the commissioners of stamps and taxes at the stamp office in London, &c.; and the company shall from time to time cause to be printed, and kept in a conspicuous place accessible to the public in their office or principal place of business, a list of the registered names and places of abode of all the members of such company for the time being." The 17th section enacts "that the manager or one of the directors of every such company shall, from time to time as occasion shall require, make out in manner thereinbefore directed, and cause to be delivered to the commissioners of stamps and taxes as aforesaid, a further account or memorial, according to schedule B., of the name and place of abode of every new director, manager, or other like officer of such company and also of the name or names of any person or persons who shall have ceased to be members of such company, either in addition to or instead of any former member or members thereof," &c. The 18th section enacts that the several memorials aforesaid shall be signed by the manager or one of the directors of the company, and shall be verified by a declaration of such manager or director before a justice of the peace or a master or master extraordinary of the high court of Chancery, made pursuant to the 5 & 6 W. 4, c. 62. The 19th section enacts "that a true copy of any such memorial, certified under the hand of one of the commissioners of stamps and taxes for the time being, upon proof made that such certificate has been signed with the handwriting of the person certifying the same, whom it shall not be neces- [530] -sary to prove to be a commissioner of stamps and taxes, shall be received in evidence as proof of the contents of such memorial," &c. Then comes the 21st section, which enacts "that the persons whose names shall appear from time to time in the then last delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act, as existing shareholders of the company; and shall be entitled to be reimbursed, as such existing shareholders of the company only out of the funds or property of the company, for all losses sustained in consequence thereof." Now, here, the memorial which is relied on to fix Mr. Kelsham as a shareholder is defective in two respects,—it does not follow the prescribed form: and it is verified by oath, and not (as the act requires) by declaration. The heading to the form in schedule A. to the 7 & 8 Vict. c. 113, is as follows:—"Memorial or account to be

entered at the stamp office in London in pursuance of an act passed in the eighth year of the reign of Queen Victoria, intituled An act to regulate joint-stock banks in England," whereas, the heading to the return filed here is, —" Return or account to be entered at the stamp-office in London on behalf of the Royal British Bank, in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled An act for the better regulating co-partnerships of certain bankers in England,"—following the form given in the schedule to the 7 G. 4, c. 46, instead of that given in the 7 & 8 Vict. c. 113. Now, it is clear that no memorial can be evidence against a shareholder, unless it is a memorial under this act. [Cockburn, C. J. The memorial here was evidently intended to be made under the 7 & 8 Vict. c. 113. Suppose this memorial had been headed "Return or memorial of the registered shareholders of the Royal British Bank," omitting all mention of the statute, would not that have done?] It is submitted that it would not. The 16th sec-**[531]**-tion expressly provides that the memorial which is to bind the shareholder shall be according to the form contained in schedule A. [Cockburn, C. J. Whose duty is it to file the memorial?] It is the duty of the company, no doubt. [Cockburn, C. J. Of whom Mr. Kelsham is one.] That is the question in contest. The neglect is that of the corporation. [Cresswell, J. You must admit that they have been acting as a company under the 7 & 8 Vict. c. 113. Crowder, J. And that a perfect memorial has been filed, except for the mis-recital of the statute?] No doubt. Still, it is submitted, there must be a strict compliance with the statute. Then, the return is not verified as required by the 18th section. This is an extra-judicial, a voluntary oath: it is at the least extremely doubtful whether the party taking it could be indicted for perjury, if it were false. [Cresswell, J. There is very little in that objection.] Mr. Kelsham's affidavit distinctly negatives his being a shareholder, he having duly transferred his shares to a bonâ fide purchaser on the 29th of August last. [Cresswell, J. Upon that point you have to encounter the 21st section. If there be a sufficient memorial, the 21st section expressly declares that the persons whose names appear therein shall be liable to all legal proceedings under the act as existing shareholders of the company. Those whose names are there are treated as existing shareholders, whether they are shareholders in point of fact or not.] The legislature could not have intended that the memorial should be more than primâ facie evidence of the fact of the parties therein named as shareholders being such. [Cresswell, J. They do not seem to have said so.]

Byles, Serjt., in support of the rule. The objections which have been urged in this case are all disposed of by a decision pronounced by the court of Queen's Bench this morning in a case of *Henderson* v. *The Official* **[532]** *Manager of the Royal British Bank* (*a*), where it was held, that the fact of the party's name being in the register is conclusive, and that all that is said in s. 16 as to the manner in which the memorial is to be made out, is directory, and not conditional. The court also held there that the case is not altered by the fact of the shareholder having been induced to become such by the fraud of the directors; but that question does not arise here (*b*).

Per Curiam. We quite concur in the propriety of the decision which has just been referred to. It is therefore unnecessary to say more than that the present rule must be made absolute, and with costs.

Rule absolute accordingly.

[533] POWIS *v.* HARDING, Official Manager of the Royal British Bank. Jan. 30, 1857.

[S. C. 26 L. J. C. P. 107; 3 Jur. N. S. 138. See *In re Overend, Gurney and Company*, 1867, L. R. 3 Eq. 633; L. R. 2 H. L. 348.]

It is no answer to a rule for execution against a shareholder in a joint stock banking

(*a*) Since reported in 3 Jurist, N. S. 111. [7 El. & Bl. 356; 26 L. J. Q. B. 112.]

(*b*) *Powis* v. *Harding*, post, p. 533. See a note of Lord Campbell's judgment in the case of *Henderson* v. *The Official Manager of the Royal British Bank*, post, p. 549.

company, that the party against whom the execution is sought was induced to become a shareholder by the false and fraudulent representations of the directors as to the solvency of the concern.—The 16th section of the 7 & 8 Vict. c. 113, which prescribes the form of memorial to be filed at the stamp-office, is directory only: an inaccuracy, therefore, in the heading,—ex. gr. a reference to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113,—does not prevent its being evidence against the persons therein named as shareholders.—Whether s. 21 makes it conclusive evidence,—quære?

Lush (with whom was Beasley), on a former day in this term, upon affidavits substantially the same as those filed in *Dossett* v. *Harding*, ante, p. 524, moved for a rule calling upon Andrew Beattie, a shareholder, to shew cause why execution should not issue against him upon a judgment against the Royal British Bank for 576l. 1s. 6d., pursuant to the 7 & 8 Vict. c. 113. It was sworn that the name of Andrew Beattie appeared in the return made to the stamp office pursuant to the statute, on the 26th of June last; and it appeared that the return, like that in *Dossett* v. *Harding*, purported to be a return under the 7 G. 4, c. 46, instead of under the 7 & 8 Vict. c. 113. They submitted that the return was conclusive of the fact of the parties therein named being shareholders; that their liability continued, notwithstanding a transfer of the shares, until a new or further memorial was filed, as provided by s. 17; and that the mere circumstance of the memorial in its heading referring to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113, made no difference, inasmuch as the 16th section was directory in that respect, and not conditional, and for the benefit of the public. [Cresswell, J. If a false return was made, containing the name of one who never was a shareholder in point of fact, would he be liable merely because some one had thought fit to put his name there?] It is not necessary to contend for that here: this person's name was placed on the memorial with his own consent.

Hugh Hill and Mellish shewed cause in the first **[534]** instance, upon an affidavit by Mr. Beattie which stated in substance as follows:—That he was not a shareholder in the Royal British Bank, but, on the contrary, a creditor of the said bank, under the following circumstances: That, in October, 1850, shortly after the Lambeth branch was opened, he removed his banking account from the London and Westminster Bank, and opened an account at the Lambeth branch of the Royal British Bank, and continued to keep such account there down to within a short time before the bankruptcy of the said bank; and, during part of such period, he also kept a deposit account with the said bank: That, in consequence of such account, he had frequent occasion to attend at the Lambeth branch of the said bank, and from time to time had conferences with Mr. M. Pellatt and Mr. Allardice, who were successively managers of the said branch, upon business relating to and arising out of his said account: That, after he had banked with the said bank for one or two years, Mr. Allardice very frequently urged upon him the flourishing and prosperous condition of the bank, and the future prospects of success, and on several occasions, and particularly when there was a large balance credited to him on his said account, represented to him the advantage of investing a portion of such balance in the purchase of shares in the said bank, and from time to time placed in his hands the half-yearly reports and balance-sheets of the affairs of the said bank, as confirming the truth of what he had stated, and shewing the soundness and stability of the said bank: That deponent believed the local manager of the said branch, and the other local managers of the said bank, were authorised and desired by the directors of the said bank to make such statements, and to try thereby to induce the creditor customers of the said bank and other parties to become shareholders in the said bank: That the said Mr. Allardice also in-**[535]**-formed deponent that a friend of his had paid several thousand pounds to a deposit account with the bank, to be exchanged for shares when the same were issued, and wished to dispose of part of his said deposit account, as he was about going to India: and that it would be the same thing whether he paid 500l. to the bank or paid the said friend 500l., and had 500l. of his deposit account transferred to him: That deponent carefully perused and considered such reports, and also the report and balance-sheet of the said bank which about that time and for several years previously were and had been, as deponent believed, with the knowledge and consent of the directors of the said bank, published in the newspapers: That, by one of the said balance-sheets, dated the

1st of February, 1854, it was stated that the assets of the said bank consisted of certain particulars, the second of which was as follows:—

	£	s.	d.
"By loans on convertible securities for short periods, advances on cash credit accounts, bills discounted, &c. .	715,666	5	7"

That, in the said report and balance sheet, the balance of assets above liabilities was stated to amount to 35,374l. 1s. 11d., out of which a dividend was declared of 6l. per cent. per annum; and that, in the report and balance-sheet, the said sum of 35,374l. 1s. 11d. consisted of the following items:—

	£	s.	d.
"To reserved fund as at 31st December, 1852, as per report for third year	7,500	7	7
To dividend thereon	117	16	1
	£7,618	3	8
To unappropriated balance at ditto	2,583	10	7
To gross balance for the year ended 31st December, 1853, after providing for interest, 19,485l. 9s. 11d. paid and due on deposits, promissory notes, and balances . .	25,171	18	8
	£35,374	1	11"

[536] That, in full faith and belief that the statements contained in the said published report and balance-sheet of the said bank were true representations of the affairs of the said bank, the deponent was induced, on or about the 15th of March, 1854, to agree to pay the said 500l., on receiving notice from Mr. Allardice; and that a day or two afterwards he received from Allardice a letter inclosing an alleged broker's note purporting to relate to the same, and requesting payment of the money: That, on the 27th of March, 1854, deponent paid the said bank 502l. 10s., being 500l. for the alleged purchase-money for the said alleged shares, and 2l. 10s. for alleged brokerage or commission on the purchase thereof; and on the same day he received from Allardice some papers which were in effect an acknowledgment that he had 500l. to deponent's credit with the said bank on a deposit for shares: That, early in August, 1854, deponent received from the said bank the half-yearly report and balance sheet dated the 1st of August, 1854, and early in February, 1855, he received from the said bank the report and balance sheet dated the 1st of February, 1855, and perused and carefully considered the same: That the said report and balance-sheet dated the said 1st of February, 1855, contained, amongst other things, a statement that the assets of the bank consisted of certain particulars, the second of which was as follows:—

	£	s.	d.
"By loans on convertible securities for short periods, advances on cash credit accounts, bills discounted, &c. .	£804,798	16	7"

That the said report and balance sheet also stated that the balance of assets above liabilities amounted to 38,371l. 13s. 3d., out of which sum a dividend was declared at the rate of 6l. per cent. per annum, free of income tax; and that the sum of 38,371l. 13s. 3d. was stated therein to consist of the following items:—

	£	s.	d.
[537] "To reserved fund as at 31st December, 1853, as per report for fourth year	£10,766	6	11
To dividend thereon	149	18	9
	£10,916	5	8
To unappropriatd balance at ditto . . .	3,142	15	5
To gross balance for the year ended 31st December, 1854, after providing for interest, 25,610l. 16s. 7d. paid and due on deposits, promissory notes, and balances .	24,312	12	2
	£38,371	13	3"

That, early in March, 1855, deponent received from the said bank the circular dated March 6th, 1855, of which the following is a copy :—

"The Royal British Bank.

"Incorporated by Royal Charter, 1849.

"Governor, Edward Esdaile, Esq.

"Deputy Governor, Archibald Spens, Esq.

"Directors.

"Humphrey Brown, Esq., M. P.	H. D. Macleod, Esq.
L. De Woolfe Cochran, Esq.	W. D. Owen, Esq.
Edward Esdaile, Esq.	Arch. Spens, Esq.
R. H. Kennedy, Esq., Alderman.	L. M. Valiant, Esq.

"Hugh Innes Cameron, Esq., General Manager.

"Chief Office, Tokenhouse Yard, Lothbury, &c.

"The directors of the Royal British Bank have the pleasure to inform their shareholders and customers that they have received from the Crown a supplemental charter authorising them to increase the capital stock of the bank by the sum of 500,000l. beyond its present amount, in such sums and at such times as they may think expedient for the interests of the bank.

"In pursuance of the powers conferred upon them [538] the directors have determined to make an addition of 300,000l. to the present capital stock of the bank.

"Subscriptions to the amount of 100,000l. have already been received; and the directors are now prepared to receive further applications for new shares. The shareholders and principal customers of the bank will receive a preference in the allotment of the new shares; and such of them as are desirous of subscribing to the additional stock are requested to signify their intention to the directors without loss of time.

"The shares are 100l. each; and the law requires that 50l. be paid up before the certificates can be issued.

"In order to meet the convenience of subscribers who do not wish to pay the whole amount of their shares at once, they will be required to pay up 10l. upon allotment, and the remainder within six months from that date. Interest at the rate of 5 per cent. per annum will be allowed on the deposits.

"The directors take this opportunity of announcing that they have been fortunate enough to secure on lease, with option of purchase, that portion of the South Sea House the principal front of which is in Threadneedle Street, where the head office of the bank will be established.

"This arrangement has been effected on terms which have not only secured a very important profit to the bank, viewed simply as an investment of capital, but will release the bank, upon a fair calculation based on the actual returns of similar properties in the like favourable position, of any augmentation of their present annual rent charge.

"The results presented by the existing joint-stock banks offer abundant proof that an ample field exists for the profitable employment of capital in banking business. The reports of the older joint-stock banks shew an average dividend for the last year of upwards of 14l. per [539] cent. per annum, after the payment of income tax, and an increased value of the paid up capital of upwards of 100 per cent.: and it will be found that the Royal British Bank has not been less successful than the older establishments, if the comparison be made at corresponding periods of their existence."

That, towards the latter end of March, 1855, deponent received from the said bank a notice requesting him to call at the head office of the said bank and sign the supplemental deed relating to the said alleged new shares, and stating that he could then have the share certificates for the same: That, in full faith and belief in the truth of the statements contained in the published reports and balance-sheets, and believing from the said circular that the said bank was authorised to allot and issue new shares, deponent, on or about the 27th of March, 1855, called at the said head office, and there saw Mr. Gatherer, who then produced to him a document which he represented to be the supplemental deed relating to the said alleged new shares; and

deponent then signed the said deed, and received from the said Mr. Gatherer the alleged certificates numbered from 1453 to 1462 inclusive, all dated the 27th of March, 1855, and each purporting to be a certificate that he was a proprietor of one share in the said bank: That, still in full faith in the truth of the statements contained in the said reports and balance-sheets, and in the said circular, deponent, in June, 1855, applied for six more of the said alleged shares; and, on the 8th of June, 1855, he paid to Mr. Craufurd, one of the officials of the said bank, at the head office of the said bank, the sum of 300*l.* for the alleged purchase-money of the said alleged new shares, and at the same time signed the document aforesaid, and received from the said Mr. Gatherer alleged share certificates numbered 2210 to 2215, both inclusive, dated the 8th of June, 1855, and each purporting to be a certificate that depo-**[540]**-nent was the proprietor of one share in the said bank: That the said bank stopped payment on the 3rd of September, 1856; and that, from information deponent had received since such stoppage, he for the first time ascertained that all the said reports and balance-sheets were utterly false and fraudulent, and that they were published in furtherance of a scheme concocted by the directors and managers of the said bank, or some of such parties, for fraudulently obtaining a more extended credit for the said bank, and for procuring money to be paid thereto in the way of additional capital: That the first information deponent received of the false statements contained in the said reports and balance-sheets was, from the proceedings at the meeting held on the 20th of September, 1856, after the stoppage of the said bank, at which meeting deponent was present; and, from the statements which were then made by Mr. Coleman, the accountant, and from information he had since received, deponent believed that the state of the assets of the bank was totally misrepresented in the whole of the said balance-sheets, and that a very large portion of the securities set down as good, were in fact, and were known to the said directors and managers, or some of them, to be, of little or no value; that a great amount of bad debts had previously been incurred by the said bank, and had been known to the directors and managers, or some of them, to have been so incurred, and to be bad, and had not been written off, but in such accounts were treated as good, and were also treated as bearing interest to the said bank, such interest forming a part of the pretended annual profits of the said bank, and being so treated in the said fraudulent accounts; and further that the said accounts were made out from books known by the directors and managers, or some of them, not to contain correct accounts of the assets and liabilities of the said bank; and deponent had also since ascertained, that, at **[541]** the time he was induced to agree to take such alleged new shares as aforesaid, the said bank had lost the whole of its paid up capital, and a considerable sum in addition, and, so far from their having or ever having had any reserved fund, as was stated in the aforesaid reports and balance-sheets, and in its other reports and balance-sheets, was then, and had long been, in a condition of hopeless insolvency; and the deponent believed that such state of insolvency was then well known to the said directors and managers, or the principal part of them: That the deponent had also since the said 20th of September, 1856, ascertained, that, in order to induce the Crown to grant the supplemental charter under which the alleged new shares were alleged to have been issued, the said bank caused to be laid before the Board of Trade various reports and balance-sheets of the accounts of the said bank, and represented them to be true and faithful accounts of the various matters and things therein appearing, whilst in truth the said reports and balance-sheets were entirely false and fraudulent; and deponent verily believed, that, if a true statement of the affairs of the said bank had been laid before the said Board of Trade, the said supplemental charter would not have been granted: That deponent had since ascertained that the preliminaries required by the statute under which the said supplemental charter purported to be and could alone be granted, had not been complied with, and, in particular, that no previous deed had been executed and no payment made of at least 10 per cent. on the capital authorised previously to the issuing of the said supplemental charter; and deponent was advised and believed that the said alleged supplemental charter was from the beginning void and of no effect, and that there never was any authority for the issuing of the said alleged new shares by the said bank; and that, had he become acquainted with the several facts evidencing **[542]** fraud as aforesaid, or any of them, before he signed the said document as aforesaid, he would not have signed the same; and that, since he had become acquainted with such facts as aforesaid, he had repudiated the said

purchase of alleged new shares: and he insisted that he was not in anywise a shareholder or member of the said bank in respect of the said alleged new shares, or any of them, or otherwise, nor liable to the debts or engagements of the said bank, or any of them, nor to contribute in respect of the same: That, on the 5th of December, 1856, the deponent carried into the court of bankruptcy a claim against the said bank for the said sum of 800*l.* for money had and received to his use by the said bank, for the alleged purchase money of the said alleged new shares, and that such claim stood over for consideration: (*a*) And that he had not, nor had any one to his order or use, received the said 800*l.* or any security or satisfaction for the same, or any part thereof, but the whole of the said sum remained due and owing to him as aforesaid.

The memorial upon which it is sought to fix upon Mr. Beattie the liability of a shareholder, is not in the form prescribed by the statute: it does not refer to it at all; but refers to a totally different act, the 7 G. 4, c. 46. [Cresswell, J. Suppose the memorial contained no reference to any statute, would that do?] It is submitted that it would not. The act must be complied with. [Cockburn, C. J. Is a shareholder to take advantage of the omission of the directors to do their duty, as against the general public? The shareholders come into the company with full knowledge of their liabilities.] So, the creditors are bound to know the provisions of the statute They know that the shareholders are not to be affected by a memorial which does not substantially com-**[543]** ply with the statute. The main question, however in this case is, whether a person who has been induced by the fraud of the directors to become a shareholder in a joint-stock bank, and who the moment he discovers the fraud repudiates the transaction, by the mere act of so taking shares becomes liable for all the debts of the concern whenever contracted. One who becomes a partner in an ordinary banking concern, though induced to do so by fraud, becomes liable only for the debts contracted during the time he was a partner. For anything that appears, the debt for which this judgment was obtained might have been contracted before Mr. Beattie joined the concern. [Cresswell, J. The 10th section of the 7 & 8 Vict. c. 113, imposes upon a shareholder a larger liability than that of an ordinary partner; and the 21st section fixes all whose names appear in the last delivered memorial.] The 21st section cannot be taken literally; otherwise, every person whose name is in the memorial, however it may have got there, would be liable. [Cresswell, J. Does it make any difference whether the fraud complained of was committed by the directors or by the vendor of the shares?] It may be that in the latter case the vendor would still be the shareholder. [Cockburn, C. J. Notwithstanding the substitution of the vendees name in the memorial? Cresswell, J. Do you deny that up to the time of the repudiation of his shares by Mr. Beattie, he was liable for the debts of the bank, and that the plaintiff might properly have resorted to him?] No. [Cockburn, C. J. Then, how can that vested right be divested by the subsequent repudiation?] Mr. Beattie ceased to be a shareholder the moment he discovered the fraud, and repudiated the transaction in the only way that was open to him. His repudiation, it is submitted, had the same effect as a transfer followed by a new memorial. [Cockburn, C. J. How can a creditor be affected by a secret transaction between the di**[544]**rectors and the shareholder?] *Burnes* v. *Pennell*, 2 House of Lords Cases, 497, is a strong authority to shew that such fraud as is disclosed upon the affidavit in this case would avoid the transaction. Lord Campbell there says,—p. 522,—"If the directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and the appellant has thereby been deceived, and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside." In the case of *The Deposit and General Life Insurance Company* v. *Ansonugh*, 6 Ellis & B. 761, where the question was whether a plea that the defendant, a shareholder, was induced to become a shareholder by the fraud of the plaintiffs, was a good answer to an action for calls, the same learned judge, referring to *Burnes* v. *Pennell*, said: "I hope that the opinion I then expressed will be found to be correct, and that a shareholder induced to become such by the frauds of the directors, may get freed from his liability. I have myself no doubt that he may; but, to do so, he must cease to be a shareholder." Here, the party has ceased to be a shareholder in the only way in which he could accomplish that object, viz. by repudiating his shares, and claiming to prove as a

(*a*) It was ultimately rejected.

creditor against the estate of the bank. In the case of *In re the Universal Provident Life Association, Ex parte Bell*, 26 Law Journ., Ch. 137 where an insolvent company, by misrepresentation, induced a person to take shares, and to authorise the secretary of the company, as his attorney, to sign the deed of settlement on his behalf,—on the company being wound up, it was held that his name ought to be erased from the list of contributories. "In a complication of difficulties," says the Master of the Rolls, "with embarrassed finances, and while begging forbearance from a creditor, they publish a prospectus for the issue of fresh shares, they invite parties [545] to become shareholders in consequence of the successful position of the company,—they knew this statement to be false. A person who takes shares in a company with the means of knowing the position of its affairs, ought to be held liable: but here Mr. Bell had no means of making himself acquainted with anything. He could not, except at a general meeting, ascertain the balance at the bankers', or whether the accounts were faithfully kept. The company was practically at an end, and it could not call in fresh parties to bear their losses." A similar doctrine is laid down by Wood, V. C., in the case of *In re the Court Grange Silver Lead Company, De Castro's case*, 2 Jurist, N. S. 1203, and also in *Ex parte Ginger, In re Tipperary Joint Stock Bank*, 5 Irish Chan. Cas. 174. The question, at all events, is far too grave a one to be satisfactorily disposed of upon a summary application like this.

Lush and Beasley, in support of the rule. The facts disclosed in Mr. Beattie's affidavit afford no answer whatever to the application. If the court entertain no judicial doubt, no considerations of supposed hardship will induce them to deprive the creditor of the right which the statute has given him. The 7th section provides, that, notwithstanding the incorporation of the company by letters-patent, as mentioned in s. 6, "the several shareholders for the time being in the said banking business, and those who shall have been shareholders therein, and their several executors, administrators, successors, and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the said company, subject to the provisions hereinafter contained, as fully as if the said company were not incorporated." What are "the provisions hereinafter contained?" The 9th section enacts "that every judgment, decree, or order of any court of justice in any proceeding [546] against the company may be lawfully executed against and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The liability, therefore, imposed by the statute upon a shareholder, is larger than that which the law imposes upon an ordinary partner. But, by way of set-off, the 10th section, which enables the creditor to have execution against present or former shareholders, contains a proviso discharging the shareholder from all liability, after the expiration of three years from the time when he shall have ceased to be a shareholder. A person who becomes a shareholder is supposed to know all the liabilities he incurs by taking that step. And the 21st section in the most plain and distinct terms states who are liable as existing shareholders, viz. "the persons whose names shall appear from time to time in the then last delivered memorial." The Chancery cases which have been referred to are entirely in favour of the applicant. Those upon the winding up acts are altogether beside the question. Those acts were merely intended to provide a machinery to enable the partners to enforce contribution amongst themselves. [Cresswell, J. And to enable the creditors to obtain payment of their debts; for which purpose very large powers are given to the official manager.] In *Ex parte Ginger, In re Tipperary Joint-Stock Bank*, 5 Irish Ch. Cas. 174, it was laid down by the Master of the Rolls, that the proper test to apply in considering whether a party should be retained on the list of contributories under the joint stock winding up acts is, not whether he would be liable to the creditors of the bank if sued by them, but whether, having regard to the rights of the shareholders inter se, he ought to be on the [547] list: and that a party may be liable at law to the creditors of the company, and yet should not be placed on the list of contributories, and, vice versâ, a party may not be liable at law to the creditors of the company, and yet ought to be placed on the list. It has repeatedly been held, that it is no answer to an action for a call, for the shareholder to say that he was induced by the fraudulent representations of the directors to become a shareholder. Thus, in *Hodgson's case*, 3 De Gex & S. 85, it was held that

directors fraudulently inducing a person to become a purchaser of shares in a company, may be personally liable to him, but they cannot be considered as the agents of the body of shareholders to commit a fraud of this kind, nor is such a fraud a valid objection, the purchaser's name being on the list of contributories. The Vice-Chancellor (Knight Bruce) said in that case,—"I have held that liability to the creditors is quite distinct from the liability of contributories under the winding-up acts. The suggestion of fraud does not affect this case. No fraud is attempted to be fixed on the general body of shareholders. Whatever fraud there may be, if fraud there be, is charged against the directors, who cannot be the agents of the body of shareholders to commit a fraud." So, in *Parbury's case*, 3 De Gex & S. 43, it was held that it is not sufficient ground for excluding an allottee from the list of contributories to a provisionally registered railway company, that the prospectus of the company contained incorrect and fraudulent statements, in reliance on which he applied for shares, or that the project was never carried into effect, unless it appear that the only other persons interested in the company were the persons who made the fraudulent statements. In *The Deposit and General Life Insurance Company* v. *Ayscough*, 6 Ellis & B. 761, the plea was held bad on the same ground. Lord Campbell says, "It is now well settled that a contract tainted by fraud is not void, but [548] is only voidable at the election of the party defrauded. There is nothing on this record to shew that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends; and he may have intended to do so." Here, that which is called a repudiation, is in truth only an attempt on the part of the shareholder to get back his money when he found he had been deceived. His equity, as the Master of the Rolls says in the case of *In re the Universal Provident Life Association, Ex parte Bell*, 26 Law J., Ch. 137, lies against those who made the misrepresentations by which he has been defrauded. Then, is there a sufficient memorial filed? No fraud is imputed in the memorial itself. The complaint is, that, by mistake, a wrong statute has been referred to. But there is no suggestion that the document does not contain all that in substance the act requires. The 16th section imposes the duty of making out the memorial upon the company. It clearly is not competent to one who is a shareholder in the concern to insist that the direction has not been properly complied with.

It being intimated to the court that similar questions were pending in the courts of Queen's Bench and Exchequer, Cockburn, C. J., said, that, under those circumstances, it would be better to allow this rule to be suspended, inasmuch as if the other two courts should come to the same conclusion, and make the rules there pending absolute, this court would probably concur with them; whereas, if there should be a difference of opinion between those courts, this court might think that a sufficient reason for directing a scire facias to issue.

Lush asked that the money might be brought into court.

[549] CRESSWELL, J. We cannot order that. It would in effect be telling the party that he must pay that price in order to induce the court to take time to deliberate.

Cur. adv. vult.

COCKBURN, C. J., now said: The court having disposed of the case of *Dossett* v. *Harding*, ante, p. 524, upon the authority of *Henderson* v. *The Official Manager of the Royal British Bank*, 3 Jurist, N. S. 111, we think the present case may be disposed of in the same way. We concur with the view of the Queen's Bench as to the question of fraud also (*a*). The rule will therefore be made absolute, with costs.

(*a*) Lord Campbell, in giving judgment in that case, said: "At the conclusion of the arguments, we entertained no doubt: but we were told that similar applications had been made to the courts of Common Pleas and Exchequer, and that rules were pending in those courts: and we thought that upon a matter of this sort it would be as well if we had a conference with the judges of those courts before we pronounced our decision. That conference has taken place, and all the judges are unanimously of opinion that what the defendant has stated is no answer to the application. I thought from the beginning that the proposed answer could not be rested on any principle or decision, because this is an application by a creditor who on the faith of the party against whom it is made, that party being a shareholder, and having held himself out

[550] CRESSWELL, J., referred to *Palmer* v. *The Justice Insurance Society*, 3 Jurist, N. S. 44.

Rule absolute, with costs.

[551] BENDY *v.* HARDING, Official Manager of the Royal British Bank.
Jan 30, 1857.

[S. C. 26 L. J. C. P. 110.]

It is no objection to the notice of an intended application against a shareholder, under the 7 & 8 Vict. c. 113, that it intimates an intention to apply "to the court or to a judge thereof."

Judgment having been obtained by the plaintiff for 687l. in an action against Harding as the official manager of the Royal British Bank, a summons was taken out (upon affidavits substantially the same as those in *Dossett* v. *Harding*, ante, p. 524), calling upon one John O'Kines, a shareholder, to shew cause at chambers why execution should not issue against him.

This summons came on for hearing before Willes, J., on the 21st instant, when, it being objected on the part of O'Kines that the notice of the intended application, pursuant to the 13th section of the 7 & 8 Vict. c. 113, was bad, inasmuch as it stated that the application would be made "to this honourable court, or to a judge thereof," that learned judge made the following order:—

"Upon hearing counsel for plaintiff and for Mr. John O'Kines, on the application of plaintiff to issue execution against said John O'Kines pursuant to the summons of the Hon. Mr. Justice Crowder, dated the 14th of January instant, and issues herein, I dismiss the same with costs, to be taxed, such costs to be deducted from plaintiff's claim upon the judgment herein, if a successful application against the said John O'Kines be made to the court within a month: if no such application be made, then I order that the said costs be paid by the plaintiff to the said John O'Kines: and I certify for counsel."

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to the world as a shareholder, gave credit to the bank by depositing money with it. He has obtained judgment for the sum so deposited, and, there being no assets of the bank as a company, the application now is that execution may issue against this party as an individual shareholder. It would be monstrous, if, having become a partner in the bank, and held himself out to the public as a shareholder, and remained such until the bank stopped payment, he could get rid of his liability to the creditors of the bank by saying, 'I am no longer a shareholder: I have been defrauded.' Whether he can say that to other shareholders who were privy to the fraud, may be a question. Suppose this were a common partnership, and credit were given to the firm, and judgment were obtained upon an action brought against the firm, it would be no answer to the creditor, that the partner he sued was induced by the fraud of the other partners to become a member of the firm. That circumstance might be considered as between the partners inter se, but, as between the firm and a creditor, it is a matter wholly immaterial. The party here admits that he was a shareholder, and that he acted as such until the bank stopped payment. His name also appeared in the memorial of shareholders made out and registered under s. 16 of the 7 & 8 Vict. c. 113, and continues there. There is no doubt an irregularity in the memorial; but we are of opinion that all that is said in s. 16 as to the manner in which the memorial should be made out, is directory, and not conditional; and, if a person's name appears on the list, it is, at all events, primâ facie evidence that he is a shareholder, notwithstanding the irregularity." And see *Daniell* v. *The Official Manager of the Royal British Bank*, 1 Hurlst. & N. 681.

The question whether a shareholder whose name appears in the last-filed memorial, but whose shares have been duly transferred to a bonâ fide purchaser before the commencement of the action in which judgment against the bank is obtained, is liable to an execution as an "existing shareholder," is still sub judice,—this court having in two cases of *Fry* v. *Harding* and *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company*, in Easter Term, 1857, directed writs of scire facias to be issued, and the facts to be turned into a special case.

Lush, on a former day in this term, obtained a rule nisi to rescind that order, and for leave to issue execu-[552]-tion against O'Kines for 687*l.* debt, and 7*l.* 8*s.* 10*d.* costs, with costs of the application.

Byles, Serjt., and Dowdeswell, now shewed cause. The single question in this case is, whether a notice, in the alternative, of the plaintiff's intention to apply to the court or a judge, is a good notice. It is submitted that it is not. The party to be called upon has a right to know which of the two modes of proceeding the plaintiff intends to adopt. When this matter was before the learned judge at chambers, reliance was placed upon a case of *Corder* v. *The Universal Gas-Light Company*, 6 C. B. 190, the marginal note of which states the court to have decided that the notice must shew whether the application is intended to be made to the court or to a judge at chambers: but, upon examination, it will be found that the point really decided there was, that the notice, having already been exhausted by an application to chambers, could not be made the foundation of a motion in court for the same purpose. [Cockburn, C. J. What advantage would it be to the party to have a notice in the form you suggest?] He knows that the court sits only during term time; and, if the notice is of an intention to apply to the court, he may give notice of his intention to shew cause in the first instance. It is analogous to the notice of action which the statute 24 G. 2, c. 44, requires to be given to a magistrate: it has been decided over and over again that such notice is bad unless it states the court in which the action is to be brought. The object in each case is, that the party shall have a given time within which to determine whether to pay the money (or tender amends) or to prepare to resist the proceeding; and, in order to do that, he should have distinct notice of the nature of the proceeding, and the place where it is to be taken. [Willes, J. Suppose two sepa-[553]-rate notices are given, one for application at chambers, the other to the court?] In that case, the last served would be the operative notice. [Crowder, J. Suppose both served together?] That would in effect be the same as this case.

Lush and Beasley, in support of the rule. The 13th section of the 7 & 8 Vict. c. 113, provides that "no such motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby." The notice need not state to which tribunal the application is intended to be made. There is no analogy whatever between a case under this act and that of a notice of action to a magistrate. If notice be given under the statute 24 G. 2, c. 44, of an intention to bring an action in this court, and the action is brought in another court, that is not a notice of the action. Has not the party in this case had due notice of the application to the court? There can be no possible inconvenience in this. He will know where the application is made when he is served with the summons or the rule. It would be frittering away the provisions of the act, to hold this notice to be insufficient. The matter has already been under the consideration of more than one of the judges at chambers; for, in a case of *Cotton* v. *The Official Manager of the Royal British Bank*, before Willes, J., that learned judge, after taking time to consult another of the judges, held the objection to be invalid. [Willes, J. I recollect the case. I consulted my Brother Cresswell, and we thought there was nothing in the objection.]

Cockburn, C. J. I am of opinion that this rule must be made absolute. All that the legislature can upon any sound principle of construction be considered [554] as having required is, that, before the powers vested in the court or a judge are put in motion, there shall be a ten days notice given to the party to be charged, that leave to issue execution against him is intended to be applied for: and, if a notice be given in the form here adopted, viz. of an intention to make the application "to the court or to a judge thereof," that is a sufficient notice. The justice of the case is clearly in favour of the applicant: but, as this is a motion to set aside a judge's order, the rule will be absolute without costs.

The rest of the court concurring,

Rule absolute accordingly.

In the Matter of Thomas Simpson.

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court:"—The court required it to be amended.

On a former day in this term, Mr. Simpson obtained a rule to strike him off the roll of attorneys of this court, at his own request, with a view to his being called to the bar. He had previously obtained a similar rule in the Queen's Bench; but that rule was rescinded before it was acted upon.

R. Hall now moved to restore him to the roll, upon an affidavit stating that he had abandoned his intention of going to the bar, and was desirous of resuming his practice as an attorney. The affidavit, however, was intituled "In the matter of Thomas Simpson, gentleman, one of the attorneys of Her Majesty's court of Common Pleas," and he was so described in the body of it, although the rule for striking him off the roll of this court had been acted upon.

The Court required the affidavit to be amended and re-sworn, and the rule was then

Granted.

[555] Thomson *v.* Harding, Official Manager of the Royal British Bank. Jan. 31, 1857.

In the notice of the intended application against a shareholder under the 7 & 8 Vict. c. 113, the party was described as "John Marshall." In the memorial last filed he was described as "John S. Marshall." There was an affidavit of identity:—Held, that the notice was sufficient.

Judgment having been obtained by the plaintiff for 142l. 10s. 9d. debt, and 5l. 11s. 10d. costs, in an action against Harding as the official manager of the Royal British Bank,

Hawkins, on a former day in this term, upon affidavits similar to those used in *Dossett* v. *Harding*, ante, p. 524, obtained a rule calling upon James Beech Hill and John Marshall respectively to shew cause why execution or executions upon the said judgment should not be issued against the persons, property, and effects of the said James Beech Hill and John Marshall respectively as shareholders of the said bank, to satisfy the plaintiff in the sum of 109l. 5s. 3d. remaining due in respect of the said judgment, with interest and costs.

Byles, Serjt., shewed cause. He admitted that the case was not to be distinguished from that of *Powis* v. *Harding*, ante, p. 533; but took an objection to the notice, which described Marshall as "John Marshall," whereas his true name, and the name by which he appeared on the return made to the stamp-office in June last, was "John S. Marshall."

There was, however, an affidavit identifying the party served with the notice as the person mentioned in the return; and the rule was made

Absolute.

[556] Grissold *v.* Harding, Official Manager of the Royal British Bank. Jan. 31, 1857.

Where a rule cannot be served, it may be amended and enlarged, even though it has run out.

In this case, which was similar to the last, the plaintiff's attorneys had been unable to serve the party to whom the notice was addressed, by reason of his having left his former place of abode.

Byles, Serjt., applied for leave to amend the rule, and to enlarge it until the first day of the next term.

Cresswell, J. How can we so deal with a rule, after it has run out?

Master Park stated that he had ascertained that that which was asked was commonly done in the court of Queen's Bench.

CRESSWELL, J. For the purpose of service?
Master Park. Yes: it is treated as in effect a new rule.
The rule was accordingly ordered to be amended and enlarged.

[557] BAILEY AND ANOTHER *v.* THE UNIVERSAL PROVIDENT LIFE ASSOCIATION. Jan. 31, 1857.

[S. C. 26 L. J. C. P. 87; 3 Jur. N. S. 269; 5 W. R. 268.]

One who has accepted shares in a joint-stock company, but has not signed the deed of settlement, or any deed referring to it, is not a "shareholder" within the 7 & 8 Vict. c. 110, and consequently is not liable to an execution at the suit of a judgment-creditor of the company,—although his name appears as a shareholder in the return filed with the registrar of joint-stock companies, pursuant to s. 11.

Hawkins, on a former day in this term, obtained a rule calling on Edward Copeland to shew cause why execution should not issue against him as a shareholder in the Universal Provident Life-Association.

The affidavits upon which the motion was founded stated, that the plaintiffs obtained a judgment against the association on the 4th of September, 1855, for 750l. 11s. 4d. debt, and 48l. 8s. 8d. costs, of which there remained due 735l. 7s. and interest; that, on the 1st of November, 1855, a fi. fa. was sued out upon the said judgment, and returned nulla bona: that the defendants had not any goods or chattels, property or effects applicable to the said execution, or whereby the said debt and costs, or any part thereof, might be satisfied; that proceedings were pending before the Master of the Rolls for winding up the affairs of the association, but that no call had been made thereunder; that the plaintiffs' claim upon the judgment had been duly proved under the petition and order pursuant to the Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45, s. 73); that, on the 26th of November, 1856, Mr. Copeland was duly served with notice of the intended application, pursuant to the 7 & 8 Vict. c. 110, s. 58; that, in and by the registered returns of the said Universal Provident Life-Association, made pursuant to the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, ss. 4, 11, and kept at the proper office, the said Edward Copeland was returned as a shareholder in the said company at the time when the said debt for which the action was brought was incurred and the judgment thereon was obtained as afore-**[558]**-said, and still remained a shareholder therein, no transfer of his shares having been registered or returned to the said office; and that the said association was a completely registered company, and was not incorporated by act of parliament or charter, nor was the liability of its members restricted by letters-patent or otherwise.

Bolton and Mellish now shewed cause (*a*). Although Mr. Copeland is a holder of

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(*a*) The affidavits upon which cause was shewn, stated, that the transfers under which Mr. Copeland held six shares in the association were not sealed, nor were they indorsed with a certificate of approval under the hands of two directors, as required by the deed of settlement, and that the date of one of the transfers was written in pencil; and that he had never signed the deed of settlement of the association. The following clauses of the deed of settlement were also set out:—

Clause 66. "That the person appearing in the company's register of shareholders to be holder of any share, and no other person, shall be entitled (subject to the regulations and in the manner herein expressed) to sell and transfer any such share to any person whomsoever, not being an infant, lunatic, married woman, or under any legal disability, and to any body politic or corporate legally capable of holding any such share: Provided, nevertheless, that it shall not be obligatory on the board to accept a transferee who shall be the holder of less than five shares in the capital of the company:"

Clause 67. "That a form of deed of transfer shall be provided by the directors, and that any shareholder shall be entitled, on application to the secretary of the company, to have a copy of such form, with printed or written instructions for the use of the same, if any shall be thought requisite:"

Clause 68. "That every deed of transfer shall, immediately after execution, be left at the company's offices; and thereupon the directors shall, with all convenient

shares in the association, and his name appears on the register of shareholders, he is **[559]** not legally a shareholder, or liable in that character, inasmuch as the shares have not been conveyed to him by a valid transfer, and he has not executed the deed of settlement. This is a proceeding under the 66th section of the act for the registra

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speed, take the same into consideration, and, subject to the proviso contained in the 66th clause, shall, if the same be found to be in accordance with the said form, and also in the opinion of the directors a fit and proper instrument of transfer within the provisions of the statute in that behalf made and provided, and in accordance with the provisions of these presents, on payment of 1s. in respect of such transfer, certify their approval of the same in writing under the hands of some two of the directors to be indorsed thereon:"

Clause 69. "That any transfer, or pretended transfer, of shares, not being approved by the directors under the last preceding clause, shall be absolutely void, and the then registered holder of the shares therein expressed to be transferred shall continue to be the shareholder in respect thereof to all intents and purposes; and notice of such non approval, and of the consequences thereof as aforesaid, shall forthwith be sent to the shareholder purporting thereby to transfer such shares:"

Clause 70. "That, in case such transfer shall be approved, but not otherwise, the directors shall forthwith cause a notice in writing to be sent to the transferree, apprising him of the same, and requiring him to come in and execute this present deed, or some deed of covenant referring thereto, or a duplicate thereof, within one calendar month from the date of such notice, which shall also specify the penalties and disabilities affixed to the non-execution of the deed of settlement of the company; but it shall be in the discretion of the board to extend that period to a time not exceeding three calendar months, when the circumstances of the case shall in their opinion justify the same:"

Clause 80. "That any person who shall become entitled to any share by purchase, representation, or otherwise, and who shall then be a registered shareholder of the company in respect of any other share, shall not be required again to execute these presents, or any deed referring thereto, but shall be entitled, on leaving the requisite transfer, or giving the requisite notice, and leaving the requisite evidence, and making the requisite election (if any of such particulars are respectively necessary), in the manner hereinbefore required, to be immediately entered in the register of shareholders as the holder of the said shares:"

Clause 81. "That, in case any person who shall have been required under the 70th or 77th clause of these presents to execute these presents, or some deed of covenant referring thereto, or duplicate thereof, shall for the space of three calendar months neglect to execute the same in the manner in such notice specified, or, in case any person claiming on the ground of any evidence re **[561]**-quired to be left under the 74th clause of these presents, shall for the space of six calendar months after the event upon which his or her title depends neglect or be unable to procure and leave valid and sufficient evidence as required by the said 74th clause, or if for any reason what soever no such evidence shall be left within the time last aforesaid by the party legally entitled to leave the same, then and in every such case the share or shares of or claimed by any such person making such default, or so unclaimed as aforesaid, shall be immediately and irrevocably forfeited to the use of the company:"

Clause 82. "That, immediately upon the execution of these presents, or such deed of covenant referring thereto, or duplicate thereof, in manner aforesaid, the person executing the same being a person duly entitled by original subscription, or by transfer, election, nomination, or otherwise, in manner hereinbefore mentioned, shall be forthwith entered on the register of shareholders, and duly entered for registration under the provisions of the statute; and such person shall forthwith, but not before, assume the liabilities and privileges of a shareholder; and, if such person shall be entitled in any of the respective capacities aforesaid, or as a nominee of any party so entitled, the dividends accruing on the share or shares to which such party or nominee of such party shall have been so entitled after the event on which such title shall have accrued, and before the execution of these presents, or deed referring thereto, or duplicate thereof, shall, unless forfeited under the 79th clause of these presents, be accumulated for and paid to the person so executing, at the time of such execution; but, in cases of direct transfer, the former holder of the share in

tion, incorporation, and regulation of joint-stock companies, 7 & 8 Vict. c. 110 (*a*). By the [560] interpretation clause (s. 3), the word "shareholder" is declared to mean, "any person entitled to a share in the [561] company, and who has executed the deed of settlement, or a deed referring to it." The provision for the transfer of shares is contained in s. 54, which enacts, that, "subject to the regulations therein contained, and to be contained in any deed of settlement of any joint-stock company completely registered under this act, it shall [562] be lawful for every shareholder of such company, and he is hereby entitled, to sell and transfer his shares therein by deed, duly stamped, in which the pecuniary consideration for such sale shall be truly expressed, and which instrument of transfer must be according to the form in the schedule (K.) to this act annexed, or to the like effect; and that the directors of the company shall cause a memorial of such instrument of transfer, when produced at the office of the company, to be entered in a book to be called 'The Register of Transfers,' and the entry thereof to be indorsed on the instrument of transfer; and that, until such instrument of transfer shall have been so produced at the office of the company, the purchaser of the share shall not be entitled to receive any of the profits of the company, or to vote in respect of such share." The affidavit shews that the regulations contained in the deed of settlement in this case have not been complied with; consequently there has been no valid transfer. The deed requires a certificate of approval, under the hands of two directors, to be indorsed on the instrument of transfer. This regulation has not been complied with. The material provisions as to the registration of transfers contained in the act, will be found in ss. 11, 13, and 18. By the former, the directors are required to make the following returns to the registrar of joint-stock companies, viz. a return accordingly to schedule (E.), containing the particulars therein set forth of every transfer of any share in such company which shall have been made since the preceding half-yearly return (or, in the case of the first of such returns made by such company, since the complete registration thereof), and which shall have come to the knowledge of the directors; and also a return according to schedule (F.), containing the particulars therein set forth of the names and places of abode of all persons who shall either have ceased to be shareholders of such company, or have become shareholders of such [563] company otherwise than by a transfer as aforesaid, since the preceding half-yearly return, or since the complete registration of the company, as the case may require, and also of the changes in the names of all shareholders of such company whose names shall have been changed by marriage or otherwise since the last preceding half-yearly return, or since the complete registration of the company, as the case may require. The 13th section enacts, "that, until the return of the transfer or other

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respect of which such execution is to be made, shall, until such execution and registration as aforesaid, continue subject to all the liabilities, and be entitled to the dividends, and all other privileges of a shareholder."

(*a*) Which enacts "that every judgment and every decree or order which shall be at any time after the passing of this act obtained against any company completely registered under this act, except companies incorporated by act of parliament or charter, or companies the liability of the members of which is restricted by virtue of any letters-patent, in any action, suit, or other proceeding prosecuted by or against such company in any court of law or equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also, if due diligence shall have been used to obtain satisfaction of such judgment, decree, or order, by execution against the property and effects of such company, then against the person, property, and effects of any shareholder for the time being, or any former shareholder of such company in his natural or individual capacity, until such judgment, decree, or order shall be fully satisfied: provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement for which such judgment, decree, or order may have been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained: provided also that in no case shall execution be issued on such judgment, decree, or order, against the person, property, or effects of any such former shareholder of such company, after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company."

fact or event whereby a person becomes the holder of any shares, be made pursuant to the provisions hereinbefore contained, it shall not be lawful for such company, its directors or officers, if such fact or event be known to them respectively, to pay to any such person any part of the profits of the concern, nor for any such person to sue for or recover any part of the profits arising in respect of such share, or in anywise to act as a shareholder; and that, until the return of the transfer of any share shall have been made pursuant to the provisions hereinbefore contained, the person whose share shall have been thereby transferred, shall, so far as respects his liability to the debts and engagements of the company, and also as respects the reimbursement of any loss, damages, costs, and charges he may incur thereby, be deemed to continue a shareholder of such company." And s. 18 enables any person to inspect and obtain a copy or extract of any return or deed, certified by the registrar, and provides, "that, in all courts of law and equity, and elsewhere, every such copy or extract so certified shall be received in evidence, without proof of the signature thereto, or of the seal of office affixed thereto." This provision differs widely from that contained in the 21st section of the 7 & 8 Vict. c. 113, which would seem to make the return conclusive evidence of the parties named therein being shareholders. Both statutes being under the consideration of the legislature during the **[564]** same session, this difference of language could hardly have been unintentional. There are numerous cases where it has been held, that the transferree of shares is not to be considered a shareholder unless the terms of the deed have been complied with. In *The Galvanized Iron Company* v. *Westoby*, 8 Exch. 17, 7 Railway Cases, 318, it was held that the defendant was not liable to be sued for calls, he never having executed the deed of settlement. So, in *Moss* v. *The Steam Gondola Company*, 17 C. B. 180, a party who had acted as a director, but who had not signed the deed of settlement, was held not liable to an execution on a judgment against the company. Jervis, C. J., there says: "You are asking for a statutory remedy against a shareholder. To entitle you to that, you must bring the party sought to be charged within the statutory definition. That you have not done." Again, in *Wilkins* v. *The Anglo Californian Gold Mining Company*, 18 Q. B. 287, a person who had subscribed for shares was held not to be entitled to certificates under s. 51, until he had executed the deed of settlement, or a deed referring thereto. In *Beaumont* v. *Shortridge*, 4 Exch. 699, a transfer was held inoperative for want of the consent thereto of "a board of directors," as required by the deed of settlement (*a*). In *Ness* v. *Angas*, 3 Exch. 805, the husband of a woman who had (with his consent) purchased shares in a joint-stock bank with the proceeds of her separate property, not having complied with the requisitions of the deed of settlement so as to become a member of the association, was held not liable to a scire facias under the 7 G. 4, c. 46, s. 13. The like was held as to an executor, in *Ness* v. *Armstrong*, 4 Exch. 21. To make a man a shareholder, the statute requires four things,—that he should have executed the deed of settlement **[565]** of the company, or some deed referring to it,—that the shares should be conveyed to him by deed duly stamped,—that a memorial of the instrument of transfer should be entered in "the register of transfers," and the entry indorsed thereon,—and that his name should appear in the return made to and filed with the registrar of joint stock companies. The three first have not been complied with here: and the question is, whether the single fact of the party's name appearing on the register fixes him with liability as a shareholder. In *Turner* v. *The Metropolitan Live-Stock Company*, 2 Exch. 567, the return was held to be primâ facie evidence only.

Hawkins, in support of his rule. The question is whether the shareholder is not estopped from setting up the irregularity, if any there be. The object of the legislature in requiring a memorial or return to be filed is, to give to persons dealing with the company the means of ascertaining with whom they are contracting. The case of *Turner* v. *The Metropolitan Live-Stock Company*, 2 Exch. 567, is expressly in point. Mr. Copeland's affidavit shews that he has done all he could to make himself a shareholder. The transfer is in the form given in the schedule, though by accident there is no seal opposite the signature of the transferror. [Cockburn, C. J. It amounts to no more than this, that the parties intended the instrument to be a deed.] In equity it would still be treated as a conveyance. Having taken advantage of it as a valid deed, and having by means of it caused his name to be inserted in the register, is not the party,

(*a*) See the observations upon this case in *Bargate* v. *Shortridge*, 5 House of Lords Cases, 297.

as between himself and a creditor whose only means of information is by looking at the register, estopped from saying that he is not a shareholder? The only effect of the omission to sign the deed of settlement is, to suspend the party's right to **[566]** exercise the powers of a shareholder: s. 26 (*a*). [Crowder, J. You argue, from s. 26, that, although not a shareholder for the purpose of receiving benefit, by reason of his omission to execute the deed, the party is a shareholder for the purpose of being liable.] Just so: and there is no good reason why it should not be so. [Cockburn, C. J. When you come to put in force the very stringent provisions of the statute, must you not shew clearly that the statutory liability is imposed upon the person sought to be affected? Cresswell, J. Suppose the legislature had said that execution might issue against every person who signs the company's deed of settlement,—would you contend that a shareholder who has not executed the deed would be liable?] No. [Cresswell, J. Do they not in effect exclude the liability of one who has not signed the deed, when they **[567]** say, that, certain conditions having been complied with, execution may issue against shareholders, and that, by "shareholders," they mean persons who have executed the deed? I think we cannot hold a man to be a shareholder, and as such liable to execution, who has not signed the deed, without overruling *Moss* v. *The Steam Gondola Company*, 17 C. B. 180, which I think was rightly decided.] In *Burnes* v. *Pennell*, 2 House of Lords Cases, 497, by a deed of co-partnership of a joint-stock company, certain forms were to be observed by any transferree of shares, before he could become a member of the company. A. purchased shares, and executed some of the acts required to constitute him a member of the company, but left one of these acts unexecuted: and it was held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract.

COCKBURN, C. J. It appears to me to be enough upon the present occasion to say that *Moss* v. *The Steam Gondola Company* is an authority directly in point. The plaintiff is seeking to enforce a judgment obtained against the company, by means of a statutable execution against one whom he charges to be a shareholder. I quite agree with the principle laid down in the case referred to, viz. that the party against whom this very stringent proceeding is taken, must be shewn to come within the definition of a shareholder given by the act,—one who has executed the deed of settlement of the company, or some deed referring thereto. Mr. Copeland in this case has not executed the deed; consequently, he is not a shareholder, and the plaintiff cannot have execution against him. The rule which has been obtained for that purpose must be discharged.

[568] The rest of the court concurring,

Rule discharged.

Hawkins submitted, that, inasmuch as the rule was not an experimental one, and the creditor had been misled by the appearance of the name of Mr. Copeland in the return of shareholders, he ought not to be visited with costs.

To this the court assented, and the rule was

Discharged without costs.

(*a*) Which enacts "that no shareholder of any joint-stock company completely registered under this act shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement of the said company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall have been registered in the registry office aforesaid; and, further, that it shall be lawful for every shareholder who shall have signed such deed, and paid up such instalments or calls, and shall have been registered, and he is hereby entitled,—to be present at all general meetings of the company,—and also to take part in the discussions thereat, —and also to vote in the determination of any question thereat, and that either in person or by proxy, unless the deed of settlement shall preclude shareholders from voting by proxy,—and also to vote in the choice of directors, and of every auditor to be elected by the shareholders; subject, nevertheless, to the provisions of this act and of the deed of settlement of the company, or other special authority, so far as such provisions shall either regulate or restrict the exercise of such powers, but not so as to deprive such shareholders thereof," &c.

BARNES *v.* HARDING, Official Manager of the Royal British Bank (*a*). May 8, 1857.

[S. C. 5 W. R. 570.]

Upon an inquisition on a writ of elegit, proof of possession or receipt of the rent of the land by the party, is primâ facie evidence of title. Where a jury, notwithstanding such evidence, found that the party had no lands,—the court set aside the finding, and directed the sheriff to take a new inquisition.

A writ of elegit was directed to the sheriff of Suffolk, commanding him to cause to be delivered to the plaintiff, by a reasonable price and extent, all the goods and chattels of Thomas Mayhew, of Saxmundham, in the said county, in his bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in his bailiwick, as the said Thomas Mayhew, or any person in trust for him, was seised or possessed of on the 30th of January, 1857, or at any time afterwards, or over which the said Thomas Mayhew on that day, or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold the same until the sum of 116l. **[569]** 19s. 2d., together with interest, should have been levied.

An inquisition under the above writ was held on the 2nd of April last, at Woodbridge, in the county of Suffolk, before James Sparke, Esq., the acting undersheriff, when a jury was duly sworn, and the following evidence given, after an objection taken by Mr. Churchyard, an attorney who attended to watch the proceedings on behalf of Mr. Mayhew, instructed by Mr. Mayhew's London agents (but afterwards withdrawn), that the deeds ought to be produced, or notice to produce given before secondary evidence could be let in:—

The first witness, Mr. Garrett, of Aldborough, stated that he knew the property of Mr. Thomas Mayhew at Aldborough; that it was comprised in the particulars and plan produced, and consisted of houses and about fifty acres of land (enumerating and describing the parcels) called the Crespigny House Estate; that the witness occupied a great portion of it, about twenty-five acres, holding it as tenant from year to year of Mr. Mayhew, and paying rent to him for it; that the property was Mr. Mayhew's on the 30th of January and the 23rd of February last; that he (the witness) had offered, and was willing to give, 5000l. for the whole estate; and that the price asked was 6000l.

On cross-examination, Mr. Garrett stated that Mr. Mayhew always called the estate his own; that he paid him no rent since last January, there being none due; that no one else claimed the rent; but that he had that day received a notice from one Thrupp, who claimed to be a mortgagee, to pay no further rent to Mr. Mayhew.

An extract from the rate book of the parish of Aldborough was produced, and admitted, shewing the gross rental of the estate to be 182l., and the rateable value 174l.

James Southwell, of Saxmundham, was next called. **[570]** He stated that he knew the property of Mr. Mayhew in Saxmundham, called the Fairfield Estate; that it was entirely in his own occupation, with the exception of a small quantity let out as garden ground,—the whole consisting of about twenty-eight acres, and the annual value 117l. 10s.

On cross-examination, this witness stated that he knew of the possession only by repute, by inspection of the rate-book, and by his (Mr. Mayhew's) residence and occupation.

The undersheriff told the jury, that, in his opinion, the evidence produced was under the circumstances admissible and sufficient; that that question was not for their consideration; but that they were to say, upon the evidence produced, what lands, &c., Mr. Mayhew was possessed of.

The jury found that there was no evidence to shew that the defendant (meaning Mayhew) was possessed of any lands, &c.

Couch, on a former day, upon an affidavit of the undersheriff verifying his notes,

(*a*) The rule was also intituled "And in the matter of the writ of elegit against the lands of Thomas Mayhew."

moved for a rule calling upon Mr. Mayhew to shew cause why the inquisition taken upon the above writ of elegit should not be set aside and a new inquisition taken thereon, on the ground that the verdict was perverse. He referred to Watson's Sheriff, 2nd edit. 313, where it is said, that, "where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ,"—citing 2 Inst. 396. [Crowder, J. Can you have a new inquisition upon the old writ? Cresswell, J. Why not, as well as upon a writ of inquiry?]

The rule was granted in the alternative,—"to shew cause why the finding of the jury upon the inquisition **[571]** taken upon the said writ should not be set aside and a new inquisition be taken thereupon, or why the said writ of elegit and the inquisition thereon should not be set aside, and the plaintiff be at liberty to issue a new writ of elegit against the lands of the said Thomas Mayhew.

Hawkins now shewed cause. It cannot be denied that there was evidence upon which the jury might, and perhaps ought, to have found that Mr. Mayhew had lands in the county which might be extended under the elegit. But it is submitted that this rule was wholly unnecessary, inasmuch as the plaintiff might have issued another elegit: Archbold's Practice, 11th edit., by Prentice, 634, 635 (*a*)[1]. [Cresswell, J. Into the same county?] Yes. [Cresswell, J. Without the leave of the court?] Yes. [Cresswell, J. If he may have a new elegit without leave, does he make it worse by asking leave? Willes, J. It may be convenient to the plaintiff to have a declaration of the court that there was evidence upon the former occasion upon which the jury should have found that Mr. Mayhew had lands. Cockburn, C. J. If the court are satisfied that the verdict was wrong, I do not see why they should not say so.] At all events, **[572]** the plaintiff ought not to have the costs of the rule. [Cresswell, J. Mr. Mayhew appeared by his attorney to oppose the plaintiff's proceedings on the inquisition. I do not see, therefore, why he should not be visited with costs (*a*)[2].]

Byles, Serjt., and Couch, contrà, were stopped by the court.

Cockburn, C. J. The finding of the jury was altogether unwarrantable. The rule must, therefore, be made absolute.

Willes, J. The jury upon an inquisition under an elegit, have no right to go into the question of title. The return to the elegit does not conclude the matter. The jury were bound to find that Mr. Mayhew had lands, upon the primâ facie evidence produced before them. It may, however, be advisable for the plaintiff to take the rule in the second alternative.

Byles, Serjt. We have considered the matter, and prefer taking the first alternative. The writ has not been executed: that which has been done upon it going for nothing. We wish to set aside the inquisition only.

Willes, J. Then you must add to the rule, a direction to the sheriff to take a new inquisition.

The rest of the court concurring,

Rule absolute (*b*).

(*a*)[1] In Archbold's Practice, 633, it is said: "Proof of possession of the land by the defendant, or receipt of rent by him in respect of the same, is primâ facie evidence of his title to it. As the proceeding is an ex parte one, and the inquisition not conclusive on the defendant, it is in general sufficient to give slight evidence of the defendant's title." "The inquisition must find the lands with certainty; the place and county where they lie, and where the inquisition is taken,—*Rausing's case*, Dyer, 208: the estate the defendant has in them,—F. Moore, 8; whether seised in severalty, or as joint-tenant or tenant-in-common, —*Heard* v. *Baskerfield*, Hutton, 16, Brownl. 38; and their value,—*Sparrow* v. *Mattersock*, Cro. Car. 319."

(*a*)[2] The rule did not ask for costs.

(*b*) The rule was drawn up as follows:—"It is ordered that the finding of the jury upon the inquisition taken upon the said writ of elegit be set aside, and that the sheriff of the county of Suffolk do proceed to take a new inquisition thereon."

[573] Ex parte Thomas Cross, a Prisoner. Jan. 22, 1857.

[S. C. in Court of Exchequer, 1 H. & N. 651; 26 L. J. M. C. 28; 3 Jur. N. S. 320; 5 W. R. 307. Discussed, *Clark* v. *Reg.*, 1884, 14 Q. B. D. 101.]

A commitment under the Vagrant Act, 5 G. 4, c. 83, s. 4, stated that "T. C. on, &c., in this city (London), then being a reputed thief, frequenting the public streets and places of and in the said city, then and there was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal," &c.: Held, sufficient.

The prisoner Thomas Cross was on the 30th of December last committed to the house of correction at Holloway, for an offence against the Vagrant Act, 5 G. 4, c. 83, s. 4, under the following warrant:—

"To all and every the constables of the police force for the city of London and the liberties thereof, and to all other constables and peace officers in the said city and liberties, and to the keeper of the city of London house of correction at Holloway, in the county of Middlesex.

"London, to wit. Whereas, Thomas Cross, late of London, labourer, was this day duly convicted before the undersigned, the Lord Mayor of the city of London, and one of her Majesty's justices of the peace in and for the said city and the liberties thereof, sitting at the Mansion House justice-room in the same city, of being a rogue and vagabond, within the intent and meaning of the statute of the Fifth year of King George the Fourth, intituled 'An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' For that he the said Thomas Cross, on the 24th day of December instant, in this city, then being a suspected person and reputed thief, frequenting the public streets and places of and in the said city, then and there was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal the moneys, goods, and chattels of Sarah Seymour from her person therein, against the form of the statute in such case made and provided: And it was thereby adjudged that the said Thomas [574] Cross, for his said offence, should be imprisoned in the city of London house of correction at Holloway aforesaid, and there kept to hard labour, for the space of three months: These are, therefore, to command you, the said constables, to take the said Thomas Cross, and him safely convey to the said house of correction at Holloway aforesaid, and there deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said house of correction to receive the said Thomas Cross into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of three months: And for your so doing this shall be your sufficient warrant.

"Given under my hand and seal, this 30th day of December, 1856, at the Mansion House justice-room aforesaid. "Thomas D. Finnis, Mayor, &c."

MacOubrey moved for a habeas corpus to bring up the prisoner to be discharged from custody, on the ground of the illegality of the conviction. He stated that a similar application had been already made to the court of Exchequer, and they thought the conviction right. The conviction was under the 5 G. 4, c. 83, s. 4. There are only two branches of the section under one of which the case could fall, viz. those which enact that "every person being found in or upon any dwelling house, warehouse, coach house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose," and that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any street, highway, or place [575] adjacent, with intent to commit felony," shall be deemed a rogue and vagabond, within the true intent and meaning of the act. Now, the conviction could not have been intended to be under the first branch, because "Railway Place" is not stated to be a place of the description there mentioned. It must, therefore, have been intended to be under the last: but it does not allege that the prisoner was "frequenting" Railway Place, but merely that he was found there: consequently, it does not allege

any offence to have been committed at all. [Cresswell, J. What do you understand by "frequenting?"] Being there more than once or twice. Dr. Johnson defines it, "To visit often; to be much in any place; to resort often to." [Cresswell, J. If you are right, it would be necessary to shew that the man was there more than once with the same intent, viz. to commit a felony.] In *Ex parte Elizabeth Jones*, 16 Justice of the Peace, 298, A. was committed as a rogue and vagabond under this section, for that she, being a suspected person, did unlawfully frequent a certain street called Regent Street, in the county of Middlesex, with intent to commit felony: and it was held that she was entitled to be discharged on a writ of habeas corpus, because the commitment was insufficient, for omitting to state that the street in question led to a canal, &c., or was itself a place of public resort, or was a street which led to a place of public resort; it being no offence within the act for a suspected person to frequent a street, with intent to commit a felony, unless it fall within either of the above clauses. That shews the extreme strictness with which the language of this section is to be construed.

Cockburn, C. J. I see no reason to find fault with the decision to which we are told the court of Exchequer came in this case.

[576] Cresswell, J. In the case of *Ex parte Elizabeth Jones*, the court could not take judicial notice that Regent Street was a place of the description mentioned in the act. Here, however, the commitment follows the use of the word in the statute. What it means in the one, it means in the other.

The rest of the court concurring,

Rule refused.

Widders, *App.*, Gorton, *Resp.* Jan. 27, 1857.

[S. C. 26 L. J. C. P. 165.]

Upon a case stated by way of appeal from a county court decision, it appeared that, the defendant being indebted to the plaintiff, the latter drew upon him two bills, which the former returned accepted, and their receipt was acknowledged by the plaintiff in a letter (to which a penny receipt-stamp was affixed) stating that they were placed to the defendant's credit. The plaintiff afterwards inclosed the bills in a letter addressed to the defendant, with a request that he would re-accept them, making them payable at a banker's. It was proved that this letter was duly posted; but there was no evidence to shew that it had ever come to the defendant's hands. After the bills had arrived at maturity, the plaintiff sued the defendant in the county-court, upon the original consideration, for goods sold and delivered. At the trial, it was contended for the defendant, that, the bills having been given in payment pro tanto of the plaintiff's account; and being still in existence, the plaintiff could not without producing them recover upon the original consideration. The judge decided that the plaintiff's letter did not in point of law amount to an acceptance by him of the bills in payment, and decided that he was entitled to recover for the original consideration: Held, that his decision was right.

This was an appeal against a decision of the judge of the Bow county-court of Middlesex. The action was for goods sold and delivered; the plaintiff by his particulars claiming 34l. 1s. 6d. for goods delivered between the 26th of February and the 23rd of June, 1856, and giving credit for 6l. on account.

The facts proved at the trial were,—that, on the 25th of June, 1856, the defendant was indebted to the plaintiff in the sum of 25l. 9s. 6d. for goods sold and delivered; and on that day the plaintiff drew upon and sent by the general post to the defendant two bills of exchange, dated respectively the 25th of June, 1856, one bill being for 10l., payable two months after date, the other being for 15l., and payable three months after date. These **[577]** bills were payable to the plaintiff or his order. They were inclosed in a letter addressed and sent by the plaintiff to the defendant, as follows:—

"Birmingham, June 25th, 1856.

"Dear Sir,—I sent you two dozen kitchen fenders on Monday last, and trust they are to hand ere this. I beg to inclose you two bills, one at three months, for 15l.,

and one at two months, for 10l., which please accept and return to me by first post, as I want to pay them away on Saturday morning. "GEORGE GORTON."

The plaintiff, in previous transactions between himself and the defendant, had taken bills from the defendant, accepted by the defendant's writing across the bills "accepted, J. D. Widders," which bills were duly paid. The defendant so accepted the said two bills so sent as aforesaid to him by the plaintiff, and he returned them by post to the plaintiff, who acknowledged their receipt in a letter sent by post, as follows:—

"Birmingham, 28th June, 1856.

"Sir, I am in receipt of the bills, viz one at three months, for 15l. and one at two months, for 10l., which are placed to your credit. "GEORGE GORTON."

This letter was written by the plaintiff's son, by the authority of the plaintiff. To this letter was affixed a penny receipt-stamp, which was cancelled by the writer of the letter writing on such stamp the initials of his name.

The plaintiff, upon receiving these bills from the defendant, sent them to his bankers to procure them to be discounted. His bankers declined to discount them, unless they were made payable at a bankers: and the plaintiff returned the same to the defendant in a letter, to be re-accepted by him payable at a banker's, and requesting him to make them so payable. That letter was [578] posted by the plaintiff; but there was no evidence that it reached the defendant, beyond the fact of its having been posted. The bills not being returned accepted by the defendant payable at a banker's, the plaintiff sent a registered letter to the defendant, to return them, and, if not received, not to pay them. No answer was given to that letter: and the plaintiff, hearing that the defendant denied receiving the bills, on the 23rd of July, 1856, served upon him a written notice, of which the following is a copy: —

"Mr. J. D. Widders. "Limehouse, July 23rd, 1856.

"I hereby give you notice that I hold you responsible for the value of two bills of exchange, one for 10l., and one for 15l., sent to you through the post-office for re-acceptance: and I hereby give you further notice not to pay these bills to any person whatsoever except myself. "GEORGE GORTON."

The plaintiff proved posting the letter inclosing the bills to be accepted payable at a banker's, and also sending the registered letter before referred to, and that neither of the letters was returned to him: and that he never accepted the bills in payment. He also proved promises of the defendant to pay the debt, these promises being made after the bills arrived at maturity, and asking further time to pay.

Upon this state of facts, it was contended by the defendant's counsel that the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not without producing them recover upon the original consideration for which they were given.

The judge, however, decided that the letters of the 25th and 28th of June hereinbefore mentioned did not in point of law amount to an acceptance by the plaintiff of the said two bills of exchange in payment pro tanto of [579] the debt due to him by the defendant, and gave judgment for the plaintiff for the original consideration, viz. for goods sold and delivered.

If the court should be of opinion that the judge was right, the judgment was to stand: but, if they should be of a contrary opinion, the amount of the said judgment was to be reduced to 9s. 6d.

Atherton, for the appellant. It does not very clearly appear what it was that the judge intended to refer to the court. [Crowder, J. He means to refer it to us to say whether or not the pieces of paper were taken in satisfaction pro tanto of the debt.] It is submitted that he could not have meant that. [Cresswell, J. I cannot understand anything else.] It had been argued before him by the defendant's counsel, that the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not, without producing them, recover upon the original consideration. [Cresswell, J. If the judge ruled that the plaintiff was bound to produce the bills, there being evidence that they had been returned to the defendant,—I should say he was wrong. He, however, did no such thing: he held

that the plaintiff was entitled to recover.] The bills having been given and accepted in payment, and being still in existence, the plaintiff could not recover without producing them or accounting for their absence. The judge does not decide that the posting of the letter with the bills in it relieves the plaintiff from the necessity of producing the bills. [Williams, J. He seems to have had in his mind those cases where it has been held that the giving a negotiable bill "for and on account of" a debt, was a quasi payment, becoming an absolute discharge by the loss of the bill.] In *Hansard* v. *Robinson*, 7 B. & C. 90, 9 D. & R. 860, R. & M. 404, n., it was held that the holder of a bill cannot, by the [580] custom of merchants, insist upon payment by the acceptor, without producing and offering to deliver up the bill. So, in *Crowe* v. *Clay*, 9 Exch. 604, it was held that the loss of a negotiable bill given on account of a debt, is an answer to an action for the debt as well as to one on the bill. [Williams, J. There, the bill was in a complete state,—negotiable,—at the time of the loss. It is not stated here whether the bills were indorsed or not.] In *Ramuz* v. *Crowe*, 1 Exch. 167, it was held to be immaterial whether the bill was negotiable or not. Besides, it is sufficiently apparent that these bills were indorsed; for, the case states that they had been sent by the plaintiff to his bankers for discount. [Crowder, J. Do you contend, that, upon the facts which are stated to us, the decision should have been different?] The plaintiff's letter of the 28th of June, 1856, shews that the bills were then received as payment. [Williams, J. Suppose you had to place the transaction upon the record, how would you plead it?] That the bills were given and received as payment, that they had arrived at maturity, and that they were out of the possession and control of the plaintiff. [Williams, J. Would it be a good replication to say that the bills were in the hands of the defendant?] Probably it would. [Crowder, J. The facts stated raise a presumption that the bills did get back into the hands of the defendant.] The judge has not so found: and the court cannot assume it. All that is stated is, that a letter inclosing the bills, and addressed to the defendant, was posted by the plaintiff. Is the post master the agent of the sender of the letter, or of the person to whom the letter is addressed? A notice of dishonor of a bill or a cheque may be sent by post, and the posting is evidence of the sending (*a*): but [581] that is an excepted case. A plea of payment of 50*l.* would not be sustained by proof of the posting of a letter containing a 50*l.* note. [Williams, J. If this were in evidence before a jury, could you say that there was no evidence for them?] No. But, if the judge arrived at the conclusion that the letter containing the bills came to the hands of the defendant, he should have so stated on the case.

Badeley, contrà, was stopped by the court.

Cockburn, C. J. I do not think it necessary to send this case back to the learned judge, though it might have been more accurately stated. He has, however, done substantial justice. It is obvious upon the statement he has made to us, that the conclusion he arrived at was, that the bills had got back to the hands of the defendant: and what he means to refer to the court is,—such being the state of things, was it incumbent on the plaintiff to sue upon the bills and to give the defendant a notice to produce? or was he at liberty to resort to the original consideration? It seems to me that the transaction as to the bills was altogether put an end to by the circumstances which took place. I think the appeal must be dismissed.

Cresswell, J. I am entirely of the same opinion. Evidence is set out in the case strongly tending to shew [582] that the bills got back to the hands of the defendant. It was contended for him at the trial, that, the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not without producing them recover in respect of the original consideration. The judge decided that the letters of the 25th and 28th of June did not in point of fact amount to an acceptance by the plaintiff of the bills in payment of the debt due to him from the defendant, so as to preclude him from suing for the original considera-

(*a*) See Byles on Bills, 6th edit. p. 234, where it is said,—"Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to prove that the letter was received; and any miscarriage will not prejudice the party giving notice," citing *Saunderson* v. *Judge*, 2 H. Bla. 509; *Kuch* v. *Weston*, 3 Esp. N. P. C. 54; *Parker* v. *Gordon*, 7 East, 385, 3 J. P. Smith, 358; *Langdon* v. *Hulls*, 5 Esp. N. P. C. 157; *Dobree* v. *Eastwood*, 3 C. & P. 250; *Stocken* v. *Collins*, 7 M. & W. 515, 9 C. & P. 653; *Woodcock* v. *Houldsworth*, 16 M. & W. 126.

tion. If any question of fact was necessary to be found to justify that judgment, we must assume that the judge took such a view as would make his judgment right. I am clearly of opinion that there is no ground for finding fault with the decision.

WILLIAMS, J. I am of the same opinion. Taking the narrow ground suggested, I am of opinion, upon the statement on the case, that the decision of the judge was right. It is impossible to say that the transaction detailed amounts to an acceptance of the bills by the plaintiff in satisfaction. But, in the larger view also, and that is probably the real question intended to be presented to us,—I think there was no discharge of the debt, and that the plaintiff was entitled to judgment.

CROWDER, J. The judge sets out the facts, and then states what the contention on the part of the defendant was, and his decision thereon, viz. that the letters of the 25th and 28th of June did not in point of law amount to an acceptance by the plaintiff of the two bills in payment pro tanto of the debt due to him by the defendant. And then the question referred to us is, whether the decision was right. How can we help being of opinion, upon the facts stated, that the decision was right? There is no ground whatever upon which we could arrive at a [583] different conclusion. It is contended that there is evidence that the bills were accepted as payment; and that the judge has not found as a fact that they got back to the hands of the defendant. I think, however, upon the facts stated, it is quite impossible to come to any other conclusion than that the bills did get back into the defendant's hands. The decision was right, and the appeal must be dismissed.

Appeal dismissed, with costs.

SIMMONS AND WIFE *v.* SIGGERS. Jan. 27, 1857.

The defendant's attorney having delivered all the demurrer-books upon the plaintiff's default, the court refused to allow the plaintiff's counsel to be heard, or (his attorney not being at hand to pay for the books) to postpone the argument.

Upon this demurrer being called on, it was objected by J. Brown, for the defendant, that the plaintiffs were not entitled to be heard, inasmuch as the whole of the paper books had, upon their default, been delivered by the defendant's attorney.

Gibbons, contrà, -his attorney not being present, -prayed that the case might stand over.

CRESSWELL, J. Until the paper-books which have been delivered for you have been paid for, you are not in a condition to be heard: and it is not usual in such a case to grant time. The defendant is entitled to judgment.

The rest of the court concurring,

Judgment for the defendant.

[584] FLORENCE *v.* DRAYSON AND OTHERS. Jan. 27, 1857.

[See *Florence* v. *Jennings*, 1857, 2 C. B. N. S. 454.]

The defendants entered into the following agreement with the plaintiff, "In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill and until the entire amount of same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of the said principle sum of £350." In an action upon the above contract, for non-payment of the stipulated interest: -Held, that a plea shewing that the plaintiff had indorsed over the bill to a third person, was a good answer, inasmuch as the interest could only be claimed as accessory to the bill.

The declaration stated, that, on the 20th of February, 1856, in consideration that the plaintiff, at the request of the defendants, would discount for the defendants a certain bill of exchange, dated the day and year aforesaid, drawn by one J. H. Florence upon and accepted by the defendants, for the payment to the said J. H. Florence of

the sum of 350l., three months after the date thereof, the defendants undertook and agreed with the plaintiff, that, if the said bill of exchange was not wholly paid at maturity, to pay the plaintiff, as interest thereon, 17l. 10s. for each month any portion of which should have elapsed after maturity of the said bill, and that, until the entire amount of the same was wholly paid and satisfied, all payments made by the defendants should be applied first in liquidation of the interest, and afterwards in reduction of the said principal sum of 350l.: That plaintiff did, before the said bill of exchange became due, discount the same for the defendants, and the said bill of exchange became due according to its tenor and effect before the commencement of the suit, and that no part of the said bill of exchange was paid at the maturity of the same bill, and the same remained and was wholly unpaid for a long time afterwards; and that, although the defendants did make certain payments to the plaintiff, and, after applying (and the plaintiff did so apply) all such payments so made by the defendants to the plaintiff first in liquidation of the said interest and afterwards in reduction of the said [585] principal sum of 350l., according to the said contract, there was at the time when this action was commenced, and still remained, a large sum of money, to wit, 17l. 10s., left due and unpaid to the plaintiff under the said contract, of the said principal sum of 350l. in the said bill specified: And that divers months and portions of months had elapsed since the maturity of the said bill before this action was commenced, and that all things and events had happened, to entitle the plaintiff to be paid the said sum of 17l. 10s. of the said principal money, and also as interest the sum of 17l. 10s. for each of the said months and portions of months which had so elapsed as aforesaid since the maturity of the said bill; yet the defendants did not nor would pay the plaintiff the said sum of 17l. 10s. of the said principal money as aforesaid, or the sum of 17l. 10s. for each of the said months and portions of months which had so elapsed since the maturity of the said bill as aforesaid, and the same respectively were still wholly due and unpaid to the plaintiff: And the plaintiff claimed 17l. 10s. for principal, and as interest the sum of 17l. 10s. for each of the said months and portions of months which had elapsed before, and which might elapse since, the commencement of the suit, until payment, or judgment.

Pleas,—first, that the defendants did not agree with the plaintiff as in the declaration alleged.

Secondly, that the said agreement was and is an agreement in writing, in the words following, that is to say,—

"To Mr. J. H. Florence. "London, 20th February, 1856.

"Sir,—In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17l. 10s. for each month any portion of which shall have elapsed after maturity of the said bill, and [586] until the entire amount of same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of said principal sum of 350l. "Drayson, Harvey, & Co.

"350l. drawn by J. H. Florence on Drayson, Harvey, & Co., at three months."

Averment, that the said J. H. Florence who drew the said bill, and the plaintiff, were and are one and the same person, and that the said bill was according to its tenor and effect payable to the plaintiff's order: That, upon the day on which the said bill became due, the plaintiff indorsed and delivered the said bill to one William Tabor; by virtue of which said indorsement the said William Tabor became and was, and from thence until and at the payment and satisfaction of the said bill as thereinafter mentioned, continued to be, the holder and owner of the said bill, and entitled to receive payment and satisfaction of and for the same: And that afterwards, and after the defendants had accepted the said bill, and after the day on which the said bill became due, and before the suit, they the defendants satisfied the said bill by paying to the said William Tabor the sum of 350l. 11s. 8d., which sum he the said William Tabor, then being such holder, owner, and indorsee as aforesaid, received of and from the defendants in full payment and satisfaction and discharge of the said bill, and thereupon, and before this suit, delivered up and returned to the defendants the said bill as then being a paid and satisfied bill.

The plaintiff took and joined issue upon the above pleas: and also demurred to

the second plea, the ground stated in the margin being as follows: "One of the objections to the second plea is, that it admits that the bill of exchange was not paid at maturity, and not until some time afterwards; and it also [587] admits that the 17l. 10s. interest was not paid in respect of the portion of the month during which the bill remained unpaid. The plea, therefore, admits the averments and breach in the declaration, and shews no answer thereto or to the plaintiff's cause of action in respect thereof, —the payment to the holder of the bill (Tabor) of 350l. 11s. 8d., being no answer to the defendants' breach of contract."

Manisty, in support of the demurrer (*a*)[1]. The con [588] tract declared upon is a separate and distinct contract from that contained in the bill, and one upon which an action is maintainable quite irrespective of the bill. [Crowder, J. Would interest be payable on the bill besides, or was the 17l. 10s. per month a substitution for the interest?] As between the parties to the contract, it would no doubt be a substitution for interest on the bill: but not as between the defendants and a third party, the holder of the bill. [Cresswell, J. The contract is a very peculiar one. Suppose 200l. of the 350l. was paid on the bill becoming due, how would that sum be applied?] In satisfaction pro tanto of the principal. [Cresswell, J. The contract evidently contemplates the plaintiff remaining the holder of the bill. How can one who is not the holder be entitled to interest upon it?] The simple question is, whether this is a binding contract, and between whom. [Cockburn, C. J. May it not mean this "If the bill is unpaid, and you (the plaintiff) are entitled to interest upon it, that interest shall be at the rate of 17l. 10s. per month?"] If this is a contract with the plaintiff, and no one else could sue upon it, is it not an independent contract for the payment of 17l. 10s. per month so long as any part of the bill, in whose hands soever it may be, remains unpaid? Two actions might very well lie, one upon the bill, at the suit of the holder, the other, upon the contract, for payment of the stipulated interest.

Lush, contrà (*a*)[2]. The contract assumes that the plain- [589] -tiff shall be in a condition to demand interest on the bill.

(*a*)[1] The points marked for argument on the part of the plaintiff, were as follows: —

"1. That the declaration does contain an agreement by the defendant to pay the principal money of the bill of exchange, and therefore that the declaration is sufficient as to the claim for the part of principal admitted not to have been paid to the plaintiff:

"2. That, the defendants having contracted with the plaintiff, by an independent contract, to pay interest at the rate specified, if the bill was not wholly paid at maturity, the rule that interest is accessory to and follows the right to the principal, does not apply to this case; and therefore that the fact that the plaintiff indorsed away the bill of exchange will not bar the plaintiff's right of action founded on such independent contract, for its breach (which is admitted on the record) in not paying the interest as there agreed:

"3. That the plaintiff has a good cause of action in respect of the breach (admitted on the record) of the independent contract, in not paying the interest as agreed; and that such cause of action exists, although the plaintiff, by indorsing over the bill, may not have been entitled to the principal of the bill of exchange: and that, notwithstanding the indorsement over of the bill, and payment to the indorsee, yet, as such payment was after the bill became due, the defendant still broke his contract with the plaintiff, and, by the non payment of the bill when it became due, the plaintiff was subjected to an action on the bill at the suit of the indorsee:

"4. That the agreement set out in the second plea, coupled with the averments therein, agrees with and does not negative the agreement as stated in the declaration:

"5. That the agreement as set out in the second plea must be taken as part of the declaration and the agreement declared on; and, whether that agreement does or does not agree with the agreement stated in the declaration is immaterial, it being still apparent on the record that the defendant has committed a breach of the agreement set out and on which the action is brought, and the plaintiff is entitled to recover on the grounds stated in the second and third points."

(*a*)[2] The points marked for argument on the part of the defendants were, —

"That the declaration is bad as to the claim for part of the principal, because it contains no promise to pay the principal; and that, as the 17l. 10s. per month was to be paid as interest, it clearly means, that, unless the plaintiff continued entitled to the

Cockburn, C. J. (stopping Lush). It appears to me that there is no difficulty whatever in this case. The contract declared upon is certainly a very peculiar one. The defendants, addressing the plaintiff, say, "In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay,"—not saying to whom,—"as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill, and until the entire amount of same is wholly paid and satisfied; all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of said principal sum of 350*l.*" The stipulation is for payment of the 17*l.* 10*s.* per month as interest on the bill. Interest could only be payable on the bill to the holder of it, as accessory to the principal. When the plaintiff passed away the bill to a third person, he was no longer in a condition to demand interest. I think the defendants are entitled to judgment

Cresswell, J. I am of the same opinion. It is im-[590]-possible to separate the right to the interest from the bill, to which the interest was accessory.

The rest of the court concurring,

Judgment for the defendants.

Sampson *v.* Hoddinott. Jan. 20, 1857.

[S. C. 26 L. J. C. P. 148; 3 Jur. N. S. 243; 5 W. R. 230: affirmed by consent, 3 C. B. N. S. 596. See *Crossley* v. *Lightowler*, 1866-67, L. R. 3 Eq. 296; L. R. 2 Ch. 478; *Roberts* v. *Richards*, 1881, 50 L. J. Ch. 302; 51 L. J. Ch. 944. Distinguished, *Kensit* v. *Great Eastern Railway*, 1883-84, 23 Ch. D. 566; 27 Ch. D. 122. *Macartney* v. *Londonderry and Lough Swilly Railway*, [1904] A. C. 311. Principle applied, *Sharp* v. *Wilson*, 1905, 93 L. T. 155.]

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. By usage, he may acquire a right to use the water in a manner not justified by his natural right: but such acquired right has no operation against the natural rights of a land-owner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. The plaintiff had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows: and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully:—Held, that this detention of the water by the defendant was a use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action.—In such a case, it is not necessary to shew actual damage to the plaintiff's reversionary interest: it is enough to shew an obstruction of his right, and, such obstruction of his right being shewn, the law will infer damage.—The right of the riparian proprietor is

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principal, he was not to have it, interest being accessory to and following the principal: and, consequently, that he disentitled himself to the interest, by indorsing away the bill, and never could become entitled to interest afterward, as the satisfaction of the bill while outstanding, and when it was overdue, prevented him from ever again becoming entitled to the principal: and that the written agreement as set out does not agree with and negatives the agreement as stated in the declaration."

limited to natural streams, and does not attach in the case of artificial cuts or drains.

This was an action for an injury to the plaintiff's reversion, by diverting a stream of water.

The declaration stated that certain tenants of the plaintiff were possessed of certain water-meadows, the reversion thereof being in the plaintiff, into which meadows a portion of the water of certain streams of right ought to have run, for watering the same: and the defendant, by obstructing and diverting the said streams, deprived the said meadows of the use of the said por-[591]-tion, and injured the plaintiff's reversionary interest: and the plaintiff claimed 200*l*.

Pleas, first, except as to part of the grievances in the declaration mentioned, not guilty,—secondly, except as above in the first plea was excepted, that he did what was complained of, so far as related to the causes of action to which that plea was pleaded, by the plaintiff's leave,—thirdly, as to certain alleged grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that the defendant, before and at the said times when, &c., was possessed of land the occupiers whereof for twenty years before the suit enjoyed, as of right, and without interruption, the privilege of using one of the streams in the declaration mentioned for agricultural purposes, and of obstructing and diverting the said stream for those purposes, for the better use and enjoyment of the said land; and that the alleged grievances to which that plea was pleaded, were uses by the defendant of the said privilege or easement,—fourthly, as to certain grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that the defendant, before and at the said times when, &c., was possessed of land the occupiers whereof for forty years before the suit enjoyed, as of right and without interruption, the privilege of using one of the streams in the declaration mentioned, for agricultural purposes, and of obstructing and diverting the said stream for those purpose, for the better use and enjoyment of the said land; and that the alleged grievances to which that plea was pleaded, were uses by the defendant of the said privilege or easement,—fifthly, as to certain alleged grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that, long before the said time when, &c., the plaintiff, or a person by, from, or under [592] whom the plaintiff and his said tenants, subsequently to the grant hereinafter mentioned, derived all his and their estate, right, and title to the said water-meadows, and the said right of irrigating the same in the declaration mentioned, then being seised or possessed of the said water-meadows for an estate not yet determined, but still in full force and existence, by deed granted to a person then seised in his demesne as of fee of and in certain land near the said stream, the privilege of using the waters of the said stream for agricultural purposes, and of diverting and obstructing the said stream for those purposes, for the better use and enjoyment of the said land for and during the whole of the said estate of the said grantor, which said land, with the said privilege so granted as aforesaid, before the said times when, &c. became legally vested in the defendant for and during a term of years not yet expired; and the defendant before and at the said times when, &c. was and still is lawfully possessed of the said land, together with the said privilege, for the said term of years not yet expired; and that the grievances to which that plea was pleaded were uses by the defendant of the said privilege,—sixthly, except as above in the first plea was excepted, that the streams in the declaration mentioned, except as above was excepted, ought not to have run into the meadows in the declaration mentioned, for watering the same, as in the declaration alleged,—seventhly, as to the grievances above in the first plea excepted, payment into court of one shilling.

The plaintiff joined and took issue on all the pleas except the last; and, as to that, traversed the sufficiency of the money paid into court. Joinder.

The following particulars of claim and defence respectively were delivered pursuant to judge's order:—

"This action is brought to recover damages for infringing the plaintiff's reversionary interest in certain [593] water meadows belonging to Sherborne Wyke Farm, in the parish of Sherborne, in the county of Dorset, and now in the possession of his tenants, William Sampson, Walter Sampson, and Thomas Sampson, by obstructing and diverting water of a certain river or stream running from and beyond a mill called

Edmund's Mill, or West Mill, in the said parish of Sherborne, to and adjoining certain lands in the possession of the defendant, also situate in the said parish of Sherborne, and also to and adjoining the plaintiff's said water-meadows, by cutting certain channels from the said river or stream to the defendant's said lands adjoining, and placing certain hatches in such channels, and occasionally placing a temporary bay across such river or stream, and also by obstructing and diverting water of another stream called the back water cut running through the defendant's said lands, by placing a hatch in such stream, and also by obstructing and diverting water of another stream called Silver Lake Spring, which rises on certain land in the defendant's occupation, also situate in the said parish of Sherborne, by penning back the same water, and forming it into a large pond, and using such water for the purpose of driving a water-wheel attached to a grist-mill and a threshing-machine, thereby impeding the proper and usual flow of the water of the said streams to the plaintiff's said water-meadows, and permanently detaining and depriving the plaintiff's said water-meadows of a great portion of such water."

"The third, fourth, and fifth pleas relate to a branch of the river Yeo, and to a stream running into it called Silver Lake, respectively, and to land in the occupation of the defendant near the said river and stream respectively. The defendant claims not only the rights stated in those special pleas, but also a common law right to use the above-mentioned streams reasonably for irrigating land in his occupation near them respectively, and [594] for other purposes connected with the occupation of the said land. The defendant also relies upon the traverses as enabling him to contest the plaintiff's case. The defendant also relies upon the second plea, as enabling him to prove a license for all or some of the matters complained of. The plea of payment into court is intended to cover any use of the said river and stream not met by the other pleas."

The following are particulars of the grounds of defence as to the back-water cut mentioned in the particulars of claim :—

"The defendant claims a common law right to use this stream reasonably for irrigating land in his occupation near it. The defendant also relies upon the traverses herein as enabling him to contest the plaintiff's case. The defendant also relies upon the second plea as enabling him to prove a license for all or some of the matters complained of. The plea of payment into court is intended to cover any use of the said stream not met by the other pleas."

The cause came on for trial before Crompton, J., at the last Summer Assizes for Somersetshire, when a verdict was taken for the plaintiff, for the damages in the declaration, subject to a special case.

The last plea was struck out by consent, at the trial, with power to the court to restore it if desirable for the purposes of justice.

The court, it was agreed, was to be at liberty to draw any inferences of fact which a jury ought to draw: and if, in settling the case, it should be necessary, in the opinion of the judge, that any fact should be ascertained, he should have power to ascertain the same, and the court should have the same power.

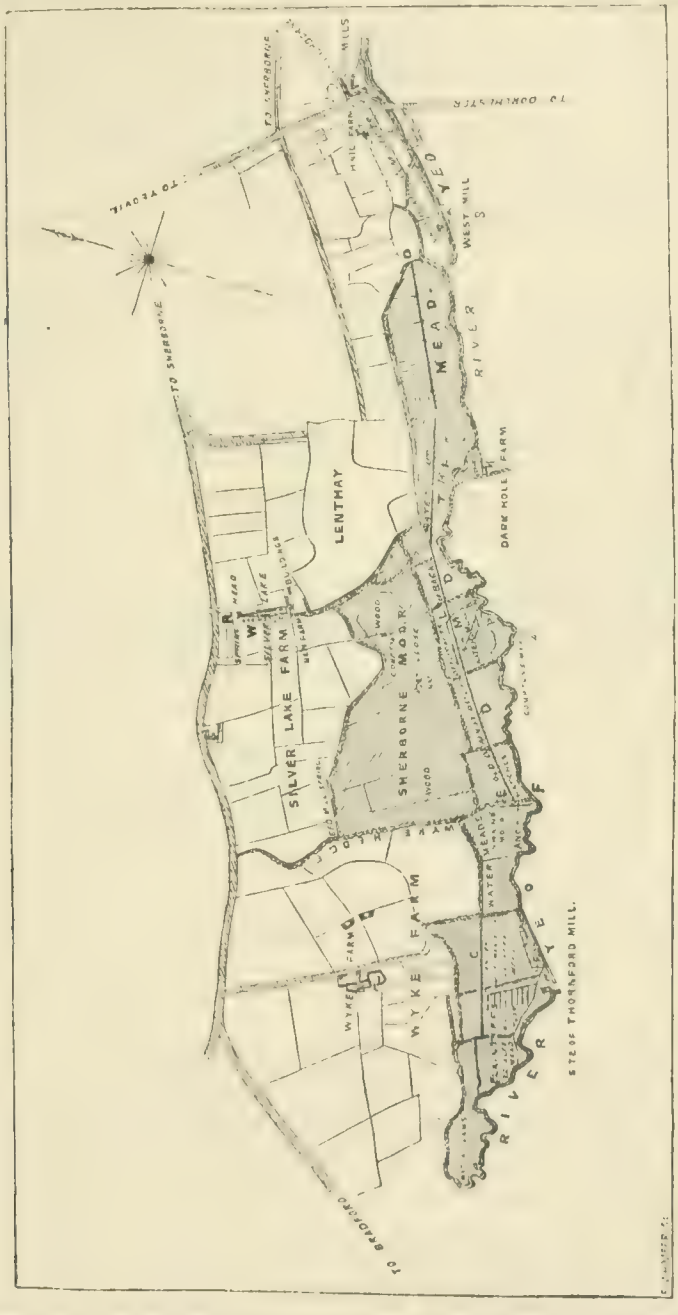
The premises were described in the annexed map or plan, which accompanied and was to be taken as a part of the case.

[595] The plaintiff's antient water-meads, called Dairyman's Mead (or Twenty Acre Mead), Mill Moor, Twelve Acre Mead, and Water Sams, containing together about forty-one acres (part of Wyke Farm), and marked C on the map, had without interruption been immemorially irrigated and watered, up to the commencement of this action, from the water in the adjoining river called "The Yeo" (and which river is shewn on the said map, and runs from and above a mill called West Mill, situate in Sherborne, marked on the map with the letter B, to and beyond Wyke Farm), by means of channels cut adjoining such river, with hatches, near the site of an antient mill situate in Thornford, and the old Mill Pond, which are marked on the map with the letter A: but the plaintiff's water-mead called Swain's Moor, which was merely a catch-meadow, was watered at times of flood (by means of the hatches marked on the map with the letter E) from the old drain or ditch or back-water cut marked on the map with the letter D, which ran through a large common called Sherborne Moor, situate on the Eastern side of and adjoining Wyke Farm, and partly from other sources.

Since the irrigation by the defendant hereinafter mentioned, the water from the

river Yeo used by him for such purpose could never be made available for the watering of Swain's Moor.

The defendant, before and at the time of the acts complained of, was the occupier of a farm called Silver Lake Farm, under Earl Digby, of which said farm a certain



meadow hereinafter mentioned adjoined the river Yeo higher up the stream than the said meadows of the plaintiff.

In 1832, the old drain or ditch or back-water cut was widened and deepened for the more quickly taking off the surface water on Sherborne Moor, and carrying it [596] into the river: but no artificial means were employed for irrigating any portion thereof, until the making of the defendant's water mead hereinafter referred to.

In 1845, under the authority of an act of parliament for that purpose, Sherborne Moor was inclosed and allotted to Earl Digby; and a portion thereof was added to a farm called Silver Lake Farm, then and still occupied by the defendant as yearly tenant to Earl Digby, which adjoins the Wyke Farm, on the eastern side thereof.

This portion,—the meadow hereinbefore referred to,—being liable to be periodically flooded from the said river, and the flood-water remaining a long time on the land, in 1848 the defendant made a channel or cut to take the water from the river to the old drain or ditch or back-water cut, as shewn on the map, from K to L, which was 4 feet 4 inches wide, and 3 feet 10 inches deep, and 104 yards long; and, in 1849, the defendant drained with tiles that part of the defendant's water-mead shewn on the said map, and containing about 7 acres, which is situate on the north side of the old drain or ditch or back-water cut.

The said chattel or trench was then carried over the cut so as to convey the river water across it when required for irrigation; and since then it has been regularly irrigated.

In 1850 and 1851, the defendant also drained with tiles the south side of the water-mead, containing 13 acres; and, in the Summer of 1854, the defendant built a weir across the old drain or ditch, at a point marked with the letter M on the map, and put a hatch into such weir; and, in the Autumn of 1854, by means of such hatch, watered the north side of the defendant's new water-mead; and, by means of three channels cut adjoining and nearly as deep as the river at points marked **[597]** with the letters N, O, and P, on the map, also watered the south side of the defendant's new water-mead.

After passing over the defendant's meadow, the water was not detained in the trenches or upon the land; but it was kept flowing over and from the land, without any penning back whatever.

The bed of the said river was nine inches below the bottom of the said hatches. The water of the said river is penned every night at West Mill, which is higher up the stream than the said meadow of the defendant, and was generally let down between 5 and 6 o'clock in the morning. The river was more or less always flowing. The said morning supply did not reach the plaintiff's meadows at any fixed time, but varied. In the Winter months, when it is most employed for irrigation, the supply of water is always the greatest: but, in consequence of the unusually tortuous character of the river's course, the water, by being carried over the defendant's meadow directly into the said old drain or ditch or backwater cut, flows again into the said river higher up the stream than the plaintiff's meadows, at a point marked F on the map. All the water passing the defendant's hatches, except so much as is necessarily absorbed in the course of irrigation, thus gets again into the river before the river reaches the plaintiff's meadows.

The water of the river Yeo has been materially improved for irrigation, in consequence of a board of health having been established at Sherborne about the year 1851; and the sewage of that town ran into the river near West Mill, at a point higher up the river than the defendant's new water mead: and the defendant's new water-mead was benefited by the water of such river first flowing over and depositing upon the defendant's new water mead the fertilising properties of such water; and the plaintiff's antient water-meads were injured by being deprived thereof.

[598] There is a spring of water which rises on the defendant's farm, called Silver Lake Farm, marked on the map with the letter R, which formerly used to run into the river. This spring rises in a willow-bed on the defendant's farm, marked W on the map. Prior to the year 1831, the water from this spring, not absorbed in its passage, found its way through several muddy ditches to the Sherborne Moor; but, in that year, the course was changed, and the water was used by the defendant for the irrigation of two of his fields, called respectively Compton's Close and Honey Naps.

This state of things continued till 1842, when the defendant erected a water-wheel and a threshing mill, intended and used for agricultural purposes, for threshing, and for grinding barley for the purpose of his farm only. At this time also, a great part of the willow-bed in which the spring rose, which adjoins the said erections, and which was extremely swampy, was dug out by the defendant, and made into a pond, the bottom and sides of which were puddled with clay. The ditch into which the said spring water used to percolate from the said willow bed, was then also cleansed out, and a thoroughly good channel for the water made for some distance by a culvert,

and thence conducted as formerly, but in an improved channel, to the said moor. In making the culvert in 1842, the defendant struck upon some new springs, which afterwards flowed into the said moor by the same course as the said old spring. The defendant also about the same time drained some fields into the said road; and from that source and the new springs together there was an additional supply of water equal in amount to the old one.

In 1842, the defendant ceased to irrigate Compton's Close and Honey Naps; and since then all the water from all the said sources went to the said moor, and subsequently into the said river.

[599] When the water-wheel is not in use, the water from the pond is carried off by a mask-hatch into the said culvert.

In 1846, a new barn and other farm buildings were erected by Earl Digby near Silver Lake Spring; and the defendant built a dam or pond-head across the line of Silver Lake Spring, to pen back the water, and dug a pond which from time to time has been increased to upwards of three quarters of an acre in extent; and the water from this pond is used by the defendant for driving a water-wheel attached to a threshing-machine and a mill for grinding corn, and other farm purposes; and, when the defendant intends to use his water wheel, he pens back the water until the pond is full, and then lets it off, either in large or small quantities, at his own pleasure, for driving the water-wheel; the water (as well when the water-wheel is at work, as when the pond is full) running off to the river.

The water from the river Yeo and Silver Lake Spring together, was never, except in case of a flood, sufficient for watering the plaintiff's antient water-meadows and the defendant's new water-mead at the same time.

The water is penned every night at West Mill; and, when the defendant was not watering his new water-mead, the water generally came down to the plaintiff's (Wyke) farm about 12 at noon, and six or seven acres of the plaintiff's water-meads could be watered at a time: but, when the defendant was watering his new water-mead, the water did not come to the plaintiff's farm until about 3 o'clock in the afternoon; and then only three or four acres of the plaintiff's water-meads could be watered at a time: and, in Winter time, it was after dark, and therefore too late to put the water over the plaintiff's meads at all.

There was evidence, that, in consequence of the defendant's watering his new water-mead in the Autumn [600] and Winter of 1854, the plaintiff's tenants could only water some of their meads, and lost some Spring feed of the meads.

There was evidence on the part of the defendant, that the hay crop in the Dairyman's Mead was as good as ever.

It was an admitted and agreed fact in the case, that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste; and that the wheel and mill were used for agricultural purposes, for threshing and grinding barley for the purposes of the defendant's farm only, and, if right existed, there was no abuse or excess.

The plaintiff contends that he is entitled to a verdict on each of his three claims mentioned in his particulars,—

On the first, because the defendant not only diverts the water from the river for watering his water-mead adjacent to the river, by three channels marked with the letters N, O, and P on the map or plan, but, by means of the channel marked K on the said map or plan, gives another direction to the water so diverted from the river across his new water-mead into the old drain or ditch at L, a distance of 104 yards, not for the purpose of watering his new water-mead adjacent to the river, but his new water-mead on the opposite side of the old drain or ditch, and therefore unreasonably detains the water.

On the second, because the defendant has obstructed and diverted the water of the old drain or ditch, by placing a hatch therein so late as the summer of 1854, for watering his new water-mead on the northern side thereof, and thereby preventing the water from flowing down the old drain or ditch and watering the plaintiff's mead called Swain's Moor, or running into the river as theretofore.

On the third, because the defendant pens back the [601] water of Silver Lake Spring in his pond, until at his own pleasure he allows it to run, either in large or small quantities, when he is using his water-wheel, or the pond is running over, in its natural course into the river, which natural course would at all times have increased

the water flowing through the same to the plaintiff's antient water-meads, as the water from Silver Lake Spring could not, like the river above, be legally penned or interfered with, by West Mill or otherwise.

And the plaintiff contends that his reversionary interest in his antient water-meadows, is injured,—

First, by his antient water-meadows being deprived of the first catch or use of the water, the fertilising sediments or properties of which are deposited on the defendant's new water-mead, instead of the plaintiff's antient water-meadows:

Secondly, by the plaintiff's antient water-meadows being deprived of those parts of the water which are lost by absorption and evaporation in the defendant's new water-mead, which is very porous (the upper soil thereof being peaty, with a layer of gravel, and a subsoil of clay), the whole of the water in the river being insufficient (except during floods) to water even the plaintiff's antient water-meadows:

Thirdly, by the water which flows over the defendant's new water-mead being detained there until it is too late for the plaintiff's tenants to watch and attend to the watering of the plaintiff's antient water-meadows; they being prevented using the water at night, by its being penned first at the Silk Mills, and secondly at West Mill, as soon as the workmen leave off work.

The defendant asserts,—First, that he had a right to the reasonable use of the water of the river for the irrigation of his land higher up than the lands of the plaintiff; that the use so made was reasonable; and that he returned the water so taken for irrigation into the river [602] again at the point above the plaintiff's land, with no other diminution than that caused by the absorption and evaporation occasioned by such irrigation:

Secondly, that, having the right to such reasonable use of the water, it is an admitted fact that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste:

Thirdly, that, with respect to the Silver Lake Spring, such spring rises out of the land of the defendant; that he and the previous occupiers of his farm have used the water from time to time in different ways for the purposes of the farm; that the defendant had the right to do the acts complained of on his own land; and that his so doing was not injurious to or an infringement of any right of the plaintiff:

Fourthly, that, the defendant having such right, it is an admitted fact that the said mill and wheel was used for agricultural purposes, for threshing and grinding barley for the purposes of the defendant's farm only, and that there was no abuse or excess in the use so made thereof:

Fifthly, that there was no damage or injury to the plaintiff's reversionary interest in his lands:

Sixthly, that the plaintiff was not entitled to the absolute and exclusive right to the flow of all the water of the river to his land below that of the defendant; but only a right to irrigate, subject to the right of riparian proprietors above to a similar enjoyment of the stream.

The question for the opinion of the court was, whether the plaintiff was entitled to recover.

If the court were of opinion in the affirmative, the verdict was to stand for 40s.,—with a certificate that the cause was fit to be tried in this court, and was brought to try a right.

M. Smith, Q. C. (with whom were Kinglake, Serjt. [603] and Barstow), for the plaintiff. It appears from the case that the plaintiff's meadows are ancient water-meadows. [Cresswell, J. You cannot found any claim upon that. Irrigation is a riparian right, to be exercised subject to the rights of other riparian proprietors.] No doubt: but, even in the American law (which is most liberal on the subject of water privileges) it has never been supposed that there could be a right in a proprietor higher up the stream so to use the water as to deprive the one below him of all enjoyment of it. [Cresswell, J. The complaint here is, rather of the inconvenient times of the water coming down to the plaintiff's meadows than of the insufficient quantity.] The case of *Embrey* v. *Owen*, 6 Exch. 353, when closely looked at, will be found to be an authority in the plaintiff's favour. It was an action by the occupiers of a water grist-mill, against a riparian proprietor, for diverting the stream. The defendant pleaded,—first, not guilty, fourthly, that, at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small

and reasonable quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; and that the diversion caused no damage to the plaintiff's mill. To this the plaintiff replied de injuriâ, whereupon issue was joined. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognisable by the senses. In directing the jury, the judge left it to them, with respect to the issue on not guilty, to say whether there was any sensible diminution of the water by reason of the diversion; and, with respect to the other issue, he told them that he had a difficulty in affixing a legal meaning to the term "in-**[604]**-appreciable," but suggested that it might mean a quantity so inconsiderable as to be incapable of value or price. The jury found in favour of the defendant upon both issues; and, upon a motion to enter a verdict for the plaintiff on the first issue, and to enter judgment non obstante veredicto on the fourth, it was held that there had not been such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was properly found for the defendant; and the court inclined to think that the word "inappreciable" meant "incapable of being estimated or valued," and that in that sense the fourth plea was not proved. An American case,—*Blanchard* v. *Baker*, 8 Greenl. Rep. 253,—was cited on the argument, wherein the law is thus stated: "The proprietor of a watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes. And he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished." In delivering judgment in *Embrey* v. *Owen*, Parke, B., says: "The law as to flowing water is now put on its right footing by a series of cases beginning with that of *Wright* v. *Howard*, 1 Sim. & S. 190, followed by *Mason* v. *Hill*, 2 B. & Ad. 304, 5 B. & Ad. 1, and ending with that of *Wood* v. *Waud*, 3 Exch. 748, and is fully settled in the American courts: see 3 Kent's Comm. Lect. 52, pp. 439-445. The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right in each proprietor of the adjacent land to the flow of all the water in its natural state: but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorised use of this common **[605]** benefit that an action will lie." And his lordship cites a passage from Kent's Commentaries, where it is said: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct as it passes along. 'Aqua curit et debet currere,' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application of it. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him." Each case must depend upon its own circumstances, the capacity of the stream, and the extent of the user. [Cresswell, J. I do not find that the case states the size of the river Yeo.] It does not in terms; but it states that "the water from the river Yeo and Silver Lake Spring together was never, except in case of a flood, sufficient for watering the plaintiff's antient water meadows and the defendant's new water-mead at the **[606]** same time." The facts clearly shew that the defendant cannot be entitled to make this large diversion of the water. [Cresswell, J. I infer from the statements in the case that the diminished quantity arises

merely from the lateness of its arrival on the plaintiff's land. The case does not find, that, if the water came down earlier, the plaintiff could not irrigate as large a number of acres as he did before.] It does shew that the quantity is diminished for the purpose of the plaintiff's irrigation. [Cresswell, J. It is not stated that the plaintiff is entitled to have the water sent down by the miller at any particular time. It seems to be left entirely to his discretion.] It is manifest, that, but for the diversion and obstruction of the defendant, the plaintiff would have had a much larger benefit from the water than he has; and *Mason* v. *Hill*, 3 B. & Ad. 304, shews that the diversion gives the plaintiff a right of action. And in *Dickinson* v. *The Grand Junction Canal Company*, 7 Exch. 299, Pollock, B., says: "We consider it as settled law, that the right to have a stream running in its natural course is, not by a presumed grant from long acquiescence on the part of the riparian proprietors above or below it, but is ex jure naturæ,"—citing *Shury* v. *Piggot*, 3 Bulstr. 339, *Tyler* v. *Wilkinson*, 4 Mason's (American) Rep 397. With regard to the back-water cut, its origin does not appear. [Cresswell, J. It would seem to have been for the purpose of drainage.] Is there any difference in point of law between a drain and any other water-course? [Cresswell, J. All the authorities, from the Digest downwards, shew that there is.] *Mayor* v. *Chadwick*, 11 Ad. & E. 571, 3 P. & D. 367, shews that the law of easements in respect of water-courses is generally the same, whether they are natural or artificial. [Crowder, J. That case has been considered not altogether satisfactory; and it is inconsistent with *Arkwright* v. *Gell*, 5 M. & W. 203.] That is explained by the ob-[607]-servation of Erle, J., and the judgment of Lord Campbell, in *Beeston* v. *Weate*, 5 Ellis & B. 986. As to the Silver Lake Spring, the question is whether the erection of the dam by the defendant was not an obstruction of the plaintiff's rights,—*Broadbent* v. *Ramsbotham*, 11 Exch. 602. [Cresswell, J. An obstruction of what right? Does the plaintiff claim it because the water is his before it becomes part of the flowing stream? or does he claim it as coming from a servient tenement?] His claim is, that this is water which of right ought to run into the river. [Cresswell, J. Not a drop of it.] The real question arises on the river Yeo. Then, as to damages,—it will be said that no damage to the reversionary interest is shewn. It is enough, however, to shew an obstruction of a right: the law will infer damage: *Kidgill* v. *Moor*, 9 C. B. 364; *Embrey* v. *Owen*, 6 Exch. 353. [Cresswell, J. You need not trouble yourself on that point.]

Butt, Q. C. (with whom were Slade, Q. C., and Ffooks), contrà. This being the case of one riparian proprietor against another, the exercise of the right for any length of time makes no difference: per Pollock, C. B., in *Dickenson* v. *The Grand Junction Canal Company*, 7 Exch. 282, 291. Each has the common right to the reasonable use of the water of a flowing stream, for the purpose of irrigating his own land. If, in the exercise of that right, the riparian proprietor above uses an undue quantity of the water, or detains it an unreasonable time, then, as is put in *Embrey* v. *Owen* and *Blanchard* v. *Baker*, in respect of that excess the riparian proprietor below him might have a right of action. If the plaintiff has by user acquired any right beyond that of a riparian proprietor, the defendant might be liable if it could be shewn that the use he made of the water was not referable to his riparian right. The only question, therefore, upon the first point is, whether [608] the facts stated in the special case are such as to shew that the defendant has exercised his natural right of irrigation in an unreasonable manner. [Crowder, J. Suppose the plaintiff had exercised rights beyond what was reasonable, and so had acquired a new right as against riparian proprietors below him on the stream, would that affect the defendant's right?] Clearly not. Whatever use the proprietor below may make of the water, the proprietor above still retains his natural rights. [Williams, J. The riparian proprietor above might, no doubt, by grant, divest himself of his right to use the stream for the purpose of irrigation: but the mere non-user of the right would not raise a presumption of a grant.] In *Northam* v. *Hurley*, 1 Ellis & B. 665, where A., being owner of land through which a stream ran down to the land of B., granted by deed to B that the stream should be in the control of B. and his assigns, and should flow in a free and uninterrupted course through a channel described in the deed, and afterwards A. and B. respectively assigned their lands to Y. & Z.,—it was held, that Y. was liable to an action at the suit of Z. for diverting the water from such channel, though he did not thereby deprive Z. of the use of any water. But, in giving judgment, Coleridge, J., says: "Our judgment is founded on the effect of the deed which

governs the rights of the present parties; and, in so deciding, we do not intend at all to limit the salutary principle laid down in *Embrey* v. *Owen*, to the effect that the superior riparian proprietors may use the stream for all reasonable purposes while in their land, provided they send it on without material diminution to inferior proprietors." The facts stated in this special case shew that what was done by the defendant here was done in the proper course of irrigation, and that the water, after its user by the defendant, got back again into the stream without undue waste before it reached [609] the plaintiff's meadows. Nor is it found by the case that an unreasonable quantity of the defendant's land was irrigated. On the contrary, there is an express admission "that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste." [Cresswell, J. We are all agreed that you need not trouble yourself as to the back-water cut, and the Silver Lake Spring.]

Smith, in reply. The true principle is that which is laid down in *Mason* v. *Hill*, 3 B. & Ad. 304. Every riparian proprietor has a right to the natural use of flowing water, subject to its reasonable use by the riparian proprietors above him, but not subject to a right to divert the water by means of cuts or channels for the purpose of irrigation. It is found that the plaintiff's meadows have been immemorially irrigated: he has, therefore, gained a title to the uninterrupted flow of the water for that purpose. The case shews an absence of that limit to the defendant's exercise of his right which alone could make it lawful. There has been a sensible diminution and detention of the water, and a consequent damage to the plaintiff. The facts clearly do not bring the case within the principle of *Embrey* v. *Owen*.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

In this case, several causes of complaint were brought forward on behalf of the plaintiff,—first, in respect of the diversion of the river Yeo,—secondly, in respect of the diversion of a stream called the Back Water,—thirdly, in respect of the obstruction and diversion of a stream called the Silver Lake Spring.

In the course of the argument, the court decided all the points that were raised in respect of the two latter [610] causes of complaint, in favour of the defendant; but they took time to consider the question arising on the first.

The result of the facts as to this part of the case appears to us to be as follows, viz. that the plaintiff had immemorially enjoyed the benefit of irrigating certain of his meadows with the water of the river Yeo, subject, however, to the right of the miller at West Mill to detain the water for the use of his mill. Although the natural flow of the river was prevented by the exercise of this right, yet the water was allowed to come down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant, for the purpose of irrigating his own adjacent land, had from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows: and, although the facts stated in the special case do not, in our opinion, lead to any certain conclusion, that, by the mere irrigation on the part of the defendant, the quantity of water which ultimately reached the plaintiff's meadows was sensibly diminished, yet the effect was, that the water was detained, by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully.

The question is, whether such a diversion and detaining of the water by the defendant is actionable.

It was contended, on his part, that it was not, because he had a right by law, as a riparian proprietor, to apply the water of the stream to irrigate his adjacent land, provided he did so (as it was admitted he did) in a careful and proper manner.

On the part of the plaintiff, it was denied, generally, that a riparian proprietor has any such right: and it was also contended, that, at all events, in this case the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment.

[611] As to the latter proposition, it appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights: but such acquired right has no operation against the natural rights of a land-owner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render

the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement.

But, if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case, his right has been equally invaded, and the action is maintainable.

The question between the parties is thus reduced to this single point,—has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that?

The general principle of law which, in our opinion, may be deduced from the decision of *Embrey* v. *Owen*, 6 Exch. 353, and the authorities cited by Parke, B., in delivering judgment in that case, is, that every pro-[612]-prietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream.

In the present case, it appears to us, on the evidence, that the detention, by the defendant, under the circumstances, of the water of the river Yeo for the purposes of irrigation, was a use of it which, in its character, was necessarily injurious to the natural rights of the plaintiff as the proprietor of land lower down the stream. The effect was obviously the same as if the defendant had placed a bar or weir across the river, and by that means had wholly prevented its natural course for a certain number of hours. And it appears to us that there is neither authority nor principle for contending that such an act can be justified on the ground that it was done for the purpose of improving the adjacent land of the defendant, whether by irrigation or otherwise.

For these reasons, we are of opinion that our judgment must be for the plaintiff as to such part of his complaint as relates to the river Yeo, and, as to the rest of the alleged causes of action, for the defendant.

Judgment accordingly.

[613] PRIDEAUX *v.* BUNNETT. Jan. 14, 1857.

The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order,—"Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff,—to the effect that the patent article would consume smoke and effect a considerable saving in fuel,—as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—Held, that no such warranty could be implied; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price.

This was an action to recover the price of an article called "Prideaux's patent self-closing (or smoke consuming) valve," for which the plaintiff had obtained a patent in the year 1854.

At the trial, before Cockburn, C. J., at the sittings at Guildhall after the last term, it appeared that the plaintiff, who carried on business under the name of the "Smoke Prevention Company," issued cards which contained on the one side a statement of the price of the article and the royalties demanded for its use, and on the other the following representation or address:—

"The Smoke Prevention Company are happy to have it in their power to state, that, in all cases where they have been able to procure an accurate return of the

consumption of fuel, a decided saving has been admitted to result from the application of the valve, so much so that its cost becomes a profitable investment, rather than an outlay.

"In some instances, they have been much gratified at being told by those who have adopted it, that they should save the cost of the valve, together with the royalty (for the whole term of the patent), in six months, and become large annual gainers by its use for the rest of the term; and not a few have congratulated themselves at finding that the effect of the compulsory enactment against smoke, in their individual cases, would be (much against **[614]** their anticipations) to confer a far from insignificant pecuniary benefit, which they would not otherwise have obtained.

"As far as the evidence they have been able to collect enables them to judge, the saving by the use of the valve ranges from 10 to 15 per cent. Taking the lower figure (viz. 10 per cent.) as a safe basis for a calculation,—then, estimating the consumption per horse-power to be 25 tons per year, worth at 1l. per ton 25l.; the saving to a manufacturer having five boilers of 20 horse-power each, would be 250l. per annum; whilst the total cost of the apparatus for five boilers, including royalty for the whole term of the patent, would only amount to 107l. 15s., being, as before stated, less than half a year's saving from the use of the invention.

"When, however, it is imperative to consume smoke, the value of this apparatus becomes still more striking, by contrasting its saving with the loss attendant upon other plans for effecting the same object; when a difference of 30 per cent. will be found in its favour. Leaving out of view the 'feeling by machinery plans' (which have their own peculiar disadvantages), it may safely be asserted that none of the many plans,—various in name, but identical in principle,—for preventing smoke by admitting a continuous supply of air at the bridge, effect this object at a less cost of fuel than 20 per cent.,—an estimate the moderation of which will be confirmed by every one who has had any practical acquaintance with their action; the usual result being much worse, as many have found to their cost.

"The yield of steam from a boiler is unquestionably increased by the valve."

Circulars were also sent out, with blanks to be filled by intended purchasers of the patent article, headed "Particulars required for the application of Prideaux's Patent Valve for the Prevention of Smoke."

[615] The defendant, who, it appeared, had never seen the article, filled up one of the circulars, and inclosed it to the plaintiff in a note as follows:—

"Deptford, Sept. 3rd, 1855.

"Gentlemen,—Please prepare us a smoke-preventing valve, [giving a drawing shewing the dimensions of the furnace door to which it was to be applied]. These are to your own figures; and we shall make the necessary allowances, as you state, to admit of the valve going into our frame easily. "BUNNETT & Co.

"The Smoke Prevention Company."

The apparatus was fitted to the defendant's furnace; but, from some circumstances which did not appear, it turned out a complete failure. No fraud was imputed to the plaintiff: but it was insisted on the part of the defendant that the representations contained on the card, and in the circulars and invoice, amounted to a warranty that the patent article would consume smoke, and therefore it was contended that the case differed from *Chanter* v. *Hopkins* (*a*), 4 M. & W. 399 (which had been re **[616]** lied on

(*a*) In that case, the defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order, "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right, 15l. 15s.: ironwork not to exceed 5l. 5s.: engineer's time fixing, 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, and was returned to the plaintiff. It was held (no fraud being imputed to the plaintiff) that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole 15l. 15s., the price of the patent right.

for the plaintiff), inasmuch as the article sold there was a thing much in use and well known in the market.

The Lord Chief Justice ruled, that the representations relied on did not amount to a warranty, and that, this being the sale of a specific chattel, and no fraud being imputed to the seller, the plaintiff was entitled to recover.

A verdict having accordingly been found for the plaintiff, with leave to the defendant to move,

Edwin James, Q. C., now moved accordingly. The question is whether the representations made by the plaintiff at the time of the sale, did not amount to a warranty that the article he sold as a "smoke preventing valve" was that for which it purported to be sold. *Chanter* v. *Hopkins* was a totally different case: there, there was evidence that the patent article which was specifically ordered by the plaintiff, was in common use and was well known in the market by that description; whereas, here there was no evidence of the sort, or that the defendant had ever seen it, or knew anything of it but from the representations made by the plaintiff. [Cockburn, C. J. The card refers to a patent article; and the defendant intended to purchase the very thing.] There were no representations of any kind in the case of *Chanter* v. *Hopkins;* but the defendant sent the plaintiff a specific order,—"Send me your patent hopper and apparatus, to fit up my brewing-copper with your smoke-consuming furnace." [Cresswell, J. Your argument would tend to fix every patentee with a warranty. Cockburn, C. J. In the case of a patent medicine which is advertised as a specific for a variety of ailments,—could you resist payment because you were not cured by it of one of the diseases mentioned in the advertisement?] That is a totally different case. [Cresswell, J. Taking all the evidence together, is it not clear that the order **[617]** was given for the patented, the ascertained article?] The question is, whether the contemporaneous representations ought not to have been submitted to the jury as evidence of a warranty that the article was what it professed to be.

Cresswell, J. I am of opinion that this case is governed by *Chanter* v. *Hopkins*. I am utterly unable to discover a literal, much less a substantial distinction between the two cases.

The rest of the court concurring,

Rule refused.

Cox *v.* Leech. Jan. 14, 1857.

[S. C. 26 L. J. C. P. 125; 3 Jur. N. S. 442; 5 W. R. 199.]

An attorney received instructions to sue forty-five underwriters for particular average loss on certain policies on goods which had been shipped to Calcutta, and there sold. Having written ineffectually to each of them, demanding payment, he (under an impression that the only defence to be set up was a supposed set-off against the broker in whose name the policies were effected) sued out writs in the Lord Mayor's court, though he knew that that court had no power to issue a commission for the examination of witnesses abroad. The actions (after consolidation) being defended, and a commission to examine witnesses at Calcutta being found necessary, the proceedings in the Lord Mayor's court were necessarily abandoned:—Held, that the attorney was guilty of crassa negligentia, and disentitled to sue his client for the costs of such abortive proceedings; and that it was no answer for him to say (upon the argument of a rule to set aside a verdict which had been found against him,) that the difficulty might have been got over by the removal of the causes by certiorari to one of the superior courts.—But, held, that he was entitled to recover in respect of the letters before action.—Quære, whether the 117th rule of H. 1853, which provides that, "if a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause," applies where the certiorari is obtained by the plaintiff?

This was an action brought by the plaintiff, an attorney, to recover from the defendant 66l. 9s. 8d., the amount of a bill of costs incurred in certain proceedings in the Lord Mayor's court, London, under the following circumstances:—

In the early part of the year 1853, the defendant, who is a manufacturer at Stalybridge, in Lancashire, shipped **[618]** certain goods to Calcutta on board a vessel

called the "Lismoyne," upon which he caused three policies of insurance to be effected to the amount of 5980l. These policies were effected in the name of a broker,—one Gibson. Upon the arrival of the "Lismoyne" at Calcutta, it was found that the goods had sustained sea-damage to the extent of 923l. 16s. Accordingly, the defendant, through his agent Mr. Murray, made claims upon the underwriters (forty-five in number) for their respective proportions of the loss. After several ineffectual attempts to obtain a settlement of these claims, Mr. Murray, on the 28th of November, 1855, wrote to the defendant, as follows:—

"5 Austin Friars, 28th Nov. 1855.

"Dear Sir,—On referring to our letter of yesterday, we find, on speaking of the claims per 'James Booth,' 'Lismoyne,' and 'Esther,' we say the first two are partially settled with the underwriters. It should have been the first and last: the claim per 'Lismoyne' is untouched, owing to there being no Lloyd's agent's certificate of damage accompanying the documents, and no protest. Still, it is quite clear you have some claim against the underwriters; and we shall be glad if you will advise us what is to be done under the circumstances. We shall be glad to offer our suggestion as to the course we should pursue to bring the matter to a close, if you think fit to avail yourself thereof. "G. MURRAY & Co."

The defendant afterwards wrote to Mr. Murray intimating his readiness to receive any suggestion he had to make relative to the matter; and accordingly that gentleman on the 6th of December, wrote as follows:—

"5 Austin Friars, 6th Dec. 1855.

"Dear Sir,—Since we addressed you last, we applied to and received from Mr. Gibson the stamped policies [619] per 'Lismoyne,' 'James Booth,' and 'Esther,' and have again laid them before the underwriters. On one of the policies per 'Lismoyne' the underwriters refuse to make a settlement: on the other, they still have the matter under deliberation, but we quite expect also that they will decline. With the claims per 'James Booth' and 'Esther' we are making progress, and hope to get them all arranged without much difficulty.

"As regards the 'Lismoyne,' we would suggest and advise that you instruct us to place the matter in a solicitor's hands; for, we quite believe it will be fruitless to make another attempt to induce the underwriters to settle: they do not even make any proposition to compromise the claims, which, at all events, we think they might have done. They have suffered a loss by Mr. Gibson's failing, and are annoyed at the heavy claims brought before them on these policies. By adopting the plan we recommend, we think you will bring the matter to a speedy and satisfactory close. Our solicitor is Mr. W. Cox, who is practically acquainted with insurance cases, and who has just successfully obtained full settlement of a similar claim from the underwriters, and to whom you cannot do better than authorise us to apply.

"G. MURRAY & Co."

Again on the 8th of December, Mr. Murray wrote to the defendant, as follows:—

"5 Austin Friars, 8th Dec. 1855.

"Dear Sir,—The papers per 'Lismoyne' are still before the underwriters: and we are still of opinion that a little shew of decision will bring about some settlement satisfactory to you. "G. MURRAY & Co."

On the 11th the defendant, in reply, addressed Mr. Murray as follows:—

[620] "Stalybridge, 11th Dec. 1855.

"Gentlemen,—If the underwriters still refuse to settle my claims per 'Lismoyne,' please to place the matter at once in the hands of your solicitor Mr. W. Cox, instructing him to take such steps as may be needful to obtain a settlement: but, before going to any serious expense, you will be good enough to communicate further with me. When Mr. Cox has considered the matter, I shall be glad to learn his opinion upon it.

"JOHN LEECH."

On the 13th of December, Mr. Murray accordingly consulted the plaintiff on the subject of the defendant's claims against the underwriters, and instructed him to take

the necessary steps to enforce payment thereof,—at the same time telling him he believed the claims were similar to Chadwick's, referred to in the letter of the 6th of December. The plaintiff thereupon wrote to four of the underwriters, demanding payment of their respective proportions, and on the 17th of December commenced proceedings against them in the Lord Mayor's court; and subsequently he commenced actions in the same court against the other forty-one. The actions were at the instance of the underwriters consolidated into four. On the 29th of December, Mr. Murray wrote to the defendant, as follows:—

"5 Austin Friars, 29th Dec. 1855.

"Dear Sir,—Since we last wrote you, we have had several interviews with Mr. Cox. The proceedings adopted up to the present time have been as follows:—1st. A written application for payment, addressed to four of the underwriters. The result of this was, a reference to their solicitor, who asked for time to look into the matter; and, on the expiration of the period, as no satisfaction was afforded, the four underwriters were served with writs. 2nd. Applications similar to above were [621] made to all the underwriters, and with the like results, as we are told the whole of them were yesterday served with writs. This must bring the matter to a speedy issue.

"G. MURRAY & Co."

The receipt of this letter was acknowledged by the defendant on the 23rd of January, 1856; and on the 25th Mr. Murray addressed the defendant as follows: –

"5 Austin Friars, 25th January, 1856.

"Dear Sir,—Mr. Cox informs us that the underwriters have consolidated the claims that have been made on them, i.e. that, if the matter goes on, the action will be against one of them, the rest abiding thereby. Mr. Cox cannot yet say that it is the positive intention of the underwriters to resist the claim. If they do, a commission will have to be appointed to inquire into the case in Calcutta. We suppose, should such be the course adopted, you can have no fear as to the result.

"G. MURRAY & Co."

On the 28th of January, Mr. Murray received the following letter, in reply:—

"Stalybridge, 28th Jan. 1856.

"Gentlemen,—Your favour of the 25th instant is duly to hand; and I note that you are sanguine as to the result of the action contemplated against the underwriters per 'Lismoyne.' When Mr. Cox knows that it is the positive intention of the underwriters to resist the claim, you will please let me hear from you before he proceeds further in the matter. If I decide to go on, and a commission has to be appointed to inquire into it at Calcutta, perhaps Mr. Cox can give me an idea as to the probable cost. I am not inclined to let the matter remain as it is; particularly as you think it so clear in my favour.

"JOHN LEECH."

[622] The plaintiff having on the 29th of January informed Mr. Murray that the underwriters had pleaded "never indebted," and that it would be necessary to take another step, that gentleman on the 5th of February wrote to the defendant, as follows:

"5 Austin Friars, 5th Feb. 1856.

"Dear Sir, So far as Mr. Cox has yet gone on with the actions against the underwriters per 'Lismoyne,' there has been no disposition evinced on their part to meet you; and the only chance now is, that, when he proceeds to ask the court for a commission to establish the necessary evidence, they may then either settle or offer a compromise. Under these circumstances, therefore, it is necessary for you to determine the course you purpose to adopt, and, by a careful examination of all the facts, to see if your position is sound. Mr. Cox believes it will be needful to have the captain's evidence that the goods were damaged by sea-water. Will you, therefore, ask your Liverpool agent to inquire if he is in England; if not, when he is likely to be; and also ask them if they can obtain a loan of his protest for that voyage.

"G. MURRAY & Co."

Upon the receipt of this letter, the defendant wrote to Mr. Murray requesting him to forward to him all the documents connected with the claims, in order that he might go through them and make up his mind as to further proceedings. Having obtained them, the defendant placed them in the hands of his own solicitor, who afterwards settled the claims with the underwriters, paying their costs in the Lord Mayor's court.

On the 5th of February the plaintiff applied to the registrar of the Lord Mayor's court, and afterwards (on the 15th) to the recorder, for a commission (on the common-law side) to examine witnesses at Calcutta: but the application was refused.

[623] Finding that the defendant had taken the matter out of his hand, Mr. Cox sent in his bill, amounting to 66*l.* 9*s.* 8*d.*, and, after demanding payment, brought the present action; to which the defendant pleaded,—first, except as to 2*l.* 3*s.* 6*d.*, parcel of the money claimed, never indebted,—secondly, as to the 2*l.* 3*s.* 6*d.*, payment into court.

The sum paid into court was paid in respect of the following items in the bill:

	£	s.	d.
"1855. Dec. 13.—Attending Mr. Murray this day on his bringing the papers relating to your claim against many underwriters at Lloyd's on several policies of assurance of goods per 'Lismoyne,' and receiving instructions to take the necessary steps to enforce payment	0	6	8
Perusing and considering the papers and policies . .	0	13	4
1856. Feb.—Attending Mr. Murray on his calling with letter from you on this matter, and requesting to have the policies sent to you, and handing same to him . . .	0	3	4
18th.—Attending Mr. Murray on his calling, informing him of the present position of the action; also conferring on the letter received by him from you, requesting to be informed of my opinion with reference to your claims, and as to the same being affected by the fact that the policies were granted in the name of Alfred Gibson, and advising thereon . .	0	6	8
Writing you very fully thereon	0	3	6
March 1st. Attending Mr. Murray on his calling, when he informed me that he had heard from you on the subject; and taking instructions to stay the proceedings for the **[624]** present: also conferring as to the evidence of the captain, and advising that it would be necessary to obtain same . .	0	6	8
April 16th. Attending Mr. Murray on his calling, when he informed me that you had determined not to proceed with the actions, but requested to have the costs sent to you .	0	3	4
	£2	3	6"

The cause was tried before Erle, J., at the last Summer Assizes at Guildford.

The plaintiff, who was examined as a witness, stated, that, in pursuance of the instructions he received from Mr. Murray, the defendant's agent, he commenced the proceedings in the Lord Mayor's court, as he had done in the case alluded to in Murray's letter of the 6th of December; that, before he did so, he had ascertained, from inquiry of the registrar of that court and also of the recorder, that though the court had power to issue "letters inquisitorial" (in the nature of commissions) for the examination of witnesses beyond the jurisdiction, on the equity side of the court, they had no power, without consent, to issue a commission on the common-law side; but that, when he issued the summonses, he had no conception of any other defence than a set-off by the underwriters against Gibson, in whose name the policies were effected. And Mr. Brandon, the registrar, also stated, that, although commissions were sometimes issued on the common law side, it was always by consent.

On the part of the defendant, an attorney who had practised in the Lord Mayor's court for upwards of twenty six years, stated that he had never known a commission issued on either side of the court, except by consent; and that, if a bill were filed for discovery, the plaintiff must pay the costs. And the defendant's attorney **[625]**

stated, that the particular average on the policies in question (the amount being disputed by the underwriters) could only be settled by information from Calcutta as to the nature and extent of the damage the goods had sustained, the expenses of sale, &c.; that the only mode of doing that would be by a bill of discovery in the Lord Mayor's court, and the issuing of letters inquisitorial, the expense of which would be from 200*l.* to 300*l.*; and that, on settling with the underwriters in this case on behalf of Mr. Leech, he had been obliged to submit to a deduction of 102*l.* for their costs,—which he thought a judicious settlement.

On the part of the defendant, it was insisted that the suing in the Lord Mayor's court for the enforcement of a claim which could only be established by means of a proceeding which could not be taken in that court except at a ruinous expense to the plaintiff, was such a degree of negligence as to disentitle the plaintiff to recover any costs.

For the plaintiff, it was submitted, that he was justified by his instructions in bringing the actions in the Lord Mayor's court, and in assuming that the only objection on the part of the underwriters arose out of their claim of set-off against Gibson, as in *Chadwick's case*: and that, at all events, assuming that there was negligence, he was still entitled to recover in respect of the letters written to the several underwriters before action, the charge for which was 6*l.* 15*s.*

The learned judge was of opinion that there was evidence to shew that a commission to examine witnesses at Calcutta would be necessary, and that there was no sound reason for thinking that the Lord Mayor's court had power to issue such commission; that the instructions which the defendant received did not warrant his proceeding in the Lord Mayor's court, unless that court was legally suited to the claim; and that there was evidence [626] to warrant the jury in finding that the defendant had been guilty of such a degree of negligence as to disentitle him to recover: and he accordingly directed a verdict for the defendant, reserving to the plaintiff leave to move.

J. Brown, in Michaelmas Term last, in pursuance of the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff for 64*l.* 6*s.* 2*d.*, or for a new trial on the grounds,—first, that there was no such negligence or want of skill on the part of the plaintiff as to disentitle him to recover,—secondly, that he was at all events entitled to recover for the letters written before action brought,—thirdly, that the work was not wholly useless to the defendant,—fourthly, that the judge misdirected the jury to the contrary of the above points,—fifthly, that the verdict was against the evidence. He submitted, that, the Lord Mayor's court having so recently been thrown open to general practitioners, and its course of proceeding not so well defined as that of the other courts, the plaintiff could hardly be held guilty of gross negligence or gross ignorance for being unacquainted with the fact that commissions for the examination of witnesses were not as of right granted on the common-law side. [Cresswell, J. A gentleman who assumes to practise in a particular court warrants that he is reasonably conversant with its modes of procedure.] No doubt. But the question is, whether the evidence shewed a case of gross negligence. It was competent to the plaintiff to have removed the causes into a superior court; and then, according to the 117th rule of Hilary Term, 1853 (13 C. B. 30), the costs in the court below would have been costs in the cause. [Willes, J. Is that so, if the certiorari is applied for by the plaintiff who goes to the inferior court?] The words of the rule are general,—"If a cause be removed from an inferior court having [627] jurisdiction of the cause, the costs in the court below shall be costs in the cause." The objection, at all events, does not apply to the charge for the letters.

Bovill, Q. C., and Honyman now shewed cause. The first question is, whether the plaintiff was guilty of gross negligence. Was he not guilty of gross negligence, when he commenced proceedings, in an action which he must have known could not be sustained without a commission for the examination of witnesses at Calcutta, in a court by the practice of which he was bound to know that such a commission was obtainable only at an expense which must render the entire proceedings impracticable and unproductive? It is said the plaintiff's instructions were, to proceed in the Lord Mayor's court. That, however, is not so: he was instructed "to take such steps as might be needful to obtain a settlement." But, assuming that he was desired by Mr. Murray to proceed in the Lord Mayor's court, that did not, as was observed by Erle, J., dispense with the obligation on his part to use ordinary diligence. He chose

to sue in a court with the practice of which he was imperfectly acquainted. He must take the consequences. No court has any inherent power to issue commissions for the examination of witnesses: it is only by force of certain statutes that it is done in the courts at Westminster: *Regina* v. *Wood*, 7 M. & W. 571. The actions here clearly became fruitless in consequence of the plaintiff's negligence and want of skill. The case comes very nearly within the principle of a recent decision of this court, *Long* v. *Orsi*, 18 C. B. 610. There, an attorney received from O. & A., agents of C. L. & Co. of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O. & A.) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all indorsed to C. L. & Co. [628] The attorney thereupon brought the action in the names of O. & A., and discovering afterwards, when the bills were for the first time shewn to him, that there was no special indorsement to O. & A. as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co.: and it was held, that the suing in the names of O. & A. without having first ascertained that they were in a position to maintain an action on the bills, was such gross negligence as to disable the attorney from recovering the costs of the abortive action. "The plaintiff," said Jervis, C. J., "when he commenced proceedings upon the bills in the names of Orsi & Armani, knew or had the means of knowing what the law of France required. It was his duty to see the bills before he took any steps. He would then have known that the action could only be brought in the names of Cusin, Legendre, & Co., and so the expense of the abortive action he first brought would have been avoided." If an attorney, in conducting a suit, commits an act of negligence by which all the previous steps become in the result useless, he cannot recover for any part of the business done: *Bracey* v. *Carter*, 12 Ad. & E. 373. The same was held in *Stokes* v. *Trumper*, 2 Kay & J. 232. With regard to the distinction attempted to be made as to the letters, it is to be observed that letters before action form part of the costs of the action; and only one is allowed,—*Capel* v. *Staines*, 2 M. & W. 850. The particulars are for costs in the actions; and the payment into court was not applicable to the costs of the actions. The letters were clearly useless. As to the suggestion that the actions might have been removed into a superior court by certiorari, it seems at the least very doubtful whether the 117th rule of Hilary Term, 1853, applies to a case where the certiorari is issued at the suit of the plaintiff.

Norman, in support of the rule. To disentitle an at-[629]torney to recover his bill of costs for business done, on the ground of negligence, it must appear that the negligence was of such a description as to render the work wholly useless to the client: *Potts* v. *Sparrow*, 6 C. & P. 749; *Hill* v. *Featherstonhaugh*, 7 Bingh. 569, 5 M. & P. 541; *Huntley* v. *Bulwer*, 6 N. C. 111, 8 Scott, 325; *Bracey* v. *Carter*, 12 Ad. & E. 373. Assuming that the special instructions he received did not justify the plaintiff in commencing the actions in the Lord Mayor's court, there is no pretence for saying that it was any other than a prudent course to adopt. It being notorious that commissions had repeatedly issued from that court for the examination of witnesses abroad, was he bound to inquire whether they had been issued adversely or by consent? [Cockburn, C. J. Is he not bound to be cognisant of the practice of a court in which he professes to carry on business?] At all events, all would have been right if the causes had been removed into one of the superior courts by certiorari, which is matter of right, *Anonymous*, 1 Ventr. 46; and then the plaintiff would have been entitled to the costs in the inferior court,—Reg. Gen. H. 1853, r. 117. [Cresswell, J. Is it so clear that the plaintiff might have removed the causes by certiorari? *Edwards* v. *Bourn*, 5 B. & C. 206, 7 D. & R. 709 (*a*), seems to shew that some cause must be assigned for the removal. The cases seem to have been abandoned in the Lord Mayor's court because it was not competent to that court to issue a commission. No suggestion was made by Mr. Cox at that time that the difficulty could be overcome by means of a certiorari. Cockburn, C. J. It is now suggested for the first time.] The particular course was not pointed out: for, the business was taken out of the plaintiff's hands; and the substituted attorney chose [630] to settle the claims without insisting upon the costs. The plaintiff is clearly entitled to a verdict for the 6l. 15s. for the letters of application for payment before action. They were properly written, and would have been allowed if the proceedings

(*a*) 2 Russ. 153; 2 Sim. & Stu. 514. And see *Perreau* v. *Bevan*, 5 B. & C. 284.

in the Lord Mayor's court had been abandoned, and fresh actions commenced in a superior court. [Cresswell, J. Possibly the attorney may have a right to recover that charge as against his own client, though not as against the parties sued.]

Cockburn, C. J. I am of opinion, that, so far as relates to the costs incurred from the issuing of the process, there was evidence of negligence sufficient to sustain the verdict. If an attorney, with or without express directions from his client, takes out a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery by which the practice of that court is regulated, and to see that it is adequate to the carrying out of the objects of the suit. Here, it appears, that, not only did Mr. Cox not bring to bear upon the business of his client that competent degree of knowledge; but there is this further circumstance in the case,—that he had taken the trouble at an antecedent period to ascertain whether or not a commission for the examination of witnesses out of the jurisdiction could issue from the Lord Mayor's court, and he had then been informed that on the common law side of the court it could not, but that it could only issue on the equity side, and that upon a bill filed, the expense of which was very considerable, and would fall upon the party seeking to obtain it. In that respect, therefore, I think that Mr. Cox was guilty of what the law calls crassa negligentia. From the nature of the actions he was instructed to bring, he must have known that he could not possibly proceed to trial without a commission. It is no answer for him now to say, that, when this obstacle to the conducting the case to [631] a successful issue presented itself, it might have been got over by the removal of the cause by certiorari into the superior court,—first, because Mr. Cox never suggested such a course,—secondly, because that point was not made at the trial. As far as regards the other part of the costs, however,—the letters written to the underwriters before any proceedings were taken,—I think the verdict ought to be entered for the 6l. 15s. It seems to me that these letters are distinguishable. They might have produced the desired result. The negligence occurred only at a later stage,—when the process was sued out of a court having no machinery adapted to the particular case.

Cresswell, J. I entirely concur in what has fallen from the Lord Chief Justice.

The rest of the court likewise concurred.

Bovill, Q. C., asked the court to give some special direction as to the costs.

Per Curiam. We do not think it necessary to make any special order as to costs. They will follow the ordinary rule.

Rule absolute.

[632] Gilbert *v.* Crosier. Jan. 31, 1857.

Upon a motion by a defendant for costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, on the ground that the plaintiff had without reasonable or probable cause made an affidavit in bankruptcy for a larger amount than he ultimately recovered, the verdict of the jury, though entitled to consideration, is not conclusive.—And, for the purpose of ascertaining whether or not there was reasonable or probable cause, the judge's notes of the trial may be had recourse to.—The plaintiff made an affidavit in bankruptcy, alleging the defendant to be indebted to him in the sum of 63l. 6s. At the trial, the jury returned a verdict for him for 10l. in addition to 37l. 10s. paid into court on a plea of tender. The judge who tried the cause reporting that he was of opinion there was evidence to shew that the plaintiff was fairly entitled to recover the whole amount:—Held, not a case for costs under the 12 & 13 Vict. c. 106, s. 86.

The defendant was on the 4th of October last served with a demand in bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict. c. 106), at the suit of the plaintiff, claiming payment of 63l. 6s., being 7l. 14s. for goods sold and delivered, and for repairing and japanning a treacle-can, and 55l. 12s. for work and materials. The defendant, admitting his liability in respect of the 7l. 10s., and also his liability for the work and materials to the extent of 30l., on the 7th, through his attorney, tendered to the plaintiff 37l. 14s., in discharge of his claim. The plaintiff declined to accept the sum tendered, and on the 8th commenced an action to recover the 63l. 6s., and on the following day caused an affidavit of debt to be filed in the court of bankruptcy, and summoned the defendant to appear in that

court pursuant to the statute. The defendant attended and admitted his liability to the extent of the sum already tendered, and resisted the demand as to the rest. The defendant pleaded to the action never indebted and a tender of 37l. 14s. before action brought, and paid that sum into court. At the trial a verdict was found for the plaintiff for 10l. only beyond the sum paid in under the plea of tender.

Thomas, Serjt., on a former day in this term, obtained a rule under the 86th (*a*) section of the Bankrupt Law Con-[633]-solidation Act, calling upon the plaintiff to shew cause why he should not pay the defendant his cost of suit, and of the application, on the ground that he had not any reasonable or probable cause for making the affidavit of debt to the amount sworn to. The affidavit upon which the rule was moved, stated that the plaintiff had contracted to do the work in question for 30l. The learned serjeant submitted, that, by analogy to the decisions upon the 43 G. 3, c. 46, s. 3, which had been held to be applicable to cases under this statute, the verdict of the jury was the test of the existence or absence of reasonable or probable cause: and he referred to *Tipton* v. *Gardner*, 5 N. & M. 424, and *Lewis* v. *Ashton*, 1 M. & W. 493.

[634] D. D. Keane now shewed cause, upon affidavits stating that the work and materials in respect of which the plaintiff had brought his action were fairly worth the sum mentioned in the affidavit in bankruptcy; that the plaintiff and his foreman both swore at the trial that there was no contract to do the work for 30l., as suggested by the defendant; and that the amount claimed was fair and reasonable. The plaintiff has recovered 47l. 14s. out of 63l. 6s. The question is, whether he had reasonable or probable cause for making the affidavit for the larger sum. The defendant does not in his affidavit state that he did not owe the 63l. 6s.; but that he swore at the trial that the plaintiff had contracted for 30l. to do work for which he charged 55l. 12s. The finding of the jury negatives his statement as to the agreed price of 30l., for they have given the plaintiff 10l. more. No doubt the decisions under the 43 G. 3, c. 46, s. 3, are applicable to cases under this statute, the language of the two being very similar: but, to render the plaintiff liable to pay costs, the difference of amount must be something substantial; and the verdict of the jury is not conclusive. In *Graham* v. *Beaumont*, 3 Scott, 287, 5 Dowl. P. C. 49, it was held, that, on a motion for costs under the 43 G. 3, c. 46, s. 3, the amount of the verdict is not the criterion by which the discretion of the court is to be guided. Tindal, C. J., there says: "The statute was not intended to apply to a case where the plaintiff might reasonably be supposed to believe he should be able to establish at the trial that his debtor owes him the sum for which he arrests him. It must not be a mere measuring cast. Neither do I agree that it is by the verdict of the jury that our discretion is to be guided, although some of the cases seem to have gone almost that length." [Crowder, J. The cause was tried before me; and I must confess I should not have been dissatisfied if the jury had given a much larger sum. Cockburn, C. J. I **[635]** think we need not

(*a*) Which enacts, "that, in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and, in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs, in like manner as a defendant may now by law have execution for costs in other cases."

trouble you any further, but will hear what my Brother Thomas can say in support of his rule.]

Thomas, Serjt., and Wood, in support of the rule. The power given to the creditor under this statute is very extensive, and its exercise should be jealously watched. The debtor against whom it is exercised is thereby placed in a situation of extreme peril. In dealing with this statute, as with the 43 G. 3, c. 46, s. 3, the court must necessarily be guided by the verdict. They will not look at what passed at the trial otherwise than as appears on the affidavits (*a*). In *Lewis* v. *Ashton*, 1 M. & W. 493, the plaintiff arrested the defendant for 42l. 5s. money lent, and proved on the trial admissions of the loan of 18l., for which amount she had a verdict. On a motion to allow the defendant his costs under the 43 G. 3, it appeared from the plaintiff's affidavit that she had lent the defendant sums of money at different times amounting to the sum for which he was arrested, but it did not appear that she had any witness to or evidence of such loans, beyond the defendant's admissions as proved at the trial. The defendant swore that she had lent him only 1l. The court, although believing from the affidavits that the whole sum was due, and that the defendant's affidavit was false, held, that, as the plaintiff could have had no reasonable ground to expect that she could recover the whole debt for which she made the arrest, the defendant was entitled to his costs. [Cockburn, C. J. There the plaintiff must have known that she could make no case against the defendant beyond 18l. But, here, the plaintiff could give evidence himself.] In *Tipton* v. *Gardner*, 5 N. & M. 424, it **[636]** was held, that an application for costs under the 43 G. 3, c. 46, on the ground that the plaintiff arrested for 35l., and recovered only 19l. 19s., was not answered by affidavits stating that the plaintiff's demand was reduced at the trial by false evidence of a witness, who was in fact a partner of the defendant, but stated herself to be his servant only. Lord Denman there says that the general rule is "that the amount of the verdict is primâ facie proof of the want of reasonable and probable cause to arrest for the amount sworn to." There are numerous cases to the same effect. A tender is equivalent to a set-off. [Cockburn, C. J. The only question for us is, whether the plaintiff had reasonable ground for thinking he could substantiate his claim to the extent of 63l. 6s. We have nothing to do with his exercise of discretion in going to the bankrupt court: that the legislature has enabled him to do.] The stringency and harshness of the proceeding is an ingredient for the consideration of the court. In *Marshall* v. *Sharland*, 15 Q. B. 1051, it was held, that, under this statute, the plaintiff who has made an affidavit of debt against a defendant, a trader, and recovered less than the amount sworn to, will be ordered to pay the costs to the defendant, as having made the affidavit without reasonable or probable cause, if he has sworn to his own claim without allowing for a counter-claim of the defendant arising on the same transaction. "I will not," says Lord Campbell, "say, that, in every case, the creditor must necessarily mention the set-off; but, if he knows of any clear set-off which must be deducted from his demand, and swears to his own debt without making the deduction, he does make the affidavit without reasonable or probable cause. The reasonable decisions on the statute 43 G. 3, c. 46, s. 3, are clearly importable into this case. Under that statute, it has been decided that a party is not to be held to bail for the amount of the plaintiff's debt, without having credit for his counter-**[637]**-claim. Now, affidavits under the statute 12 & 13 Vict. c. 106, may produce bankruptcy, and strip the debtor of all he has in the world: and I think the legislature did not mean to give such power to a creditor, unless he stated in his affidavit the sum which he is ultimately entitled to recover, either by action or proof in bankruptcy. The words of the statute are explicit." And he afterwards adds: "The machinery of the statute in question is exceedingly stringent; and, consequently, good faith is the more required in setting it in motion."

Cockburn, C. J. I am of opinion that this rule must be discharged. I quite agree that a creditor who has recourse to the provisions in the bankrupt act for the purpose of compelling his debtor to pay his demand, incurs a very serious responsibility in swearing to the amount: and I also agree that the verdict of the jury is a material element in the consideration of whether or not the plaintiff had reasonable or

(*a*) In *Van Nyvel* v. *Hunter*, 3 Ad. & E. 243, it was held, that, upon a motion under the 43 G. 3, c. 46, s. 3, it was not necessary that the amount of the verdict should be stated in the affidavits, but that it might be shewn by the judge's notes.

probable cause for making the affidavit in the amount sworn to: but the verdict is not conclusive on the court, especially where the question in dispute is the value of work done. The judge who tried the cause reports to us, that, not only had the plaintiff reasonable cause to think he should be able to establish his claim to the full extent, but that he himself thought the jury ought to have given a verdict for a much larger sum than they did. The impression on my mind from the facts is, that the plaintiff had fair and reasonable ground for believing that he should have recovered the full amount for which he called upon the defendant to appear in the court of bankruptcy, and consequently that there is no ground for the present application.

CRESSWELL, J. I am entirely of the same opinion. The language of the 86th section clearly shews that the [638] legislature did not contemplate that the court, in dealing with the question of reasonable or probable cause, should be governed by the verdict of the jury. I am not satisfied that there was such an absence of reasonable or probable cause here as to induce me to visit the plaintiff with costs.

WILLIAMS, J. I am of the same opinion. I agree with what was said by my Brother Thomas, except as to his suggestion that a reduction of the amount by a tender and payment into court is to be regarded in the same light as a reduction by set-off. There is no analogy whatever between the two cases. In the case of a set-off, the plaintiff knows of the cross-demand against him, and should make allowance for it. But, why should he be put in a worse position because his debtor has thought fit to tender him a less sum than he ultimately recovers?

CROWDER, J. I am of the same opinion. The case is not at all affected by the tender. The only question is, whether, upon the facts, the court are satisfied that the plaintiff had reasonable or probable cause for swearing to the amount he did. I must confess I see no reason for thinking that he had not. The jury, it is true, have thought fit to give him a verdict for about 25*l.* less than the sum he claimed. I thought he fairly proved the work done to the full amount he demanded, and I expected the jury would have given him a verdict for the whole. I am far from saying that they did wrong in returning the verdict they did: but I still think there was ample evidence to justify them in giving the larger sum.

Rule discharged, with costs.

[639] LURY AND ANOTHER *v.* PEARSON AND ANOTHER. Jan. 28, 1857.

By a charter-party, it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners: and the charter-party contained a stipulation that "any question or difficulty which might thereafter arise out of that charter-party should be decided by arbitration," in a manner pointed out. An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence: —Held, not a case for the application of the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

On the 5th of September, 1856, a charterparty was made between the plaintiffs and defendants for the letting of a steam vessel called the "Bordeaux" for one year, upon the terms and conditions in the following charter-party:—

"London, 5th Sept. 1856.

"This charterparty witnesseth that Messrs. Lury & Hoyland, of London, merchants, and managing owners of the steam screw ship or vessel called the 'Bordeaux,' of London, of the burthen of $\frac{1}{94}\frac{7}{94}$ tons register (and eighty horse-power) or thereabouts, let the said ship to freight or hire to Messrs. Z. C. Pearson & Co., of Hull, shipowners (hereinafter called 'the charterers,') for the term of one year, to commence from to-day: and the said vessel is hereby placed at the charterers' absolute disposal, for employment in carrying cargo between safe European ports, for the period of one year, upon the terms and conditions following: Provided always that the cargo to be from time to time taken and received on board the said steam vessel shall not be of a nature to cause damage or injury to the hull or machinery of the said vessel, and shall not be more than she can safely and reasonably carry and stow over and above her stores, tackle, provisions, furniture, and fuel.

"It is also agreed that the owners are to employ a well known and competent surveyor to examine and survey the said vessel, her engines, boilers, machinery, and appurtenances, at any time the owners may wish to do so during the period of this charterparty, and to require all necessary repairs to be done at the charterers' expense.

[640] "It is also agreed that the said charterers shall at their own costs and charges effect a satisfactory insurance of the said vessel and appurtenances on account of the owners, and in such office or offices, or by and with such company or companies or individual underwriters at Lloyd's, as may be satisfactory to the owners, by policies in the ordinary form and against the ordinary risks, but including what is usually called 'the running-down clause;' and such policy or policies shall be either in the names of the owners or as they may prefer, and the same shall be to the extent of 9000l. for the period of twelve calendar months; and such policy or policies of insurance shall be delivered to the owners, and shall be their property, and at the time when they are delivered it shall be shewn to the satisfaction of the owners that the premiums of insurance have been paid, or that credit has been given for the same to some other person or persons other than the owners.

"And that the said charterers shall and will pay or cause to be paid unto the owners, their executors, administrators, or assigns, in full for the freight or hire of the said steam-vessel for the said service, at and after the rate of 145l. per calendar month (less a rebate of three months' discount on one half of such payment, at the rate of 5 per cent. per annum), and so in proportion for less than a calendar month; such pay or freight to commence on this 5th of September, 1856, and continue until the expiration of the said service; and the said freighters expressly undertake and agree with the owners to re-deliver the said steamer, her engines, boilers, machinery, and appurtenance, in the same efficient condition as they are hereby acknowledged to be in (reasonable wear and tear excepted) as aforesaid, at the expiration of the one year, in some convenient place in the port of London. And, in the event of not making such re-delivery as aforesaid at the expiration of the said year, then the said **[641]** charterers agree to pay for each and every day of retaining the said vessel, at the rate of 5l. during the first month, and so in proportion for less than a month, and at the rate of 10l. during the second and each subsequent month; and that the said freight shall be paid monthly, on the last day of each month during the said full term of one year; and to effect satisfactory insurance in manner aforesaid for such extra time.

"The said charterers are to have the sole appointment of the master, engineers, and all such persons as shall be necessary for the safe navigation of the said steam-vessel: and such master, engineers, and other persons shall be considered as the agents and servants of the charterers; but, nevertheless, the master and engineers shall be approved by the owners, if they desire to do so, before being appointed by the charterers: and the charterers shall bear and pay the wages of the master, engineers, and such other persons as aforesaid, and shall provide at their own costs all fuel, stores, provisions, ballast, and water, and pay all port charges and pilotage, harbour-dues, light-dues, and any other expense consequent on the employment of the said steam-vessel; and that the charterers shall not during the said term of service load or discharge the said vessel whilst on the ground, or lay her on the ground when laden; and the said charterers shall not employ the said steam-vessel in any contraband of war or unlawful trade, or use or navigate her in any way or manner whereby the vessel or her appurtenances may be seized, or the owners thereof made liable to any loss or damage. And, in case of loss of the said steam-vessel by tempest or other contingency beyond the control of the said charterers, the rent or hire thereof shall cease from the day of such loss, or, if the actual day of loss cannot be ascertained, from the expiration of the calendar month on which she was last seen, or left port.

"And that the said Messrs. Lury & Hoyland, as owners, **[642]** shall not be in any wise liable or responsible for any damages done or sustained by the said steam-vessel, her engines, boilers, machinery, tackle, and appurtenances, but shall be held harmless and indemnified by the charterers for all such damages, or the consequences thereof, beyond what is not recoverable from the underwriters: Provided always, and it is understood and agreed between the parties, that, although the absolute possession of the said steamer and appurtenances is given by this charter-party to the charterers, that, nevertheless, in case of any default of payment of the freight or hire thereof

for ten days after the same shall become due, the owners shall be at liberty, if they think fit, to demand and resume possession of the said steamer, and, on such possession being demanded, the owners shall be considered to have resumed possession, and shall have the same lien on the vessel and cargo for the freight due, as if the absolute possession had all along remained with them.

"It is agreed this charterparty is not to be assigned by the charterers, without the consent in writing of the owners. Should the said steamer meet with any accident to cause her to undergo repairs, and should the said steamer be under repair more than fourteen days, then the owners hereby consent to make a reduction of one half of the amount of hire for such period of excess of days beyond the fourteen days only: Provided always, that the said charterers give due notice in writing to the owners at the time of such repairs taking place. The charterers to have liberty to remove the water-tanks if they desire to do so during the time of the said charter, and to replace them in the said steamer on her re-delivery.

"The charterers are to appoint, and do hereby appoint Mr. T. E. Snooks, shipbuilder, of Millwall, as their surveyor and arbitrator, who is to judge of the condition of the said steamer, and her engines, boilers, and machi-[643]-nery, &c., both at the present time and also on her re-delivery: and Messrs. Lury & Hoyland do in like manner hereby appoint Mr. Bayley, of Cowper's Court, Cornhill, as their surveyor and arbitrator, who is to judge of the condition of the said steamer, and her engines, boilers, machinery, &c., both at the present time and also on her re delivery: and the decision of these two gentlemen is to be binding on both owners and charterers; but, in case of any difference of opinion between the above two arbitrators, then the opinion of Lloyd's surveyor at Hull, who may be employed to survey the said vessel, is to be final and binding on both charterers and owners.

"Any other question or difficulty which may hereafter arise out of this charterparty is to be decided by arbitration in like manner."

(Signed) "Z. C. Pearson & Co.
"Lury & Hoyland."

In pursuance of the above charterparty, the defendants effected insurances upon the "Bordeaux" for the sum of 9000*l*. The vessel, whilst prosecuting a voyage under the charterparty, was stranded. The policies were effected in the names of the defendants' brokers, who claimed a lien upon them for a debt due to them from the defendants; and, the defendants having refused to deliver them to the plaintiffs according to the stipulation contained in the charterparty, an action was brought against them to recover damages for such non-delivery.

Honyman, for the defendants, now moved for a rule to stay the proceedings, under the 11th section (*ante*, p. 317) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), on the ground that the action was brought in respect of a matter by the charterparty agreed to be referred. The affidavits upon which the motion was [644] founded, stated, that differences, questions, and difficulties had arisen between the plaintiffs and the defendants out of and relative to the terms of the charterparty, and to the construction thereof, and particularly as to the sufficiency of the policies effected by the defendants upon the said ship, and as to the damages claimed by the defendants of the plaintiffs in consequence of the plaintiffs' having at the time the charterparty was entered into represented the said ship to be in a very different condition to the state in which she ultimately proved to have been, and also as to the right of the defendants to retain the said policies until certain other claims of the defendants against the plaintiffs in respect of the charterparty were paid; that the defendants were willing to refer such matters to arbitration as provided by the charterparty; and that "the action was brought in respect of one of the differences, questions, or difficulties thereinbefore referred to as having arisen out of and relative to the terms of the charterparty, and was brought in respect of a matter by the said charterparty agreed to be referred to arbitration, and was not brought in respect of any other matter whatever.

Lush shewed cause in the first instance, upon an affidavit, stating that the defendants had refused to deliver up to the plaintiffs the policies on the "Bordeaux," claiming to be entitled to the amount paid for premiums; that it was not true that any difference, question, or difficulty other than the plaintiffs' right to the policies, had arisen between the plaintiffs and defendants on or relative to the terms of the

charterparty, or to the construction thereof; and that no claim or demand of any kind had ever been made by the defendants on the plaintiffs for damages in consequence of any misrepresentation of or relating to the vessel, or any claim whatever except the claim before mentioned, to detain the policies for **[645]** payment of the premiums. This is not a matter which the parties have agreed to refer; it is not "a question or difficulty arising out of the charterparty:" and, if it were, it is not a case which the court would compel the plaintiffs to refer. [Willes, J., referred to *Wallis* v. *Hirsch*, ante, p. 316, where the court refused to enforce a reference clause in a contract for the sale of linseed, there being a bonâ fide suggestion of fraud.]

Honyman. In *Russell* v. *Pellegrini*, 22 Law Times, 121, the court of Queen's Bench held such a case as this to be precisely one for a reference.

Lush. In that case an action had been brought upon a charterparty, by the shipowner, for the stipulated freight, and a cross-action had already been brought by the charterer for damages alleged to have been occasioned by the unseaworthiness of the vessel. There is no suggestion here that there is any defence to the action.

CRESSWELL, J. By the 11th section of the Common Law Procedure Act, 1854, the court is impowered, "upon being satisfied that no sufficient reason exists why the matters ought not to be referred to arbitration," to make a rule staying the proceedings in the action. Now, in this case, I am not satisfied that there is no sufficient reason why the matters should not be referred. On the contrary, I am quite satisfied that they should.

The rest of the court concurring,

Rule refused.

[646] HEMANS *v.* PICCIOTTO. Jan. 23, 1857.

[S. C. 26 L. J. C. P. 163; 5 W. R. 322.]

Where a deed contains two covenants which cannot both be performed, they are dependent covenants.—The plaintiff declared upon a covenant whereby it was agreed that he should be paid 25,000l., by monthly instalments, for certain services connected with the formation of a railway, and alleged for breach the non-payment of five of the monthly sums. The defendant pleaded, that, by the deed declared on, it was covenanted, that, in case for any reason the construction of the railway should not be proceeded with, the plans, specifications, &c., made by the plaintiff should be the property of the company, and, in case the whole 25,000l. should not then have been paid, it should be referred to one R. S. to say whether any and what further sum should be paid to the plaintiff; and averred, that, before any of the said five instalments became due, the said railway was not proceeded with, and that he was ready and willing to refer the matters to R. S.:—Held, that the two covenants were not dependent covenants; and that the plea was a good answer to the declaration, although it did not aver that the plaintiff had notice (or knew) that the railway was not proceeded with.

The declaration stated, that, by an indenture made on the 29th of May, 1854, between the directors of the South Eastern Railway of Switzerland, acting by John Sadleir, Robert Gillman, Thomas Hawes, Robert Keating, Anthony Norris, and Thomas Viner, the English portion of the general committee of management, of the first part, the said John Sadleir, John Masterman the younger, Moses Hayne Picciotto, James Rhodes, John Watkins Brett, and John Gurney, of the second part, and the plaintiff of the third part,—it was agreed, amongst other things, that the plaintiff would act as engineer in chief of the South Eastern Railway of Switzerland Company, in respect of the line of railway then about to be constructed, from Rapperschyl and Rorschach to Coire, with a branch to Glaris, in the cantons of St. Gal, Grisons, and Glaris, in Switzerland, and in that capacity to prepare all necessary plans, surveys, and sections of the said line, and also the drawings and specifications of the works, stations, and working stock; that he the plaintiff would set out on the ground the whole of the said line and works, and would provide all necessary engineering superintendence and assistants for the due inspection of the said work, its progress, and for insuring its proper execution, as well as that the conditions of the contract with the contractors were duly complied with; **[647]** that he the plaintiff would maintain a local

office, with competent assistants in charge of every part of the works; that he the plaintiff would give proper certificates of the quantity of work executed by the contractor from time to time, and generally do all such things as were usual and customary in such capacity of engineer in chief, in conducting and superintending the works of a line of foreign railway from the commencement to its conclusion; that, in consideration of the due performance of the above-named covenants, he, the plaintiff, his executors, administrators, and assigns should be paid and receive for all such engineering services as in the said indenture mentioned the sum of 25,000*l*., by the instalments and in manner following, that is to say, the sum of 1000*l*. on or before the execution of the said indenture, and the sum of 500*l*. on the last day of the then present month of May, and the sum of 500*l*. on the last day of each succeeding month, until the plaintiff should have been paid in money the aggregate sum of 18,000*l*. on account of the said sum of 25,000*l*.; and that the plaintiff was willing to accept and take as and for the residue and difference between the said sum of 18,000*l*. so to be paid in cash as aforesaid, and the said sum of 25,000*l*., three hundred and fifty shares, representing 7000*l*., in paid up shares in the said company to that amount: and the defendant thereby covenanted with the plaintiff that he would be personally responsible, and would guarantee to the plaintiff the due payment of the said several monthly instalments of 500*l*. each: Breach, that, although the plaintiff had performed and fulfilled the said agreement in all things on his part to be performed and fulfilled, and all things had been done and happened to entitle him to be so paid the said monthly instalments, yet the plaintiff had not been paid, nor had he received, for his services as such engineer, the said salary of 500*l* per month; but, at the time of the commencement of this [648] suit (*a*)[1], there was and still remained due to him five several monthly instalments of such salary, amounting, to wit, to 2500*l*.

Third plea,—that, by the said indenture, it was covenanted and agreed, that, in case of the death of the plaintiff at any time before the completion of the said line of railway, or in case, from any reason whatever, the construction of the said railway should not be proceeded with, then all the plans, specifications, drawings, and other writings prepared by him for the said works, or which should relate thereto, should immediately become the property of the directors of the said company for and on behalf of the said company; and, in case the whole of the said sum of 25,000*l*. should not then have been paid, it should be referred by the said parties thereto of the first and second parts and the plaintiff to the sole and final arbitration of R. Stephenson, Esq., who should have full power to decide and determine whether any and what further sum of money, in further part of the said sum of 25,000*l*., should be paid to the plaintiff; and that, after the making of the said indenture, and before any one of the said five instalments became due, the construction of the said railway was not proceeded with, and the said parties to the said indenture of the first and second parts had always been ready and willing to refer to the sole and final arbitration of the said R. Stephenson to decide and determine whether any and what further sum of money, in further part of the said 25,000*l*., should be paid to the plaintiff.

The plaintiff joined issue, and also demurred to the third plea,—the ground of demurrer stated in the margin, being, "that the covenant mentioned in the declaration and in the plea respectively, are separate and independent the one of the other, and that the latter [649] is not pleadable in bar to an action on the former." Joinder.

Manisty, in support of the demurrer (*a*)[2]. The plea in question is clearly insufficient, for not stating that the construction of the railway was discontinued or abandoned to the knowledge of the plaintiff, or that the directors gave him notice thereof [Cresswell, J. That rather savours of special demurrer.] It is matter of substance. It is not alleged that the directors determined never to proceed with the railway: and it is submitted that they cannot, by merely abstaining from proceeding with the works,

(*a*)[1] The declaration was dated the 3rd of June, 1856.

(*a*)[2] The points marked for argument on the part of the defendant, were, "That the covenants mentioned in the declaration and in the third plea, were independent the one of the other: that the third plea was bad in substance, in this, that it did not allege that the plaintiff ever had any notice that the construction of the railway could not be proceeded with, and also in this, that the plea did not allege that the plaintiff was ever requested to refer it to Mr. Stephenson to decide what further sum he should be paid."

disentitle the plaintiff to the stipulated monthly payments. To make this a good plea it should have distinctly averred that the project was abandoned, and that the plaintiff had notice of that fact, and was required to refer the matter to Mr. Stephenson. Then, the covenant set out in the plea affords no answer to the breach of the covenant declared on: the two covenants are separate and independent. [Cresswell, J. If both covenants cannot be performed, they cannot be independent covenants. Crowder, J. Is it not manifest that the one covenant depends upon the other?] If the court entertains a strong opinion, it will be idle to press the point, especially as the matter has been so fully discussed in the recent case of *Scott* v. *Avery*, 5 House of Lords Cases, 811 (*b*).

[650] Raymond, contrà (*a*). The fact of the railway not being proceeded with was as much or more in the knowledge of the plaintiff than in that of the defendant. It was no part of the contract that notice should be given: therefore, the absence of notice is no answer to the defence set up. If the discontinuance of the works was a mere temporary discontinuance, an illusory or colourable non-proceeding with them, the plaintiff might have traversed it. The plea is in the very words of the covenant,—that "the construction of the said railway was not proceeded with." How can the court say that those words mean something different in the plea from what they import in the covenant? If the parties have mutually agreed to select a referee to determine the remuneration to be paid to the plaintiff in a given event, there is no hardship in holding them to be bound by the bargain.

Manisty, in reply. Under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. where it is sought to obtain the benefit of the arbitration clauses, an arbitrator must be appointed, and notice given to the other party. So, here, it is not enough for the defendant to aver in his plea that he was ready and willing to refer the matter in question to Mr. Stephenson: he should have gone on to allege that the plaintiff had notice of the existence of the state of facts that rendered it necessary to call in the aid of the referee.

[651] Cresswell, J. I am of opinion that the third plea in this case is a good answer to the declaration. The declaration is founded upon a covenant under which the plaintiff is to be paid certain monthly sums for certain services in connection with the formation of a railway. The plea shews that the covenant declared on was not an absolute covenant for the payment of those monthly sums in all events, but for their payment only in the event of the work proceeding: because the indenture contains another covenant or stipulation, that, in case, from any reason whatever, the construction of the railway should not be proceeded with, all the plans, specifications, &c., prepared by the plaintiff for the works, should become the property of the directors, and, in case the whole of the stipulated sum of 25,000l. should not have been paid, it should be referred to Mr. Stephenson to determine whether any and what further sum should be paid to the plaintiff: and then the plea proceeds to aver that the construction of the railway was not proceeded with, and that the covenantors were ready and willing to refer. That has happened, therefore, upon which the covenant mentioned in the plea was to attach. I think the defendant is entitled to judgment.

Crowder, J. I am of the same opinion. The third plea sets out the covenant upon which the defendant relies for his defence, and, following the very language used in that covenant, avers, that, before any one of the five instalments claimed by the plaintiff became due, the construction of the railway was not proceeded with, and that the parties to the covenant were ready to refer in the manner stipulated for. I think that was the only averment that could properly be made. There is nothing about notice in the covenant.

Judgment for the defendant

(*b*) See *Avery* v. *Scott*, 8 Exch. 487.

(*a*) The points marked for argument on the part of the defendant, were,—

"That the covenant mentioned in the declaration, and for the breach of which the action is brought, and the covenant mentioned in the plea, must be construed together, and that the latter governed the former: and that, as the construction of the railway was not proceeded with before any one of the instalments became due, it should have been referred to Mr. Stephenson to decide whether any sum, in further part of the 25,000l., should be paid to the plaintiff."

[652] Dobson and Another *v.* Hudson and Another. Jan. 23, 1857.

[S. C. 26 L. J. C. P. 153; 3 Jur. N. S. 216; 5 W. R. 308.]

The plaintiffs contracted with the defendants to fit up for them the 'tween decks of an emigrant-ship, the work to be done to the satisfaction of the commissioners' surveyor, and to be paid for at the rate of 15s. "per statute adult:" —Held, that the plaintiffs were only entitled to be paid at the stipulated rate for so many statute adult berths as the ship ultimately sailed with, and not for berths which had been erected and removed by order of the surveyor; and that they were not entitled to charge as extras those incidental accommodations which the passengers act required, inasmuch as they were either included in the contract, or not authorised by the defendants.

This was an action for work and materials, money paid, and money found to be due from the defendants to the plaintiffs on accounts stated.

Pleas, —first, except as to 36l. 2s. 6d., parcel, &c., never indebted, —secondly, except as to the said sum of 36l. 2s. 6d., parcel of the money claimed, payment before action brought,—thirdly, as to the 36l. 2s. 6d., payment into court.

Replication, joining issue on the first and second pleas, and taking the 36l. 2s. 6d. out of court in satisfaction pro tanto.

The cause was tried before Willes, J., at the sittings in London after the last term. The facts were as follows. The plaintiffs (Dobson & Hegarty) are ship-joiners at Wapping; the defendants (Messrs. Hudson & Foster) are provision-merchants and contractors for ships' fittings at Sunderland. The plaintiffs' claim, as indorsed upon the writ of summons, was as follows:—

"1855. June and July. For work done on board the ship 'Chowringhee,' and materials provided by the plaintiffs for the defendants, the full particulars whereof have already been delivered by the plaintiffs to the defendants	£237	10	0
Cash on account	160	0	0
	£77	10	0"

[653] Pursuant to a judge's order, the indorsement on the writ of summons was amended, by the addition of the following items:—

	£	s.	d.
"June, 1855. Cutting holes in water-closet . . .	0	7	6
July 4. Fourteen 9½ inch prismatic deck-lights . .	1	18	6
One 4 inch brass ventilator, and screws . .	0	15	6
Four shipwrights one day each letting in deck-lights	1	10	0
Water-closet	3	10	0
Three fathoms dunnage wood . . .	3	15	0
	£11	16	6"

The "Chowringhee" was the property of one Cregg, of Belfast, who, on the 31st of May, 1855, chartered her to the Colonial Land and Emigration Commissioners to proceed with emigrants from London to Sydney. By that charter, Gregg undertook to fit up the 'tween-decks and provide every thing for the emigrants, for a certain sum.

Having so chartered the vessel, Cregg on the same 31st of May entered into the following agreement with the defendants:—

"137 Fenchurch Street, London, 31st May, 1855.

"This agreement made this day between Mr. James Cranston Gregg, of Belfast, of the one part, and Messrs. Hudson & Foster, of Sunderland, of the other part, witnesseth, that Hudson & Foster agree to sell and J. C. Gregg agrees to purchase the emigrants' stores, &c., for the ship 'Chowringhee,' now chartered by Her Majesty's emigration commissioners for the port of Sydney, the whole to be shipped free on board the said vessel in the London Docks, and to consist of (say) emigrants' stores,

fire hearth, medicines, baking-ovens, coals, coke, and [654] charcoal, mess utensils, medical comforts, lamps, candles, and water-casks, with fittings, plumbing, screens, baths, and everything comprised in the commissioners of emigrants schedule (except a fire-engine), without any extras whatever: the whole to be shipped and fitted to the entire satisfaction of the surveyor to the emigration commissioners, and subject to their approval. For and in consideration of the foregoing, J. C. Gregg agrees to pay to Hudson & Foster the sum of 7l. 5s. per statute adult, as per government scale, say, by his acceptance at six months' date from day of vessel's clearance at the Custom-House, London. "HUDSON & FOSTER,

"Witness, C. G. Service. "J. C. GREGG."

The defendants, on the same day, and after communicating to them the above agreement, entered into a contract with the plaintiffs for the fitting up of the 'tween decks, and one of the plaintiffs thereupon signed the following undertaking, which was assented to by the defendants:—

"Messrs. Hudson & Foster. "91, St. George's Street, St. George's East.

"Gentlemen, I hereby undertake to fit up the between decks of the ship 'Chowringhee' for government emigrants, to provide all materials and labour, viz. all plumbers' and joiners' work, for the sum of 15s. per statute adult,—the whole to be done to the satisfaction of the emigration commissioners.

"May 31, 1855. "JOHN DOBSON, jun".

Pursuant to this contract, the plaintiffs proceeded to do the work, under the inspection of the commissioners' surveyor; but, in consequence of fewer double berths being required than was at first anticipated, the plaintiffs, by order of the surveyor, took down thirty six of them, and erected in their place forty-four single berths.

[655] The plaintiffs claimed to be paid at the rate agreed upon for all the berths they were at the expense of putting-up under the orders of the commissioners' surveyor, including those which they had been ordered to pull down, and they sent in the following account:—

"Messrs. Hudson & Foster. "Drs. to Dobson & Hegarty.

	£	s.	d.
"1855. To building 276 single and double berths on board the ship 'Chowringhee,' at 15s. per head . . .	207	0	0
To taking down schoolmaster's cabin, and re-building same with double berths, tables, shelves, and washstand complete for family	5	0	0
To taking down matron's cabin, and altering same, with fittings complete	3	10	0
To taking down, altering, and rebuilding 36 double berths to ship's side for 44 single men, with tables, seats, shelves, &c., complete, at 10s. each	22	0	0
	£237	10	0
Cr. by cash on account . . .	160	0	0
	£77	10	0"

On the part of the defendants, it was insisted that they were only chargeable in respect of the erection of so many berths as they had authorised the plaintiffs to erect, viz. so many as the vessel was capable of carrying. The vessel actually sailed with 261½ statute adults.

The learned judge directed the jury to find a verdict for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter the verdict for them, if the court should be of opinion that there was no [656] evidence to support the verdict for the plaintiffs beyond the amount paid into court.

Overend, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly, or for a new trial on the ground that the verdict was against the evidence.

Shee, Serjt., and Salter, now shewed cause. Having entered into the contract with Gregg for the hire of the ship "Chowringhee," which was produced and read at the time,—the defendants enter into the contract declared on. Under that contract the plaintiffs are clearly entitled to recover for all the work that was done, viz. the 276 berths. The work was done under the authority of the Passengers' Act, 1852 (15 & 16 Vict. c. 44). By the interpretation clause, s. 3, "statute adult" is declared to mean "a passenger of the age of fourteen years or upwards, or two passengers above the age of one year and under that of fourteen." The 12th section limits the number of passengers to be carried in passenger ships, and imposes a penalty for an excess. The 16th section enacts that "no passenger ship shall clear out or proceed to sea unless she shall have been surveyed, under the direction of the emigration officer at the port of clearance, but at the expense of the owner or charterer thereof, by two or more competent surveyors, to be appointed by the colonial land and emigration commissioners for each port at which there may be an emigration officer, and for other ports by the commissioners of customs, nor unless it shall be reported by such surveyors that such passenger ship is in their opinion seaworthy, and fit in all respects for her intended voyage." By s. 18 it is provided that the berths shall be of dimensions not less than after the rate of six feet in length and eighteen inches in width for each statute adult, and shall be sufficient in number for the proper accommodation of [657] all the passengers contained in the lists of passengers hereinbefore (s. 13) required to be delivered by the master of the ship" Section 21 requires a sufficient space to be set apart for an hospital. Section 22 enacts that "no passenger ship shall clear out or proceed to sea unless fitted, to the satisfaction of the emigration officer at the port of clearance, with at least two privies, and with two additional privies for every 100 passengers on board, which shall be maintained in a serviceable condition throughout the voyage." And s. 22 enacts that "no passenger ship having on board as many as 100 statute adults shall clear out or proceed to sea without having on board an adequate and proper ventilating apparatus, to be approved by the emigration officer at the port of clearance, and fitted to his satisfaction; and, in every passenger ship, the passengers, whatever be their number, shall at all times during the voyage (weather permitting) have free access to and from the between decks by the whole of each hatchway situate over the space appropriated to the use of such passengers: If, however, the main hatchway be not one of the hatchways appropriated to the use of the passengers, or if the natural supply of light and air through the same be in any manner unduly impeded, the emigration officer at the port of clearance may direct such other provision to be made for affording light and air to the between decks as the circumstances of the case may, in his judgment, appear to require; and, in case of non compliance with any such directions, or in case such ship shall be cleared out or proceed to sea without such ventilating apparatus, the owner, charterer, or master of such ship shall be liable to a penalty not exceeding 50*l.* nor less than 20*l.*" The contract being for work to be done on board an emigrant ship, must be taken to have been made with reference to the statute, and that requires that the fittings between decks for the accommodation of passengers shall be done [658] under the inspection and to the satisfaction of the surveyor to the commissioners. The fair meaning of the contract, therefore, is that the plaintiffs were to construct and to be paid for as many berths as the commissioners or their surveyor should require to be put up. Then, the ventilation, water closets, and other fixtures and fittings were clearly within the contract: these were things without which the vessel would not have been permitted to sail. They were essential for the use of the emigrants occupying the 'tween decks.

Overend, Q. C., and Chandler, in support of the rule. Both parties must be taken to have been cognizant of the duties imposed upon them by the statute in respect of the fittings, and the contract must be taken in connection with the act The defendants, therefore, can only be liable for the number of statute adult berths erected under the contract to the satisfaction of the surveyor; and not for those which may have been erected and pulled down or altered because not done to his satisfaction. With regard to the ventilation and the waterclosets on the upper deck, if they are within the contract as incidental to the work contracted for, they are comprised in the stipulated payment of 15*s.* per statute adult berth: if not, their construction was not authorised by the defendants, and they cannot be called upon to pay for them.

Cresswell, J. I am of opinion that this rule must be made absolute. By the contract the plaintiffs undertake for a given sum per statute adult to fit up the between

decks of the "Chowringhee" for the conveyance of government emigrants. They, therefore, undertake to do everything necessary to fit her for an emigrant ship. I think we may fairly take into account the act of parliament. We must presume that they undertook to do the [659] work according to law. To that extent, and no more, did the defendants employ them: and it is not pretended that there was any other contract, express or implied, for any work not included in this. It may be that the commissioners or their surveyor called upon the plaintiffs to do more than was required by the statute. Now, the statute requires many things,—amongst others, a hospital, water closets, ventilation in certain circumstances, which possibly may include lights. But the contract is for the fitting up an emigrant ship, and therefore is a contract to do all that is necessary to fit the ship for that purpose. Then, how are the plaintiffs to be paid? The sum stipulated for is 15s. per statute adult. The meaning of paying at so much per statute adult I take to be this, that the defendants were to pay at that rate for the number of statute adults who might ultimately be provided for under the direction of the surveyor. I find no provision in the contract for the expense of alterations resulting from the opinion or caprice of the commissioners or their surveyor. The plaintiffs undertook to do the work to the satisfaction of the surveyor. It follows, therefore, that they have received all they were entitled to, viz. 15s. for the number of statute adults ultimately provided for. With regard to the extras, they were either matters which the commissioners were justified in calling upon the plaintiffs to do, or they were not. If they were, they are included in the contract price; if not, they were done without any authority from the defendants, and they cannot be called upon to pay for them.

WILLES, J. I am of the same opinion. The contract is for the fitting of berths on the between decks of an emigrant ship, to be done to the satisfaction of the surveyor of the commissioners. That which was first done was not done to the satisfaction of the surveyor, and therefore is not to be paid for under the contract. The [660] plaintiffs were only entitled to be paid for the 261½ statute adult berths which were ultimately erected in conformity with the contract, that is, to the surveyor's satisfaction. Then the plaintiffs claim certain extras, for lights, water-closets, schoolmaster's cabin, &c. The answer to that is, either the plaintiffs were bound to provide these things under the contract, or they were not: if they are things that by the statute were properly required to be done, they are within the contract; if not, they have been done without the defendant's authority. In either case, therefore, the rule must be made absolute to enter the verdict for the defendant.

Rule absolute.

SMITH *v.* WOODFINE. Jan. 17, 1857.

[Adopted, *Berry* v. *Da Costa*, 1866, L. R. 1 C. P. 333. Referred to, *Finlay* v. *Chirney*, 1888, 20 Q. B. D. 505.]

Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the bona fides of the application, cannot be looked at for the purpose of explaining or contradicting the evidence given at the trial.—In such an action, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives.

This was an action for breach of promise of marriage brought by the plaintiff, who was the daughter of a retired clerk in a public office, against the defendant, a brewer at Hornchurch, in Essex.

The cause was tried before Willes, J., and a special jury, at the sittings in London after last Trinity Term. The promise and the breach being proved, evidence was given to shew the defendant's means. This consisted principally of a statement by the father of the plaintiff, that the defendant had represented to him that he was possessed of property independently of his business, that [661] the brewery had been valued at 60,000l., but was really worth 100,000l., that it produced a profit of about 6000l. a year, and that there was property on the premises or in the funds worth from

16,000l. to 19,000l. In addition to this, it was proved that the defendant had hired a house and land at Upminster at a yearly rent of 200l., and had ordered a carriage. The will of the father was also put in; and from this it appeared that the defendant took only a moiety of the brewery.

The jury having returned a verdict for the plaintiff, with 3000l. damages,

The Attorney-General, in Michaelmas Term last, moved for a new trial on the ground of quasi surprise and excessive damages. The motion was founded principally upon the affidavits of the defendant, who swore, that, at the death of his father, he was possessed of 250l. only; that the entire property of which his father died possessed was not worth more than 38,000l.; that the property he derived under his father's will did not exceed the value of 12,000l.; that the entire profits of the brewery (of which he was entitled to the half) averaged about 750l. per annum; that he never informed the plaintiff's father that he possessed 16,000l. or 19,000l., or any other sum in which he was beneficially interested, in the funds or elsewhere, or anything to that effect, or that the profits of the brewery were 6000l. a year; that the house and premises at Upminster were hired (furnished) for a year at a rent of 200l., the landlord paying all rates and taxes; that the only carriage he had ordered was a phaeton, for which he was to pay 80l.; that he was entirely taken by surprise at the statements made by the plaintiff's father at the trial as to his representations respecting his property; and that it never was his intention to break off the proposed match, but merely to postpone it in consequence of some squabbling between [662] the plaintiff and himself and some members of their respective families as to the guests to be invited to the wedding. There were also the affidavits of a Mr. Shaw, the solicitor who managed the affairs of the defendant's late father, corroborating the statement in the defendant's affidavit as to the value of the property thereby bequeathed to him, and of one Mason, a valuer, confirming his statement as to the value of the brewery and plant.

Cresswell, J. We cannot act upon the defendant's denial of the evidence given at the trial, inasmuch as he could not be examined as a witness upon another trial. My brothers Crowder and Willes, however, think there should be a rule. My Brother Willes considers that the conduct of some part of the defendant's family may have had a tendency unduly to influence the damages. For my own part, I must confess I think the question was one peculiarly for the jury. I have always felt it very difficult to interfere with the verdict of a jury upon a question of amount.

Willes, J. It seems to me that this is peculiarly a case for an imparlance.

A rule nisi having been granted,

Byles, Serjt., Montague Smith, Q. C., and Unthank, now shewed cause, upon an affidavit of the plaintiff's father generally reiterating the statements made by him in his evidence at the trial, as to the representations of the defendant respecting the value of his property, and averring the affidavit of the defendant upon which the rule was moved to be wholly untrue. Upon the evidence which was given at the trial, there could be no pretence whatever for disturbing the verdict: and there is nothing [663] upon the affidavits upon which this rule is moved, to shew that the jury have been misled by false evidence, or have acted under the influence of undue motives, or from misconception or mistake: consequently, there is no pretence for interfering with their verdict. There is no affidavit of surprise, properly so called: the defendant must have known that evidence would be given as to the nature and extent of his means, and was bound to come prepared to meet it. The affidavit now mainly relied on is that of the defendant himself, which the court can hardly give effect to, seeing that he is precluded by the statute 14 & 15 Vict. c. 99, s. 4, from being examined as a witness. [Cresswell, J. That affidavit was received merely for the purpose for which a similar affidavit was received in *Hawker* v. *Seale*, 17 C. B. 595, viz. for the purpose of rebutting any inference which might be drawn from the absence of it.] If that affidavit were admissible, it is in many respects answered by that of the plaintiff herself, which contradicts it in every material particular. [Willes, J. The statements in the defendant's affidavit contradicting the evidence given by the witnesses at the trial, being inadmissible, the affidavit of the plaintiff contradicting that affidavit must equally be inadmissible.] That being so, there are no grounds laid before the court to justify its interference with the verdict of the jury. Many authorities might be cited; but it will be sufficient to refer to two for the purpose of shewing the principle which guides the court in matters of this sort. In *Gough* v. *Farr*, 1 Y. & J. 477, it was held that the court will not, in an action for a breach of promise of

marriage, grant a new trial on the ground of excessive damages, unless they be so large as to induce the court to infer that the jury were actuated by undue motives, or acted upon a misconception of the facts. There, the plaintiff was the daughter of a clergyman, and the defendant the son and assistant of a silversmith: **[664]** and the jury returned a verdict for 250l., which Bosanquet, Serjt., before whom the trial took place, reported to be under the circumstances "large." In discharging a rule which had been obtained for a new trial on the ground of excessive damages, Alexander, C. B., said: "This is an application to the court to grant a new trial, upon the single ground of the jury having awarded excessive damages. The power of granting new trials has been and is exercised in a variety of instances in cases similar to the present: and it is a mistake to suppose that in doing so the courts at all infringe upon the province of juries, the constitutional tribunal to assess the amount of damages. Where the courts are of opinion, taking into consideration the circumstances of each case, that the jury have acted under the influence of undue motives or of misconception, it is their duty to interfere, not by fixing the amount of the damages to be recovered, but by submitting the case to the consideration of a second jury; and, for my part, I think that the courts are in many cases bound to interfere." And Hullock, B., said: "The principle which governs the courts in cases of this description is, not whether they think the damages too large, but whether they be so large as to satisfy the court that the verdict was perverse, and the result of gross error, misconception, or undue motives. There are, I think, no circumstances in this case to warrant such a conclusion. Poverty is pleaded as a ground for inducing the court to interfere. I am not, from the evidence, satisfied that the defendant is unable to pay the damages: but, even if he were, that would not, I apprehend, be a ground for disturbing the verdict." Can it be said here that the verdict was the result of gross error, misconception, or undue motives on the part of the jury? or, is there anything now before the court to shew even that the defendant is unable to pay the damages which the jury have awarded? In *Wood* v. *Hurd*, **[665]** 2 N. C. 166, 3 Scott, 368, 3500l. having been awarded by a jury as damages in an action of this sort, the court refused to set aside the verdict on the ground that the damages were excessive. In that case also the will of the defendant's father was produced at the trial to shew the amount of property the defendant had succeeded to, and there were contradictory statements as to the interest he took under it. As to surprise, there clearly was none. No evidence was given at the trial, which the defendant might not have anticipated; it is not suggested that he has since discovered any fresh evidence; and the court will not grant a new trial merely for the purpose of giving the defendant a chance of mitigating the damages without calling witnesses. Of all cases, an action for a breach of promise of marriage is, from its very nature, and the unpleasant ordeal the plaintiff has to go through, the most inconvenient in which to grant a new trial.

Sir F. Thesiger, Q. C., Montagu Chambers, Q. C., and Prentice, in support of the rule,—admitting, that, in order to induce the court to make the rule absolute, they must satisfy them that there had been misconception on the part of the jury as to the facts or as to the means of the defendant—submitted that the circumstances disclosed at the trial, and in the affidavits before the court, shewed nothing to warrant the extraordinary and unreasonable amount of damages which the jury had awarded against the defendant.

Cresswell, J.(*a*). I am of opinion that this rule should be discharged. It is not disputed that the plaintiff was entitled to a verdict: but it is said that the damages are extravagantly excessive, regard being had **[666]** to the position in life of the parties, and therefore there ought to be a new trial.

I am far from denying that there may be cases in which it may be the duty of the court to interfere with the verdict of a jury. If, for instance, it appeared that it had been obtained by means of perjury, that would be ground for setting aside the verdict. So, if it were shewn that evidence was given which had taken the defendant by surprise, and which he could have had no opportunity to meet. It is said here that the defendant was surprised at the amount at which his property was estimated by the plaintiff's witnesses. It appears, however, that the evidence as to that consisted principally of repetitions of his own statements which even now are not denied, and

(*a*) Cockburn, C. J., had been counsel in the cause, and therefore took no part in the discussion.

the will of his late father, which was the only evidence that was fairly within the plaintiff's reach, and more, I think, than she was bound to give. But, at all events, it cannot be said that the plaintiff artfully relied on the statements of the defendant, and abstained from giving other evidence in her power, in order to mislead the jury as to the value of the defendant's property. Was it surprise that the question as to his circumstances was entered into? Certainly not: for, that is an inquiry that is invariably gone into in cases of this sort, and therefore it was his duty to be prepared for it. As to the statements made by the plaintiff's father, do these afford any ground for granting a new trial? These statements necessarily would be repeated if the case were to be sent to another jury, and would remain uncontroverted; for, the defendant cannot be called. It would be idle, therefore, to send the cause down again, there being no reason for believing that the plaintiff's father spoke other than the truth. It was the defendant's own fault that the facts before the jury remained unanswered. His mother was in court, and she might have been called to give the explanation as [667] to the value of the brewery which she has now given in her affidavit. The case, then, stands thus: There has been no perjury, and no fraud or misconduct on the part of the plaintiff to deprive the defendant of a fair opportunity of laying his case before the jury: nor is there any suggestion that the jury were acting under any prejudiced view, or that they misunderstood any particular piece of evidence. There has been no perjury, no surprise, no prejudice, no mistake. But it is said that the jury have awarded the plaintiff an unreasonable and excessive amount of damages. No legitimate ground being laid for it, it seems to me that we should be guilty of a most inconvenient and unconstitutional exercise of our power if we took upon ourselves to interfere with the discretion which the law has in a peculiar manner vested in the jury in cases of this sort. For these reasons, I am of opinion that the rule should be discharged.

Willes, J. The law as to breaches of promises of marriage is at least as old as the reign of William the Third, as appears by the case of *Harrison* v. *Cage and Wife*, Carth. 467, where, after verdict for the plaintiff, with 400l. damages, it was moved in arrest of judgment, "because this action would not lie upon the promise of marriage made by the woman, for, the law doth not intend that the man is advanced by marriage, and therefore such a promise of marriage to him is of no consideration in law, and by consequence no action can be founded thereon: but 'tis otherwise where a man promiseth to marry a woman, because marriage in the eye of the law is an advancement to the woman." To which it was answered, and so resolved per Curiam, "that here were reciprocal promises; and therefore, as her promise to him was a good consideration to make his promise obligatory, so by the same reason his promise to her was sufficient [668] consideration to make her promise binding in this case as well as in any other mutual agreements." And the court" did not allow that distinction between the advancement of a man and of a woman in marriage." At the end of the case, the reporter adds this note:—"Nota. It had been moved before for a new trial, because of the excessive damages; but, upon reference to the Chief Baron Ward, who tried the cause, he certified that the promise of the woman was well proved, and that the damages were more than he expected, but that he did not think them so excessive as to set aside the verdict." The report states that it was proved that the woman was worth 3000l. when the plaintiff courted her, and afterwards by the death of her brother worth double that sum. That which was laid down as law at that time is law at the present time. In Sedgwick on Damages, 2nd edit., p. 208, it is said: "The clear and irresistible result of the authorities is, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement." He then proceeds to notice an exception "in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title:" and, at p. 210, he adds: "To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form ex contractu, yet, it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances, and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. 'The damages in this action,' says the Supreme Court of New York, in *Southard* v. *Rexford*, 6 Cowen, 254, 'rest in the sound discretion of the jury, under the circumstances of each particular case.' [669] And

this exception is perhaps one of the strongest proofs of the general rule." The learned author proceeds to cite certain American cases,—*Torre* v. *Somers*, 2 N. & M. 267, *Cargell* v. *Colbaugh*, Coxe, 77, *Stout* v. *Parll*, Coxe, 79, *Greene* v. *Spencer*, 3 Miss. 318, and *Hill* v. *Maupin*, 3 Miss. 323,—which, however, are only echoes of what has been decided in our courts. Again, at p. 368, the learned author says: "The action for breach of promise of marriage, as has been already said, though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage: *Wells* v. *Padgett*, 8 Barb. S. C. R. 323. From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,—*Southard* v. *Rexford*, 6 Cowen, 254, subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages. So, where it appears that the promise was made by the defendant with a view to seduce the plaintiff, this will be allowed to go to the jury in aggravation (*a*)[1]. So, also, it is held that the defendant may **[670]** shew in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever: *Johnson* v. *Caulkins*, 1 J. C. 116. It is also settled that, in this action, dissolute conduct on the part of the female after the promise (or before if unknown) discharges the contract altogether. Indecent conduct before the promise, if unknown to the defendant, or after the promise, goes in mitigation of damages" (*a*)[2]. Here it is said that the jury were prejudiced, and in consequence of that prejudice gave a verdict which they ought not to have given. The first inquiry I should think would be, whether that prejudice was caused by any wrongful act of the plaintiff. Looking at the evidence, it would appear that the jury based their verdict upon representations made by the defendant as to the value of the property. It was stated at the trial that he was possessed of means independent of the brewery, and that the brewery was valued at 60,000*l*., and was worth 100,000*l*., and produced a yearly profit of 6000*l*., and that in addition he had from 16,000*l*. to 19,000*l*. worth of property on the premises. Not one of these statements is alleged by the defendant to be false; on the contrary, they are admitted on the affidavits to be true. It may be that these representations which were stated, and truly stated, by the plaintiff's father to have been made by the defendant, were made with a view to induce the plaintiff to consent to marry him. He now calls upon us to set aside the verdict because the representations so made by him with a view to their being acted upon by the plaintiff, were untrue. It is doubtful, to say the least of it, whether **[671]** this might not be put upon the well known rule of estoppel under the bankrupt acts, where parties are precluded from denying facts which they have once asserted or admitted to be true. There is, however, no necessity to decide that point here; for, the plaintiff, having given evidence of these representations of the defendant, proceeded to put in the will of his father, under which it was stated he acquired his property. The will so put in shewed the value of the brewery and plant to be about 30,000*l*.; and it appeared that the defendant had only a share in it. I do not think the jury could possibly have fallen into any mistake. They must have taken that will into their consideration as well as the statements made by the defendant. The plaintiff clearly was guilty of no misconduct in producing this evidence; and I do not think that the jury,—a special jury of the city of London,—were at all likely to come to an erroneous conclusion

(*a*)[1] Citing *Paul* v. *Frazier*, 3 Mass. 73; *Greene* v. *Spencer*, 3 Miss. 318; *Hill* v. *Maupin*, 3 Miss. 323; *Buck* v. *Strain*, 2 Bibb. 341; *Whalen* v. *Layman*, 2 Blackf. 194; *Wells* v. *Padgett*, 8 Barb. S. C. R. 323. The contrary has been held in Pennsylvania: *Weaver* v. *Bachert*, 2 Barr. 80. But, there, the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages: *Baldy* v. *Stratton*, 11 Penn. R. 316.

(*a*)[2] Citing *Boynton* v. *Kellogg*, 3 Mass. 189; *Willard* v. *Hone*, 7 Cowen, 22; *Palmer* v. *Andrews*, 7 Wend. 142; *Irving* v. *Greenwood*, 11 E. C. L. 412; *Capehart* v. *Carradine*, 4 Strobhart, 42.

as to the effect of that evidence. The amount of damages, it is true, is large: and I have remarked that considerably larger damages are usually given by special juries of the city of London in these cases than are given by those of any other place. It may be because they are accustomed to deal in large amounts themselves, and so are led to estimate wounded feelings higher than other juries do. But I have no means of estimating the propriety of their assessment, seeing that I am unable to satisfy my mind that they have either been misled or have acted from bad or corrupt motives. I therefore agree with my Brother Cresswell in thinking that the rule for a new trial must be discharged.

Rule discharged.

[672] DALTON *v.* DENTON. Jan. 15, 1857.

[S. C. 5 W. R. 203.]

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:—Held, that B. was not responsible.

This was an action to recover damages for an injury alleged to have accrued to the plaintiff from the negligent mooring of the defendant's vessel.

At the trial before Cockburn, C. J., at the sittings in London after the last term, it appeared that the plaintiff was a mast-maker occupying a wharf at Shadwell, and, at the time the accident in question happened, had some men at work upon a spar which overhung the river in front of his wharf about twenty feet: that a collier belonging to the defendant was moored to the adjoining wharf, and so placed as that her bowsprit projected over the river fronting the plaintiff's wharf and over the plaintiff's mast; and that the tide falling caused the defendant's bowsprit to descend upon the plaintiff's mast and break it.

The jury having returned a verdict for the defendant, and leave having been reserved to the plaintiff to move to enter a verdict for him for the value of the mast (35*l.*) if the court should be of opinion that the defendant was under the circumstances liable,

Hawkins now moved accordingly, submitting that the defendant had been guilty of negligence in so mooring his vessel as to project over the front of the plaintiff's wharf, or in omitting to keep a look out and to move her when the state of the tide rendered it necessary.

Per Curiam. The plaintiff's choosing to occupy the waterway of the river by suffering his mast to project over it, imposed no duty upon the defendant, whose bowsprit had as much right there as the plaintiff's mast had.

Rule refused.

[673] MOORE *v.* WEBB. Jan. 27, 1857.

To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fell-monger, and returning it polluted to the stream when so used, and also prescriptive rights for twenty and forty years respectively. The plaintiff new assigned "that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified." At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues except the first and second: Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or

the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence.—And held, that the new-assignment was well pleaded.

This was an action for polluting a watercourse.

The declaration stated that the plaintiff was possessed of a farm at Badeley, in the county of Suffolk, through which flowed a stream or watercourse; that the plaintiff ought to have had, and still ought to have, the use and benefit of the water of the said stream for his cattle and other purposes; yet that the defendant, on the 1st of July, 1856, and on divers other days, wrongfully polluted and disturbed the water of the said stream, so that it became foul and impregnated with noxious substances, and the plaintiff's cattle were unable to drink it, and the plaintiff had been compelled to drive his said cattle to a distance for water, and had lost the use and benefit of the said water of the said stream, whereby his farm was greatly deteriorated: And the plaintiff claimed 100*l*.

The defendant pleaded,—first, not guilty.

Secondly, that the plaintiff ought not to have had, or to have, the use and benefit of the said stream, as in the declaration alleged.

Thirdly, that the defendant was, and still remained, seised in his demesne as of fee of and in a tan-house **[674]** and premises for carrying on the business of a tanner and fell-monger, adjoining the said stream, and higher up than the plaintiff's farm, and that the defendant and all those whose estate he then had, from time whereof the memory of man was not to the contrary, had been accustomed to and ought to take the water of the said stream and use it in the said tan-house and premises, and to let off and empty into the stream all the water used in the said tan house and premises, and which was and is made foul and impregnated with noxious substances, necessary for carrying on the said business, and thereby to pollute and disturb the stream; and that the defendant, being so seised, and carrying on his business, used the water of the said stream at the said several times for the purposes of his said trade, and did let off and empty into the said stream the water necessarily used, and did thereby render foul and polluted the water so used, and the water so polluted passed through the plaintiff's farm, &c.

Fourthly, that the defendant was and still remained occupier of the tan-house and premises in the third plea mentioned; and that the occupiers of the said tan-house and premises, for twenty years before this suit had without interruption, and of right, taken the water and used it in the said tan-house and premises, and let off and entered into, and so polluted, &c. the water of the said stream, wherefore he did as he lawfully might, and the water so polluted ran through the said farm, &c.

Fifthly, a similar plea, setting up a forty years' user.

The plaintiff joined issue on all the pleas; and, as to the third, fourth, and fifth, new assigned, that he sued not only for the grievances therein admitted, and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified.

[675] The defendant pleaded not guilty to the new-assignment. Issue thereon.

The cause was tried before Coleridge, J., at the last Summer Assizes at Ipswich. It appeared in evidence that the plaintiff was the occupier of a farm called the Holy Oak Farm, at Badeley, in the county of Suffolk, through which a stream or watercourse ran, the water of which had immemorially been used by the tenants of the farm for watering their cattle and for other purposes; that the defendant and his father and grandfather successively had for at least thirty six years carried on the business of tanners (and more recently that of a currier also) upon premises adjoining the stream, and higher up than the plaintiff's farm; that the waste water from the tan-yard had been accustomed to flow into the water-course, though down to the year 1842 not to such an extent as to prevent the water from being used by the plaintiff; but that, since that time, the defendant's premises had been enlarged by additional buildings, and his business had been increased about fourfold, and the water of the stream had in consequence become so polluted and impregnated with noxious substances from the tannery that the plaintiff's cattle refused to drink it, and he was obliged to have them driven some distance to water, and was unable to use his farm adjoining the stream so beneficially as he had been accustomed to do.

On the part of the defendant it was submitted that the second, third, and fourth

pleas were proved, and that there was no evidence to support the new-assignment, which was limited to purposes ultra the trade purposes.

On the part of the plaintiff, it was admitted that the defendant was entitled to use the water of the stream for the purpose of his trade of a tanner and fell-monger, and to pollute the stream for that purpose, to the extent to which it had been used twenty years ago, but to that extent only: and it was insisted that the pleas only [676] justified the immemorial user, and did not apply to the trade of a currier.

To this it was answered that there was no evidence of any pollution of the stream, arising from the carrying on the trade of a currier.

The learned judge,—after giving the plaintiff an opportunity to amend the new-assignment, which was ultimately declined, directed a verdict to be entered for the defendant upon all the issues except those upon the first and second pleas, which were found for the plaintiff.

The Attorney-General, in Michaelmas Term last, obtained a rule nisi for a new trial on the ground that the learned judge misdirected the jury in directing them to find for the defendant upon the issues joined on the third, fourth, and fifth pleas, and upon the new-assignment, or for judgment non obstante veredicto on those issues. He submitted that the defendant had in effect converted a limited into an unlimited right.

Byles, Serjt., O'Malley, Q. C., and Couch, now shewed cause. The third, fourth, and fifth pleas afford a complete answer to the complaint in the declaration; and that defence is not removed by the new-assignment, which, if it means anything, means that the plaintiff charges a user of the stream beyond the purposes and the necessities of the defendant's business. It is not said, that, within the twenty or forty years the actual user of the stream had been greater: that might have raised a question which does not appear to have been raised in any of the cases. [Cresswell, J. The twenty and forty years depend upon actual user. If a man has gone on increasing the user every year, he has not actually used the stream for the whole period in the manner he claims.] The stream was used at all times as it was wanted for the purposes of the trade. It will be enough for the defend-[677]-ant to establish his right to an immemorial user under the third plea. Can there be such a grant as that a man shall use the water of a stream to the extent needed for the purposes of his trade? Suppose a man has a grant of an easement for washing all his sheep levant and couchant on certain lands, could it be said that he was restricted from increasing their number to any extent? As far back as living memory went, it was shewn that the ditch had been used for the discharge of the waste water from the tannery, as the exigencies of the business required. [Cresswell, J. It is quite clear that My Brother Coleridge did not understand the plea in the extended sense now contended for. If it means what you say it does, the plea was not proved: there was no such extensive immemorial user; and it is impossible to suppose that the plaintiff's counsel would have declined to have the question put to the jury. And, if you read the plea in the more limited sense, it lets in the new-assignment. Williams, J. Assume that the learned judge ruled that it was open to the defendant to shew an immemorial grant, or right under Lord Tenterden's Act (2 & 3 W. 4, c. 71), to carry on the trade, and to make the water of the stream subservient to the exigencies of the trade for twenty years, was that proved? It clearly was not admitted; and it was not put to the jury.] It is submitted that the pleas cover any extent of pollution that the plaintiff complains of. In *Manning* v. *Wasdale*, 5 Ad. & E. 758, 1 N. & P. 172, it was held, that the privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit a prendre, but a mere easement; and that such a right may be claimed by reason of the occupation of an antient messuage, without any limitation as to the quantity of water to be taken. [Williams, J., referred to *Bower* v. *Jenkin*, 6 Ad. & E. 911, 2 Nev. & P. 87.] This is rather like the case of [678] *Aldin* v. *Latimer*, 11 Ad. & E. 759, 3 P. & D. 581. And see *Luttrel's case*, 4 Co. Rep. 87 a., cited in Gale on Easements, 2nd edit. 368. The third plea being proved, the question is as to the meaning of the replication. [Cresswell, J. The first question is as to the meaning of the plea. Does it mean any more than a continuous user of the same character and to the same extent?] The case of *Wright* v. *Williams*, 1 M. & W. 77, is very analogous, and it was never suggested that the pleas were bad on the ground of the extensive character of the right claimed. The true meaning of the new assignment is, that the defendant has used the stream

for other purposes than those of his business. [Williams, J. I understand it to mean that the pleas do not cover the extent of pollution of which the plaintiff complains. The case of *The Rochdale Canal Company* v. *Radcliffe*, 18 Q. B. 287, shews, that, if the plaintiff meant to rely upon an excessive user of the water, he was bound to new-assign. I must confess I do not see how the plaintiff could have new-assigned in any other manner than he has done here, if he meant to say that the user has gone beyond the limits of the grant.

Knowles, Q. C., Prendergast, Q. C., Wells, Serjt., and Honyman, in support of the rule. The learned judge was clearly wrong in holding that the plea was proved: and, even if that were not so, the plaintiff would be entitled to succeed upon the new-assignment, which follows the form given in the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sched. (B.), 55. The declaration complains that the plaintiff was possessed of a farm through which of right flowed a stream which was used by him for watering his cattle, &c., and that the defendant wrongfully polluted and disturbed the stream, so that the plaintiff's cattle were unable to drink it. To the grievance so complained of, the defendant pleads, **[679]** that he was seised of a tanhouse and premises adjoining the stream, and higher up than the plaintiff's farm, and that he and all those whose estate he had, had immemorially used the water of the stream in the said tanhouse and premises, and returned the water so used therein into the stream, and thereby polluted it. All that is traversed. What the defendant had to prove, in order to sustain his plea, was, not that the owners of the tannery had at all times been accustomed to use the stream for the purposes of their business, but that the owners of the tannery premises of which he was possessed at the time of the committing of the grievances complained of had been so accustomed. That was not proved. A large portion of the tannery premises were erected about twelve years ago: the immemorial right claimed clearly could not apply to those. The only mode in which the plaintiff could meet that enlarged claim was, by new-assigning as he has done,—not, as the learned judge seems to have supposed, that the defendant committed the grievances complained of for other purposes than those alleged in the plea, but that he did it in excess. [Williams, J. Do you admit that twenty years ago the occupiers of the tannery took and fouled as much of the water as they wanted for the purposes of their trade?] It may be assumed that the fact was so: but that would be no evidence of a right on their part to throw in any quantity of filth that might arise from the extended premises. Either the plea must be taken in the sense suggested, and then it is not proved, and the plaintiff is entitled to a verdict upon the traverse; or the plaintiff is entitled to a verdict upon the new-assignment, as in a case of *Wood* v. *Ripley*, where a similar question arose with reference to certain dye-works in Yorkshire a short time ago. In Gale on Easements, 330, 332, it is said, —"As every easement is a restriction upon the rights of property of the owner of the servient **[680]** tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had." "So, too, by the civil law, a party entitled to a flow of water, for irrigation or other purposes, was not allowed to impart the use of it to his neighbours; nor, as it appears, even if he himself purchased the adjoining lands, would he be entitled to take a larger quantity of water than before for the use of his estate; for, in determining the amount of a servitude, regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement tigni immittendi, could not increase the number of beams which his neighbour was bound to support, and might be compelled to remove any additional ones inserted by him." The law is well laid down in *Bealey* v. *Shaw*, 6 East, 208, cited in an earlier part of the same work. There, the mills and works of the plaintiff and defendants were situated on the banks of the river Irwell. The persons under whom the defendants claimed had an antient weir across the stream, by means of which they had an easement to divert a certain quantity of water. The plaintiff erected a mill lower down, to supply which he used the portion of water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir, in 1791, in such a manner as to divert an additional quantity of water, to the injury of the plaintiff's mill, and for this diversion the action was brought. At the trial, Graham, B., told the jury "that the important period for them to attend to, as to the question of right, was in 1791, when it was

clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly en-[681]-larged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claim; that persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use: that every such exclusive right was to be measured by the extent of its enjoyment, and, if the defendants had in 1791, taken more water from the river than had ever been done by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left for himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged, was a continuance of the injury, for which the action lay." A verdict having been found for the plaintiff on this ruling, a new trial was moved for, on the ground that "the evidence of exclusive enjoyment by the defendants and those from whom they claimed, to as much of the water as they had occasion for, increased from time to time as more was wanted, from 1794 downwards, was evidence to be left to the jury of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty years' quiet enjoyment." In giving judgment, Lord Ellenborough said: "The general law as applied to this subject is, that, independent of any partial enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration; but an adverse right may exist, founded on the occupation of another; and, though the stream be [682] either diminished in quantity, or even corrupted in quality, as, by means of the exercise of various trades, yet, if the occupation of the party so taking have existed for so long a time that will raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. Here, it appears, from 1724 downwards there has been a partial enjoyment of the water of the river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff, in 1787, comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years, without objection from any person. Suppose the question had arisen, then, on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shewn that the occupiers of the defendants' premises were then in possession of all the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works, and, for the very purpose of appropriating to themselves more of the water, they enlarged their sluice?" Grose, J., said: "The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it in respect to the premises which they occupied higher up the river. To what extent did that go? It appears, prior to the year 1791, the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, has a [683] right to all the water coming over that weir which had not been carried off by such sluice. Then, to 1791, the persons under whom the defendants claim converted the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it. By so doing they encroached on his right, and deprived him of a benefit which was attached to his estate. It was an extension of a right before exercised by them, and a material injury to the plaintiff." And Le Blanc, J., added: "The true rule is, that, after the erection of works and the appropriation by the owner of land of a certain quantity of the water flowing over it, if the proprietor of other land afterwards takes what remains, the first mentioned owner,—however he might, before such second appropriation, have taken to himself

so much more,—cannot do so afterwards." So, here, the plaintiff had a right to the use of the stream polluted only to the extent to which the immemorial user by the defendant and those under whom he claimed had polluted it; and the evidence abundantly shewed that they never had the extensive right claimed upon the record.

CRESSWELL, J. (*a*). I am of opinion that this rule must be made absolute for a new trial. I have endeavoured, but, I fear, unsuccessfully, to make myself master of what passed at the trial. My Brother Coleridge is said on the one hand to have treated the third plea as claiming an immemorial right on the part of the defendant and those under whom he claimed, to use and to foul as much of the water of the stream as might be wanted for the purpose of the tannery. That being so, **[684]** it is very singular that he should have offered the plaintiff an opportunity to amend his new-assignment. He must have construed the plea as meaning to claim a user extra the purposes of the tannery. It seems to me to be impossible to suppose that he could have taken the view suggested. It is, however, pretty clear that he held the plea to be proved. Now, it is impossible to say that the plea was proved, if it be construed in the larger sense, because there was no evidence of any increase in the tannery business until within the last twenty years. He therefore could not have intended that. The defendant, as it seems to me, is in this dilemma. If the plea is to be construed in the larger sense contended for on his part, the question was not left to the jury. If, on the other hand, it is to receive the more limited construction, the new-assignment is aptly framed to meet it. Quâcunque viâ, therefore, the rule for a new trial must be made absolute. The real case presented upon the record has not been tried. I desire to be understood not to offer any opinion as to which is the proper construction of the plea.

WILLIAMS, J. I am of the same opinion. The real contest between the parties seems to have been this, whether the evidence of the enjoyment of this easement was such as to warrant the jury in finding that it amounted to a right on the part of the defendant to take and foul all the water of the stream which might be required by him for the purpose of his trade of a tanner, to whatever extent. If the evidence established that extensive right in favour of the defendant, he would be entitled to general success in the cause. On the other hand, if, instead of the general right to take any quantity of the water, the defendant had the narrower right only, to take no more of the water than he and those under whom he claimed had been accustomed to take **[685]** for the use of the business as carried on within the time to which living memory reached, that limited right would not justify the defendant, and the plaintiff would be entitled to general success. It was the province of the jury to decide that. I must confess I do not perceive that the state of the pleadings presented any impediment in the way of trying that right. It is difficult to say with certainty what right it is that the pleas,—and more especially the third,—set up. If they are to be understood as claiming the larger right, then, inasmuch as it is clear that that was not admitted by the plaintiff, the case should have gone to the jury. If they had found that the plaintiff had such larger right, the defendant would have been entitled to the verdict on that as well as on the other issues. If, on the other hand, the defendant's right was only such as the plea in its narrower sense would import, the plaintiff would have failed so far as those pleas shielded the defendant, viz. to the extent of the enjoyment of the stream as it was exercised at the time when living memory first applied to the subject. Upon the whole, it seems there has been a miscarriage, and consequently the cause must go down again.

Rule absolute accordingly.

[686] SIMIAN *v.* MILLER. Jan. 30, 1857.

Quære, whether a plea to an action brought against a defendant in this country upon a contract made and executed in France, that the debt had been attached (saisie-arrêtée), pursuant to the Code de Procédure Civile, by creditors of the plaintiff in that country, is any answer either legal or equitable?—Judgment having been signed on the ground that such a plea was not issuable, the court set aside the judgment only upon the terms of the defendant bringing the amount claimed into

(*a*) Cockburn, C. J., was absent on account of indisposition.

court.—Obtaining leave to reply and demur,—held to be no answer to the objection to the plea.

This was an action for goods bargained and sold, and goods sold and delivered, for money paid, and for money found due upon accounts stated.

The defendant, being under terms to plead issuably, pleaded the following pleas,—

First,—never indebted.

Secondly,—that, before action, he satisfied and discharged the plaintiff's claim by payment.

Thirdly,—a set-off for goods sold and delivered, money paid, &c.

Fourthly, that, before action, he satisfied and discharged the plaintiff's claim by delivering to the plaintiff certain goods and chattels, which the plaintiff accepted and received by way of accord and satisfaction of the said claim.

Fifthly,—as a defence on equitable grounds (*a*), the defendant said, that, before and at the time of the accruing of the causes of action in the declaration mentioned, he was and still is a part-owner of a certain ship or vessel called the "Caledonia," and that he never was indebted to the plaintiff otherwise than as such part-owner in manner and form as thereinafter mentioned, and the plaintiff was at the times aforesaid, and still is, an alien and a subject of the empire of France, domiciled and living and carrying on business in, and subject to the laws of, France aforesaid; and that the said goods [687] were bargained and sold and sold and delivered, and the said money was paid, and the said accounts were stated, and the said money became payable, under and by virtue of a contract made in France aforesaid between the plaintiff and one John Punton, then being and as the master of the said ship or vessel, for the supply of provisions and other stores by the plaintiff in and on board of the said ship or vessel, to be used and consumed by the crew and passengers of the said ship or vessel in and on board of the said ship or vessel; and under and by virtue of the said contract the goods in the declaration mentioned were accordingly supplied and delivered by the plaintiff in and on board of the said ship or vessel to and used and consumed by the said crew and passengers as aforesaid, and the said money was paid and the said accounts stated in and about the said supply and delivery thereof: that the plaintiff was before action indebted in France aforesaid to divers creditors of the plaintiff, subjects of France aforesaid, in divers sums of money amounting in the whole to more than the moneys so payable by the defendant to the plaintiff, which said creditors of the plaintiff, according to the law of France aforesaid, after the accruing of the causes of action in the declaration mentioned, and whilst the said John Punton as such master, and whilst the said ship or vessel were in France aforesaid, caused such proceedings to be taken in the courts of law in France aforesaid having jurisdiction in that behalf, that the said debt so accruing due to the plaintiff under and by virtue of the said contract,—being the debt in the declaration mentioned,—was before the commencement of this action seized, arrested, and attached, and made liable, and still is liable, to the said debts of the plaintiff; and John Punton, as such master, and the defendant, became and still are, and each of them is, by reason of the [688] said proceedings, and by the law of France aforesaid, liable to pay the said creditors of the plaintiff the said amounts of their said debts out of the moneys so payable by the said John Punton, as such master, and by the defendant, to the plaintiff; and the payment of the said money claimed by the plaintiff in this present action before the plaintiff should have paid, satisfied, or discharged the said debts of his said creditors, or taken such proceedings in the said court of law in France that the said seizure, arrest, and attachment should be wholly ended and determined, would not according to the law of France in any way excuse or discharge the defendant from the payment to the said creditors of the plaintiff of the said amounts of their said debts, or any part thereof, but the said John Punton, as such master, and the defendant, and each of them, would, according to the law of France, be liable to pay to the said creditors the said amounts of their said debts, notwithstanding his payment to the plaintiff in the present action of the money so claimed to be payable as in the declaration mentioned: and that the plaintiff has not paid, satisfied or discharged the said debts,

(*a*) The words "as a defence on equitable grounds" were inserted upon the suggestion of Willes, J., when the parties were before him at Chambers upon a summons to plead several matters.

or any part thereof, nor taken any proceedings to end or determine the said seizure, arrest, and attachment; but that the debts remained wholly unpaid, unsatisfied, and undischarged, and the said seizure, arrest, and attachment still remained in full force and effect according to the law of France aforesaid, and that, according to the law of France, no action could be brought by the plaintiff against the defendant in respect of the said claim of the plaintiff, during such continuance of the said seizure, arrest, and attachment as aforesaid.

The plaintiff's attorney having signed judgment, on the ground that the fifth plea was not issuable, a summons was taken out before Crowder, J., at Chambers, to [689] set aside that judgment for irregularity; and, that learned judge having referred the matter to the court,

R. Clarke, on a former day in this term, obtained a rule nisi to the same effect. He referred to and proposed to distinguish from the present the cases of *Mines Royal Societies* v. *Magnay*, 10 Exch. 489, *Wodehouse* v. *Farebrother*, 25 Law Journ. Q. B. 18, and *Wood* v. *The Copper-Miners Company*, 17 C. B. 561 (*a*).

(*a*) The affidavit upon which cause was shewn set out a statement of facts, and an opinion of a French advocate as to the French law upon the subject, of which the following are copies:—

"Messrs. M'Gregor & Co., residing in Scotland, are owners of English steamers which have made on account of the French government various voyages from Marseilles to Constantinople and other ports of the Mediterranean and Black Sea. Mr. Simian, of Marseilles, was employed to furnish provisions for the passengers on board those vessels. This undertaking has not succeeded; and Mr. Simian, to escape the proceedings of his creditors, has fled to England, where he has been declared bankrupt. On the other hand, certain creditors have made attachments in the hands of the captains of the three steamers. The attachments in the hands of Captain Fraud, commanding the 'Empress,' one of the said steamers, are in the possession of the undersigned; those intimated to the other two captains have not been handed to him; but the existence of those documents could be easily established. Under these circumstances, Mr. Simian, or the syndic of the bankruptcy declared in England, demands of the owners of these vessels the payment of the sums due from the captains.

"The question proposed to the undersigned, is, whether, according to the French law, the payment demanded can be made under the circumstances of the said attachments, and before they be removed.

"There can be no doubt on the point. The attachment is an act by which a creditor seizes a sum due to his debtor by other parties. The effect of it is, to prevent that third party from paying, and to place the sum due from him under the hands of justice. If, notwithstanding the attachment, the third party should pay his creditor, he would be obliged to pay a second time, from having disregarded the force of an attachment legally laid. This results from Article 557 of the Code of Civil Procedure, —'Every creditor may by virtue of titles authenticated, or privés, attach in the hands of a third party the sums and effects belonging to his debtor, or oppose their transmission.' *

"The attachments made in the hands of Captain Fraud have been made in the form prescribed by the above article. One of them, made in the name of three creditors, Mr. Simian and Messrs. Michel and Chobert, has been even declared valid [valable], by judgment of the court of Marseilles, of the 19th of April, 1856; and it has been ordered that Captain Fraud should pay into the hands of those creditors the sums he may owe, without prejudice to the rights of the other creditors who have taken similar proceedings. That judgment is added to the present note. Thus, Captain Fraud or his owners will be obliged to pay to the creditors in France the sums due from them to Simian. They cannot be obliged to pay a second time in England.

"The attachments in the hands of the captain evidently prevent the owners from

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* "Tout créancier peut, en vertu des titres authentiques, ou privés, saisir-arrêter entre les mains d'un tiers les sommes et effets appartenant à son débiteur, ou s'opposer à leur remise."

[690] Montague Smith, Q. C., and H. Lloyd, shewed cause. The judgment was properly signed, the fifth plea clearly not being an issuable plea. It sets up a supposed suspension of the plaintiff's remedy in France, which undoubtedly affords no answer at law. The rule upon this subject is well stated by Parke, B., in delivering [691] the judgment of the Exchequer Chamber in *Ford* v. *Beech*, 11 Q. B. 852, 867, —"It is a very old and well-established principle of law, that the right to bring a personal action, once existing, and by the act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in *Platt* v. *The Sheriffs of London*, Plowd. 35, 36, 'And, if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge for ever.' And in *Lord North* v. *Butts*, 2 Dyer, 139 b., 140 a., it is said: 'A thing personal suspended, or action personal suspended for an hour, is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended.' And in *Woodward* v. *Lord Darcy*, Plowd. 184, it is said: 'for, a personal action once suspended by the act or agreement of the party is always extinct, and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished.' The principle thus laid down is repeated throughout the text-books of authority, and recognised and applied through a long course of decision. And in *Cheetham* v. *Ward*, 1 Bos. & Pul. 630, 633, it is said by Lord Chief Justice Eyre 'that the principle is now acknowledged, that, where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged'" (*b*). Then, does the plea [692] present any equitable defence? It has been decided over and over again, that, to make a good equitable defence, the plea must shew a complete bar, and present grounds upon which a perpetual and unconditional injunction would be granted in a court of equity: *Mines Royal Societies* v. *Magnay*, 10 Exch. 489; *Wodehouse* v. *Farebrother*, 25 Law Journ. Q. B. 18; *Wood* v. *The Copper-Miners Company*, 17 C. B. 561. [Willes, J. This was put rather upon the ground that it amounted to an assignment.] It is somewhat analogous to a plea of foreign attachment, which, in *Magrath* v. *Hardy*, 6 Scott, 627, 4 N. C. 782, was held to be no answer unless it shewed that execution had been executed. [Willes, J. That turned upon the particular terms of the custom. Cockburn, C. J. Is it competent to the French creditor to substitute himself for Simian, and compel the defendant to pay the debt to him?] No: it is a mere stop or distringas, which may be removed in many ways, and then the plaintiff's right would revive; and this shews that the plea cannot be good either as a legal or an equitable defence. It is not like the plea in *Gould* v. *Webb*, 24 Law Journ. Q. B. 205. There, the defendant pleaded, as to 50*l*., part of the plaintiff's demand, &c., that an action had been brought against the plaintiff in the Supreme Court of the state of New York, for a sum exceeding 50*l*.; that, by process duly issued out of the said court, and executed on the defendant, the said sum of 50*l*. due and owing from the defendant to the plaintiff, was attached in the defendant's hands, according to the laws of the said state, to satisfy the demand in the action; that judgment was afterwards recovered in the said court, and execution was issued to the sheriff of New York, whereupon the defendant was obliged, by the laws of the state, to pay, and did pay, over to the sheriff the value of the said sum of 50*l*., deducting the necessary expenses of the [693] attachment. The plea

paying: that is a consequence of Article 216 of the Code de Commerce, —'Every proprietor of a vessel is civilly answerable for the acts of the captain, and bound by the engagements contracted by the latter for whatever relates to the vessel and the voyage.'**

"Thus, if the captain paid Simian, he would commit a wrong towards the attaching creditors, for which the owners would be responsible; and the latter would personally do the same wrong if they themselves paid.

"I therefore declare, that, according to the French law, Mr. Simian, or the syndic of his bankruptcy, cannot proceed against the owners until after removing the attachments. "Am. Estrangier, Advocate.

"Marseilles, 13 Dec. 1856."

(*b*) And see *Gibbons* v. *Vouillon*, 8 C. B. 483.

** "Tout propriétaire de navire est civilement responsable des faits du capitaine, pour ce qui est relatif au navire et à l'expédition."

further alleged that the plaintiff and the defendant were citizens of the said state, and the defendant was resident there, and subject to the jurisdiction and process of the said court; and that, by the laws of the state, the defendant was discharged and acquitted of the said sum of 50l. Lord Campbell said: "I think the thirteenth is a good plea. It substantially avers that the law of foreign attachment prevails at New York, and that the defendant as garnishee had by process of law been compelled to pay over to the sheriff of New York a debt of 50l. which he owed to the plaintiff. Pro tanto, I think that is a good answer to the present action."

Byles, Serjt., and R. Clarke, in support of the rule. It is enough that the plea presents a fair question. It may be open to a demurrer, or it may be that the plaintiff might have applied under the 52nd section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, to strike it out as an embarrassing plea. This action is brought in respect of a contract made and to be performed in France, and the interpretation of which must consequently be according to the laws of that country: and it appears that by the law of France the debt may be attached, and that such attachment has the effect of completely defeating (until removed) the remedy of the creditor. It is not like the case put, of a suspension of a cause of action by consent of the parties. An attachment under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 61, may be pleaded. [Cresswell, J. Have you any authority for that? Cockburn, C. J. Could the creditor in this case put himself in the place of the plaintiff, and sue the debtor? H. Lloyd. He could not. By the law of France, a debt may be attached by what is called an arrêt. By another proceeding, called a saisie-arrêt, the creditor may entitle himself to judgment [694] and execution.] At all events, the plaintiff by applying for leave to reply and demur, admits that there is something to reply to: *Trott* v. *Smith*, 2 Dowl. N. S. 278. [Cresswell, J. In *Trott* v. *Smith*, an application for time to reply was held to be a waiver of an objection to a plea on the ground that it was not issuable. But the question here is, whether the plaintiff precludes himself from objecting that the plea is not issuable, by merely asking leave to reply and demur. We must consider whether the plea is issuable or not.]

Per Curiam. We think the rule may be made absolute, upon the defendant's bringing the money claimed into court to abide the order of the court on the result of a judgment on a demurrer to the plea.

Lloyd. The defendant should abandon the other pleas.

Cockburn, C. J. I see no reason why the defendant should be shut out from his set-off. The rule must be made absolute, the costs to abide the event.

Rule absolute accordingly.

[695] In the Matter of the Arbitration between Edward Beck and Francis Jackson. Jan. 28, 1857.

Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, and without finally consulting, the third, cannot be supported.

By articles of agreement made the 26th of August, 1856, between Edward Beck, of Newcastle-upon-Tyne, slater, of the one part, and Francis Jackson, of the same place, agent, of the other part, - reciting that disputes and differences had arisen and were pending between the said parties thereto touching or concerning or arising out of certain goods alleged to have been sold and delivered by the said Edward Beck to the said Francis Jackson, and at his request, but which sale and delivery were disputed by the said Francis Jackson, and in order to put an end to the said differences and disputes, and to obtain an amicable adjustment thereof, the said parties thereto had respectively agreed to refer the same to the award, arbitrament, final end, and determination of John Edward Watson, of Newcastle-upon-Tyne, architect, a person chosen by or on behalf of the said Edward Beck, and John Wardle, of the same place, architect, a person chosen by or on behalf of the said Francis Jackson, and to such third person as should be chosen and agreed upon by the said John Wardle and John Edward Watson before proceeding on the said reference, to arbitrate, adjudge, and determine jointly with them of and concerning the said matters in difference, in manner thereinafter mentioned,—it was witnessed, that the said Beck and Jackson did for themselves severally and for their respective partners, heirs, &c, agree to stand to, obey, abide by, and perform the award, &c., of Wardle and Watson and of such third person as should be

chosen by them to arbitrate, adjudge, and determine jointly with them [696] as afore said, or any two of them, of and concerning all the said matters in difference between the said parties thereto, so as the said award of the said arbitrators, or any two of them, were made in writing under their hands, ready to be delivered to the said parties in difference, &c., on or before the 14th of September next, or on or before such subsequent day or days as the said arbitrators, or any two of them, should at any time or from time to time, by writing under their hands, appoint for making and publishing their award in the premises, and which award of the said Wardle and Watson and such third person as aforesaid, or any two of them, so made as aforesaid, should be binding, final, and conclusive upon all the said parties thereto, and their respective executors, &c.: And it was thereby further agreed that the costs of the action brought by Beck against Jackson, and of preparing, ingrossing, stamping, and executing that agreement, and of the said reference, and of the award to be made in pursuance thereof, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators or any two of them, who should by their said award order and direct by whom and to whom and in what proportions and manner the same should be paid, &c., &c.: And, further, that, if either of the said parties in difference should in the opinion of the arbitrators, or any two of them, by non-attendance, or non-production of such books, papers, or writings as might be required for the purposes of the said reference, or in any other manner, wilfully delay or impede the said arbitrators, or any two of them, in proceeding with the said reference or making their said award, the said arbitrators, or any two of them, should be at liberty to proceed ex parte, after two days' clear notice to the party or parties causing such delay or impediment as aforesaid, &c.

The two arbitrators named in the agreement duly [697] appointed one Dobson to be "the umpire or third party."

On the 19th of November, 1856, two of the arbitrators, viz. Dobson and Watson, made an award, the substance of which was as follows:—

"The said John Edward Watson, John Wardle, and John Dobson, having taken upon themselves the burthen of the said reference, and having on divers days and times duly heard and examined the said respective parties and their respective witnesses, and having duly inspected, weighed, and considered all and singular the books, accounts, and statements by them the said parties respectively produced and given in evidence on the said reference,—We, the said John Edward Watson and John Dobson, two of the said arbitrators, do make and publish this our award in writing of and concerning the matters so referred to us and the said John Wardle, in manner following, that is to say, we the said John Edward Watson and John Dobson, two of the said arbitrators, do find and award that there is now due and owing from the said F. Jackson to the said E. Beck the sum of 138l. 17s. 5d.; and we do award, order, and direct, that the dividend now payable to the creditors of Thomas Alexander of Newcastle-upon-Tyne aforesaid, builder, shall be received by the said E. Beck for and in respect of the sum of 149l. 2s. 5d.: And we do further award and direct that the sum of 82l. 5s. 4d. shall be paid by the said F. Jackson to the said E. Beck, on, &c., at, &c., and that the receipt of the said dividend and of the said sum of 82l. 5s. 4d. shall be accepted by the said E. Beck as and for, and the same is hereby declared by us the said J. E. Watson and J. Dobson to be, in settlement of all disputes and differences between the said E. Beck and F. Jackson, and referred to arbitration in and by the said hereinbefore recited articles of agreement as therein mentioned: And we the said J. E. Watson and J. Dob-[698]-son do further award, order, and direct that the said E. Beck and F. Jackson shall bear and pay their own respective costs of and about the action brought by the said E. Beck against the said F. Jackson, and of preparing, &c., the agreement, and of, in, and about the reference in all other respects: And we do further award, order, and direct that the costs and charges of the said arbitrators in and about the said reference, and the costs and charges of this award, amounting together to 72l. 17s., shall in the first instance be borne and paid by the said E. Beck, and the said F. Jackson shall repay to the said E. Beck the sum of 36l. 8s. 6d., being one moiety of the said sum of 72l. 17s., within one week after the same shall be demanded by a notice in writing signed by the said E. Beck."

F. Russell, on a former day in this term, obtained a rule, on behalf of Mr. Jackson, calling upon Beck to shew cause why the award should not be set aside, on the grounds—first, that the same was made by two of the arbitrators without notice to

the third, and without dissent by him to its terms, or his withdrawal from the reference,—secondly, that the same was made by an arbitrator who had not attended all the meetings,—thirdly, that the same was made before the case was closed, and without affording Jackson an opportunity of producing his witnesses,—fourthly, that a meeting was held of which Jackson had no notice,—fifthly, that Beck and his witnesses were examined in the absence of Jackson, and without his being allowed to be present,—sixthly, that there was an excess of jurisdiction in giving any direction as to dividends. The motion was founded upon the affidavits of Jackson and of Wardle (one of the arbitrators), which clearly shewed that the award had been made by Dobson and Watson without consulting Wardle or giving Jackson an opportunity to produce **[699]** evidence which he had intimated that it was his intention to offer.

C. Pollock now shewed cause. With respect to the last ground of objection, it is one which might very well have been urged by Beck, if he were moving to set aside the award for uncertainty; but it hardly lies in the mouth of Jackson to object that the direction as to the mode of payment was not within the compass of so general a reference as this. [Cresswell, J. Suppose Alexander objected, and Beck did not receive the 56l. 12s. 1d., would Beck be concluded to that extent as against Jackson?] Clearly he would. [Cresswell, J. It seems to me that the arbitrators have left it altogether uncertain whether they meant to fix Jackson with the whole amount of 138l. 17s. 5d., or that he should be liable only for the balance, and that that balance and the prospect of obtaining the 56l. 12s. 1d. from the dividend should be taken in satisfaction of the whole. The circumstance of Beck's agreeing that the award shall be good in that respect, does not preclude the other party from contending that it is bad.] The award specifically mentions the sum which Jackson is to pay. [Crowder, J. How long is Jackson to be left in doubt as to whether he is liable for the whole sum awarded, or for the balance only?] It is submitted he could never be called upon under this award to pay more than the 82l. 5s. 4d. [Crowder, J. I doubt that. Cresswell, J. This difficulty may probably be got over by sending the matter back to the arbitrators.] All the other objections are completely answered by the affidavits of Beck, of his attorney, and of Wardle; which shew that ample opportunity was given to Jackson to produce any additional evidence he might have, that no complaint was ever made by him as to the mode in which the proceedings were being conducted, and that **[700]** the circumstance of the award having been made by Dobson and Watson only was owing to the absence of Wardle from Newcastle on the last day of the extended time for publication.

Cresswell, J. I find the rule thus stated in Russell on Arbitration, p. 209,—speaking of the duty of joint arbitrators,—"As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all: for, the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision: *Plews* v. *Middleton*, 6 Q. B. 845; *Little* v. *Newton*, 9 Dowl. P. C. 437, 2 M. & G. 351, 2 Scott, N. R. 509; *Stalworth* v. *Inns*, 13 M. & W. 466, 2 D. & L. 428. So necessary is it that the arbitrators should act jointly, that, where referees in the case of a joint arbitration agreed to carry on their inquiries apart, and to examine the witnesses separately, and, if they concurred in the result, to decide accordingly,—it was laid down by the court that such a course of proceeding would not be sanctioned in any instance, but that an award made on facts so ascertained would be set aside as procured by 'undue means,' since such a mode of examination was a departure, not merely from established courses of procedure, but from natural justice: *Plews* v. *Middleton*. If two arbitrators meet and agree on the terms of an award, though they afterwards, when it is drawn up, fix their respective signatures to it at different times and different places, the court of Common Pleas seem inclined to doubt whether they would hold an award void for the objection that the execution ought to have been by both **[701]** together: *Little* v. *Newton*. But, in a late case,—*Stalworth* v. *Inns*,—the court of Exchequer were strongly of opinion that the award should have been reduced into writing by the common consent of the arbitrators, and jointly executed by them; on the principle that the law required every judicial act done by several should be completed in the presence of each other, and that, in the case of arbitrators, it was possible that at the last moment one might change his opinion. The court added a hope, that, having

had this intimation from the court, arbitrators would in future take care that the execution of the award should be joint."

F. Russell. That doctrine has since received confirmation by the court of Queen's Bench in a case of *In re Lord and Lord*, 5 Ellis & B. 404, where Coleridge, J., in delivering the judgment of the court, says: "It is now clearly established, that every judicial act to be done by two or more, must be completed in the presence of all who do it; for, those who are to be affected by it have a right to the united judgment of all up to the very last moment. In *Stalworth* v. *Inns*, where it was sought to set aside an award on the ground that the two arbitrators had executed it at different times and places, the court of Exchequer refused to do so because, if they did, there could be no appeal against their decision; but they intimated that they would grant no attachment, nor make any order for payment of the sum awarded. They left the party to bring his action, expressing a hope that, the strong opinion of the court being known, arbitrators would in future take care that their execution was joint. It appears to us that what is true of the execution of the award by arbitrators, is equally true of their appointment of an umpire: this is a judicial act of the last importance to the parties who intrust them with the absolute power [702] of constituting the judge who is to decide the controversy between them, about whose appointment the arbitrators may differ up to the last moment, and about which the parties have a right to the exercise of their joint judgment up to its entire completion" (*a*).

Cresswell, J. I think it is impossible to get over this objection. The rule to set aside the award must be made absolute.

The rest of the court concurring,

Rule absolute.

O'Brien *v.* Sir William Henry Don, Bart. Jan. 31, 1857.

[S. C. 26 L. J. C. P. 96; 3 Jur. N. S. 318; 5 W. R. 269.]

The defendant was arrested on a ca. sa. upon a judgment obtained against him in this court, and was discharged by order of a judge, on the ground that he had at the time of the arrest obtained his protection from process under a Scotch sequestration. Upon a motion to rescind that order, and for leave to issue another ca. sa.:—Held, that it was not competent to this court to inquire into the trading upon which the sequestration was founded,—although fraud was suggested.

In the year 1850, the plaintiff obtained a judgment against the defendant in this court for 920l. 4s. The defendant shortly afterwards went to reside in the United States, and remained there until some time in the year 1855, when he came to this country for about three weeks, and then went to Germany, where he continued to reside until the beginning of 1856. In May last, he went to Edinburgh for the purpose of performing as an actor at the theatre there, where he presented a petition for sequestration to the Lord Ordinary, under the statutes 2 & 3 Vict. c. 41, and 16 & 17 Vict. c. 53, in which petition he was described as a "trader, underwriter, and dealer in stock." A sequestration was duly awarded upon that petition on the 5th of July, and a warrant of [703] protection granted to the defendant "against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee." A meeting of the defendant's creditors accordingly took place on the 25th of July, when a trustee was duly elected; and at that meeting the defendant made a proposal for the consideration of the creditors at the next meeting, of 4s. in the pound, to be paid in three, six, and twelve months; and the majority in number and value of the creditors then present at that meeting resolved that the personal protection of the defendant ought to be renewed for one year; and a renewal of his protection was accordingly granted.

On the 29th of July, the defendant was arrested by an officer of the sheriff of Lancashire, under a ca. sa. on the above judgment, purporting to be issued by the plaintiff in person, though in truth issued by a clerk of Messrs. Lewis & Lewis. The sheriff declining to discharge the defendant out of custody, upon the production of the proceedings in the sequestration and the warrant of protection, a summons was taken

(*a*) And see *Peterson* v. *Ayre*, 14 C. B. 665.

out calling upon the plaintiff to shew cause why the defendant should not be discharged, which summons was duly served at the office of Messrs. Lewis & Lewis, as the plaintiff's attorneys: and on the 31st Crowder, J., "upon hearing counsel for the defendant, and the attorneys or agents for the sheriff of Lancashire, and upon reading the several affidavits of the defendant and J. H. Wilton," ordered that the defendant be discharged immediately from custody, "with costs to be paid by the sheriff, unless the sheriff should satisfactorily answer the affidavit of J. H. Wilton in a week after having a copy thereof." On the 22nd of August, a summons was obtained to rescind that order: this summons came on for hearing before Bramwell, B., on the 29th, and was by him referred to the court.

[704] Shee, Serjt., in Michaelmas Term last, instructed by Messrs. Lewis & Lewis as attorneys for the plaintiff, obtained a rule calling upon the defendant to shew cause why the order of Crowder, J., should not be set aside, and why the plaintiff should not be at liberty to issue a new writ of ca. sa. against the defendant. The affidavits upon which the rule was obtained were those of the plaintiff and of Mr. J. G. Lewis. The former pledged his belief that the sequestration was founded on a fraudulently alleged trading, and was obtained for the purpose of protecting the defendant from arrest at his suit, and not with the intention of bonâ fide carrying out the objects thereof; that he (the plaintiff) had been acquainted with the defendant for many years, and that during the whole of such period the defendant never was a trader; and that the debts proved under the sequestration were none of them trade debts, but were all debts due to private personal friends of the defendant. Mr. Lewis's affidavit stated that, on the summons to discharge the defendant from custody being served at his office, it was returned to the defendant's attorneys with an intimation, that, as the ca. sa. was sued out by the plaintiff in person, he could not appear to the summons; and that his partner and himself had been instructed by the plaintiff to appear as his attorneys upon this application since the 31st of July.

Montague Smith, Q. C., now shewed cause (*a*). The defendant was clearly entitled to be discharged from custody upon the production of the warrant of protection: *Jones* v. *Anstruther*, 1 Exch. 867. The 18th section of the 2 & 3 Vict. c. 41, enacts "that the warrant granting **[705]** protection or liberation, or a copy thereof certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in meditatione fugæ, or ad factum præstandum, or for any criminal act." The affidavits upon which this rule was obtained disclose no ground upon which this court can inquire into the validity of the protection granted to the defendant. [Williams, J. Suppose an application were made to discharge a party from arrest here, on the ground that he had obtained a certificate in the court of bankruptcy, would it be any answer to say that the defendant was not a trader?] Clearly not. This court cannot upon a motion of this sort try the validity of the proceedings under the sequestration. If any imposition has been practised upon the Scotch court, the remedy must be sought there.

Shee, Serjt., in support of the rule. The grounds of this motion are, that the order for the defendant's discharge from custody was obtained upon an ex parte application, and without notice to the plaintiff; and that the sequestration, and the consequent protection, were fraudulently obtained, the defendant having by his petition falsely represented himself to be "a trader, underwriter, and holder of railway and other stock, and as such within the description of persons whose estates might be sequestered, as contained in the 2 & 3 Vict. c. 41," when in point of fact he was not and never had been a trader at all. First, —as to the want of notice. Messrs. Lewis & Lewis not being the plaintiff's attorneys at that time, the summons should have been served upon the plaintiff himself. [Smith The affidavits shew **[706]** numerous communications with Messrs. Lewis & Lewis, in which they were assumed to be, and were treated as, the plaintiff's attorneys. Cresswell, J. Is there not an objection a little higher up? Can an outlaw issue a writ in person?] Substantially the outlawry

(*a*) It appeared by the affidavits that the plaintiff had been outlawed, at the suit of one Ford, on the 24th of May, 1849; and that the outlawry was not formally reversed until the 15th of October last.

was long since gone, though the formal entry of reversal appears not to have been made until the 15th of last October. [One of the Messrs. Lewis, who was in court, admitted that the ca. sa. was issued by his clerk with his sanction, he having an interest in the judgment.] The main point arises upon the sequestration. Although the courts of this country give full faith and credence to the judgment or adjudication of a foreign court of competent jurisdiction; yet, if it is shewn that such judgment or adjudication has been fraudulently obtained for the purpose of defeating or evading the process of our courts, the party will not be allowed to avail himself of it. The validity of a foreign judgment may always be inquired into, where fraud is suggested: *The Bank of Australasia* v. *Harding*, 9 C. B. 661. [Cresswell, J. That is, where you are seeking to enforce it here.] The affidavits upon which this rule was obtained distinctly allege that the defendant was not a trader, and that his assumption of trading was a mere sham; and he makes no affidavit in answer. [Cresswell, J. How can we inquire into that here? In the case of *Barrow* v. *Poile*, 1 B. & Ad. 629, the after-acquired goods of a certificated bankrupt having been taken in execution for a debt which might have been proved under the commission, the court, on motion, set aside the fi. fa., and refused to put the bankrupt to an auditâ querelâ, though it was stated on behalf of the creditor that the bankruptcy was collusive, and that, in an action by the assignees, a jury had found against the plaintiffs as to the fact of the trading. Lord Tenterden, in giving judgment, there says,—"It is expressly enacted by the 121st section of the statute [6 G. 4, c. 16], that **[707]** every bankrupt who shall have surrendered and conformed himself, and obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from all demands proveable under the commission. This judgment-debt was clearly so proveable. It is admitted, that, if an action had been brought on this judgment, the defendant might have pleaded his bankruptcy and given the certificate in evidence, and that the certificate would have been conclusive; and also, that, if he had been taken in execution upon the judgment, or detained in prison upon it, he might have been discharged by a judge on production of his certificate, in which case also it would have been conclusive. But it is said the certificate is conclusive in these cases only. Whether the language of the 126th section is sufficiently general to include the present case or not, does not seem to me to be very material; it points out the course of proceeding in particular instances, but it cannot control the general words of the 121st section; and, it being manifest that the plaintiff's demand is one which might have been proved under the commission, I think we should not give effect to the words of that section, which provides that the bankrupt obtaining his certificate shall be discharged from every demand proveable under the commission, if we were to reject the present application, and put the defendant to the course which has been suggested. If the certificate could be brought within any of the cases specified in the 130th section, where it is declared that a certificate, if obtained, shall be void, as by gaming, or other misconduct of the bankrupt, the question would be very different: but nothing of this kind is suggested: the only endeavour here is, to throw a doubt upon the trading and petitioning-creditor's debt" (*a*).] **[708]** It must be confessed that there would be great difficulty in distinguishing that case from the present.

Cockburn, C. J. I am of opinion that this rule must be discharged. The case of *Barrow* v. *Poile* is directly in point. The protection granted under the Scotch sequestration act 2 & 3 Vict. c. 41, s. 18, is quite analogous to the certificate under the 205th section of our Bankrupt Act, 12 & 13 Vict. c. 106. It is clearly established, that, where a bankrupt has obtained his certificate, the petitioning-creditor's debt, the trading, or the act of bankruptcy, cannot be called in question in a proceeding like this. The principle is the same as applied to the warrant of protection granted under a Scotch sequestration.

Cresswell, J. I am entirely of the same opinion. With respect to the notice, I think Messrs. Lewis were the proper persons to receive notice of the summons for

(*a*) And see *Pennell* v. *Butler*, 18 C. B. 209. By the 20th section of the 17 & 18 Vict. c. 119, it is enacted that a trader petitioning for an adjudication of bankruptcy shall forthwith after filing his petition, and before adjudication, make it appear to the satisfaction of the court that his available estate is sufficient to produce 150*l.* at the least:—Held, that the decision of the court of bankruptcy as to value is conclusive.

the defendant's discharge from custody. Although they might not strictly speaking be his attorneys, they clearly were his agents for that purpose.

The rest of the court concurring,

Rule discharged, with costs.

[709] CUMBERLEGE AND ANOTHER *v.* HENRY LAWSON. Jan. 23, 1857.

[S. C. 26 L. J. C. P. 120; 5 W. R. 237.]

To a declaration upon an indenture, described as made between R. G., of the first part, the defendant and one T. L. of the second part, and the plaintiffs of the third part, whereby the defendant and T. L. jointly and severally covenanted with the plaintiffs for the payment by R. G. of certain annual premiums, the defendant (setting out the indenture in hæc verba, shewing that it was made between R. G. of the first part, the defendant and T. L. and one Pearce of the second part, and the plaintiffs of the third part), pleaded "that the said indenture was made and executed by him, in the faith that Pearce should join therein or execute the same, and that Pearce never did join therein or execute the same:" Held, bad, it not appearing that the defendant's execution of the deed was upon condition that his execution thereof should be void, if the deed was not executed by Pearce, the other co-surety. The plaintiffs replied, "on equitable grounds," that, after the making and executing of the indenture in the plea mentioned by the defendant and R. G. and T. L., and before the time for payment of the instalments had arrived, R. G., the defendant, and T. L., having notice that Pearce had not joined in nor executed the indenture, by a note in writing consented and agreed that they would be liable upon the indenture, and that their execution thereof should be valid and binding upon them although Pearce had not executed it; and that the plaintiffs relied and acted upon such consent and agreement:—Quære, whether the replication shewed any equitable answer to the plea, if well pleaded?

The declaration stated, that, on the 7th of February, 1844, by a certain indenture made between one Robert Goodwin of the first part, and the defendant and one Thomas Lawson of the second part, and the plaintiffs and Sir G. W. Prescott, Bart., since deceased, of the third part,—after reciting that the said Robert Goodwin had effected a policy of assurance on his own life in the Anchor Life-Assurance Company, whereby the funds and other property of the said company were charged with and rendered subject and liable to the payment to the executors, administrators, or assigns of the said Robert Goodwin, of the sum of 600*l.*, within three months after satisfactory proof of his decease, subject to the payment of the annual premium and to the provisions in the said policy expressed; and reciting that the said Robert Goodwin had agreed with the plaintiffs and the said Sir G. W. Prescott for the loan of 85*l.*, on the security of an assignment of the said policy, and the joint and several covenants of the said Robert Goodwin and the defendant and the said Thomas Lawson,—it was witnessed, that, in consideration of the sum of 85*l.* paid to [710] the said Robert Goodwin by the plaintiffs and the said Sir G. W. Prescott, he the said Robert Goodwin did thereby assign unto the plaintiffs and the said Sir G. W. Prescott the said recited policy, and the moneys thereby assured, and all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, moneys, and premises unto the plaintiffs, subject to the proviso thereinafter contained, that is to say, provided always, that, in case the said Robert Goodwin, his heirs executors, or administrators, should pay to the plaintiffs and the said Sir G. W. Prescott, their executors, administrators, or assigns, the said principal sum of 85*l.*, by equal quarterly payments of 7*l.* 10*s.* on each succeeding 7th of May, 7th of August, 7th of November, and 7th of February, until the whole of the said principal sum should be paid, together with interest at 5*l.* per cent. per annum on so much of the said principal sum as should from time to time remain unpaid,—the first of such instalments to be paid on the 7th of May then next,—then and in that case, and the covenants thereinafter contained being fully performed, the said indenture and the assignment thereby made should be null and void; and the defendant did thereby covenant with the plaintiffs and the said Sir G. W. Prescott, that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of

them, or their or some or one of their executors or administrators, would pay to the plaintiffs and the said Sir G. W. Prescott, their executors, administrators, or assigns, the said instalments and interest on the several days and times aforesaid, and that, if default should be made in payment of any or either of the said instalments and interest, or any part thereof as aforesaid, then that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of them, their or some or one of their executors or administrators, would **[711]** pay to the plaintiffs and the said Sir G. W. Prescott, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as should remain unpaid; and did further covenant that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of them, their or some or one of their executors or administrators, would, from time to time during the life of the said Robert Goodwin, until all moneys secured by the said indenture should be fully paid and satisfied, pay the premiums, duty, and expenses which ought to be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy: That the said Robert Goodwin and the defendant and the said Thomas Lawson had not, nor had any or either of them, paid the said sum of 85*l.*, or any part thereof, or any interest on the same, or any part thereof, and the whole of the said principal sum, and all such interest as aforesaid respectively remained and were wholly due and unpaid, contrary to the covenant of the defendant in that behalf: That, although all the moneys secured by the said indenture had not been fully paid and satisfied, and although in the life time of the said Robert Goodwin a certain premium, to wit, the sum of 14*l.* 12*s.*, was forgotten and ought to have been paid for keeping the said policy on foot, the said Robert Goodwin and the defendant and the said Thomas Lawson did not, nor did any of them, pay the said premium, or any part thereof, but default was made in the payment thereof, contrary to the said covenant of the defendant in that behalf: And that, by reason of the premises, the plaintiffs and the said Sir G. W. Prescott were entitled to receive the amount of the said last mentioned premium, but the said Robert Goodwin and the defendant and the said Thomas Lawson had not nor had either of them paid the same, or any part thereof, but the same remained and was wholly due **[712]** and unpaid, contrary to the defendant's covenant in that behalf: And the plaintiff claimed 200*l.*

Second plea, that the indenture in the declaration mentioned was and is in the words and figures following, —"This indenture, made the seventh day of February, 1844, between Robert Goodwin, of, &c. (who is hereinafter for the sake of brevity styled 'the said borrower'), of the first part, Henry Lawson, of, &c., Thomas Lawson, of, &c., and Joseph Pearce, of, &c. (sureties of the borrower), of the second part, and Nathaniel Cumberlege, of, &c., Sir G. W. Prescott, of, &c., and Edward Baylis, of, &c., of the third part: Whereas, by a policy of assurance of the Anchor Life Assurance Company, dated the 6th of July 1843, and numbered 275, the funds and other property of the said company are charged with and rendered subject and liable to the payment to the executors, administrators, or assigns of the said borrower of 600*l.* within three months after satisfactory proof of his decease, subject to the payment of the annual premium and to the provisions in the said policy expressed: And whereas the said borrower hath agreed with the said parties hereto of the third part, for the loan of 85*l.* on the security of an assignment of the said policy, and joint and several covenants of the said borrowers and of the parties hereto of the second part hereinafter contained: Now this indenture witnesseth, that, in consideration of the sum of 85*l.* to the said borrower paid by the said parties hereto of the third part immediately before the execution of these presents, the receipt whereof the said borrower doth hereby acknowledge, the said borrower doth by these presents grant, bargain, sell, assign, and transfer unto the said parties hereto of the third part, their executors, administrators and assigns, all that the said recited policy, and the money thereby assured, and all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, moneys, **[713]** and premises, unto the said parties hereto of the third part, their executors, administrators, and assigns, subject nevertheless to the proviso hereinafter contained: And the said borrower doth hereby irrevocably constitute and appoint the said parties hereto of the third part, their executors, administrators, and assigns, to be the attorneys and attorney of the said borrower, his executors and administrators, and at his or their costs and charges to

ask, demand, sue for, recover, retain, and receive of and from the said company, and all other persons who may pay the same, all and every sum and sums of money which shall become payable by virtue of the said policy, and to give sufficient receipts and discharges for the same, and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever relative to the premises, as fully to all intents and purposes as the said borrower, his executors or administrators, might or could do in his or their own proper person or persons: and whatsoever the said attorneys or attorney shall lawfully do or cause to be done in or about the premises the said borrower doth hereby, for himself, his heirs, executors, and administrators, covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that he the said borrower, his executors or administrators, will allow and confirm: And the said borrower doth declare that the person or persons, company or companies, paying to the said attorneys or attorney any sum or sums of money on account of the said policy, shall be exempt from all liability of seeing to the application thereof, and shall not be concerned to inquire or take notice whether default has been made in payment of the moneys and interest hereby secured, or whether the said moneys or interest, or any part thereof, still remain due or unpaid: Provided always, that, in case the said borrower, his heirs, executors, or administrators, shall pay unto the said parties hereto of the third part, their exe-**[714]**-cutors, administrators, or assigns, the said principal sum of 85*l.* by equal quarterly instalments of 7*l.* 10*s.* each, on each succeeding 7th of May, 7th of August, 7th of November, and 7th of February, until the whole of the said principal sum shall be paid, together with interest at five per cent per annum on so much of the said principal sum as shall from time to time remain unpaid, —the first of such instalments to be paid on the 7th of May next,—then and in that case (and the covenants hereinafter contained being fully performed) these presents, and the assignment hereby made, shall be null and void: And the said borrower and the said parties hereto of the second part, do hereby, for themselves, their heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said instalments and interest on the several days and times aforesaid; and that, if default shall be made in payment of any or either of the said instalments and interest, or any part thereof, as aforesaid, then that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as shall remain unpaid; and do further covenant, in manner aforesaid, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will from time to time during the life of the said borrower, until all moneys secured by these presents shall be fully **[715]** paid and satisfied, pay the premiums, duty, and expenses which ought to be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy: and that, in case default shall be made in payment of any such annual payments, duty, or expenses, it shall be lawful for the said parties hereto of the third part, their executors, administrators, and assigns, from time to time, so long as any money shall remain secured by these presents, to keep on foot such assurance as aforesaid, and, in case of the forfeiture or determination of the said policy, to renew the same policy, or effect a substituted policy with the said company for the like amount upon the life of the said borrower, and to pay or retain the premiums and other expenses thereon: and that the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will, upon request, pay unto the said parties hereto of the third part, their executors, administrators, or assigns, all such money as they or he shall expend in or about, or be reasonably entitled to receive or retain for or in respect of keeping on foot such assurance as aforesaid, or for or in respect of renewing the same policy or effecting any such substituted policy as aforesaid, with interest thereon after the rate of 5*l.* for every 100*l.* by the year: and the said policy or such substituted policy shall be a security for the repayment of the same sums and interest in addition to the said sum of money hereby secured as aforesaid, and the interest thereof, and the costs,

charges, and expenses occasioned by the non-payment thereof; but so, nevertheless, that the total amount of principal money to be ultimately recoverable under these presents shall not exceed the sum of 200*l.*; and also that the said borrower will not do any act, or commit any default whatsoever, by means of which the said recited policy, or any substituted policy, shall be impeached or become [716] void or voidable, or by reason whereof any higher rate of premium may become payable thereon: and, further, that, in case the said borrower shall happen to go to reside beyond the seas, or become bankrupt or insolvent, or be unable to meet his engagements with his creditors, or in case each or either of them the said parties hereto of the second part, or any other surety to be substituted as hereinafter mentioned, shall happen to die, or go to reside beyond the seas, or become bankrupt or insolvent, or unable to meet his engagements with his creditors, before the whole of the moneys and interest intended to be hereby secured shall be paid, then, if the said borrower shall not at his own costs, within twenty-eight days next after the happening of either of the said events, from time to time as often as the case shall happen, procure some responsible person, to be approved of by the said parties hereto of the third part, their executors, administrators, or assigns, as a substitute for each such person as shall so die, go to reside beyond the seas, become bankrupt or insolvent, or unable to meet his engagements with his creditors as aforesaid, to enter into a bond in a sufficient penalty, or deed of covenant, at the option of the said parties hereto of the third part, their executors, administrators, or assigns, for securing the payment to them of the said principal sum hereby secured, and the interest thereof, or so much thereof as shall remain unpaid, and also the payment of such premiums, duty, and expenses as aforesaid, with interest, in manner hereinafter mentioned, so that the said principal money, premiums, and interest respectively may always be secured by bond or covenant to the satisfaction of the said parties hereto of the third part, their executors, administrators, or assigns; or if the said parties hereto of the first and second parts, their executors or administrators, or any surety or sureties to be substituted as aforesaid, or any or either of them, shall, not at all [717] times, so long as any money shall remain due out his security, duly pay all the premiums, duty, and other expenses for keeping on foot the aforesaid policy, or any substituted policy for the time being in force, as and when the same ought to be paid, or if the said borrower shall do any act, or commit any default, by means of which any such policy shall become liable to be impeached or void or voidable, or any additional rate of premium become payable thereon: then that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as shall remain unpaid. In witness, &c."

Averment, that the said indenture was made and executed by him the defendant in the faith that the said Joseph Pearce should join therein and execute the same, and that the said Joseph Pearce never did join therein or execute the same.

To this plea the plaintiff replied, on equitable grounds, that, after the making and executing of the said indenture in the plea mentioned, by the defendant and the said Robert Goodwin and Thomas Lawson, and before the time for payment of any of the said instalments or sums of money pursuant to the said indenture had arrived, the said Robert Goodwin and the defendant and the said Thomas Lawson, having notice that the said Joseph Pearce had not joined in nor executed the said indenture, did, by a certain note in writing signed by them respectively, consent and agree with the plaintiffs, that they the said Robert Goodwin and the defendant, and the said Thomas Lawson, would be liable upon the said indenture, and that their execution thereof should stand good and be valid and binding upon them, al [718] though the said Joseph Pearce had not executed the said indenture; and the plaintiffs, relying upon the said consent and agreement, did give time for payment of the said sum of 85*l.* according to the form and effect of the said indenture.

The plaintiffs also demurred to the second plea, the point marked in the margin being, "One of the matters of law intended to be argued on this demurrer is, that it does not appear that the defendant's execution of the indenture was upon condition that his execution of the said indenture should be void if the deed was not executed by the said Joseph Pearce, nor does it appear that the defendant would not have

executed the same if he had known that the said Joseph Pearce would not join in the execution thereof." Joinder.

The defendant demurred to the replication, the ground stated in the margin being,—"One of the points of law intended to be argued is, that the replication discloses no consideration for the agreement, and that such an agreement would not make the deed valid." Joinder.

Hindmarch, for the plaintiff. The plea is bad. The averment is, that the defendant made and executed the deed (which imports delivery) in the faith that Pearce should join therein and execute the same, that is, with an expectation in his own mind that Pearce would execute it afterwards. It cannot be put higher than an execution and delivery of a deed as an escrow. [Cresswell, J. A deed cannot be delivered as an escrow to the party himself.] Clearly not. The doctrine on this subject will be found in Co. Litt 36 a.,—"If a man deliver a writing sealed to the party to whom it is made, as an escrow, to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the party himself: for, the delivery is sufficient, without speaking of any words (otherwise, a man that is mute **[719]** could not deliver a deed), and tradition is only requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect, non quod dictum est, sed quod factum est inspicitur. And hereof though there hath been variety of opinions, yet is the law now settled agreeable to judgments in former times; and so it was resolved by the whole Court of Common Pleas. But it may be delivered to a stranger as an escrow, &c., because the bare act of delivery to him without words worketh nothing." So, in Sheppard's Touchstone, 58, it is said: "The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two conditions must be heeded,—1, that the form of words used in the delivery of a deed in this manner be apt and proper, —2, that the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made. The words, therefore, that are used in the delivery must be after this manner: 'I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is.' Or else it must be thus,—'I deliver this as an escrow to you, to keep until such a day, &c., upon condition, that, if before that day he to whom the escrow is made shall pay me 10*l.*, or give to me a horse, or infeoff me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed.' For, if when I shall deliver the deed to the stranger, I shall use these or the like words,—'I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions;' or, 'I deliver this to you as my deed, to **[720]** deliver to him to whom it is made when he comes to London:' in these cases, the deed doth take effect presently, and the party is not bound to perform any of the conditions. So, it must be delivered to a stranger; for, if I seal my deed and deliver it to the party himself to whom it is made, as an escrow, upon certain conditions, &c., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions: for, 'in traditionibus chartarum, non quod dictum, sed quod factum est inspicitur.'" So, in *Thoroughgood's case*, 9 Co. Rep. 137, "it was resolved that the actual delivery of a writing sealed to the party, without any words, is a good delivery; for, in traditionibus scriptorum, non quod dictum est, sed quod gestum est inspicitur: but here he saith, 'I deliver this writing to you,' which clearly is sufficient, although he doth not say, as his deed, or as his act. And therefore, if A. makes a writing to B., and seals it, and delivers it to B. as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed, for, the law respects the delivery to the party himself, and rejects the words which will make the express delivery to the party upon the matter no delivery." For the purpose of this issue, the execution of the deed is admitted. *Horne* v. *Ramsdale*, 9 M. & W. 329, is also a distinct authority to shew that the plea affords no answer to the covenant which the defendant has entered into. There, to a declaration stating that T. was the lessee of certain tolls, and that S. and the defendant agreed to join with T. in a bond conditioned for payment of the rent under the lease, and alleging

as a breach that the defendant refused to join T. in the bond,—the defendant pleaded, first, that, at the time of tendering the bond to him, S. had not executed the same, nor was he present ready to execute it jointly **[721]** with the defendant, secondly, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it: and it was held that the pleas were bad. "What the defendant undertook," said Alderson, B., "was, to join with Taylor in the bond. The only condition precedent was, the execution of the bond by Taylor. He has executed it, but the defendant refuses to do so. I think he has no right so to refuse: it is no part of the agreement that he shall join with the other surety in the execution." So, here, the execution of the deed by Pearce, the co-surety, was not a condition precedent to the covenantee's right to put the deed in suit against the defendant. Then, as to the replication,—although it professes in its commencement to be an answer to the plea upon equitable grounds, that will not prevent its enuring as a legal answer, if it may do so. By the 85th section of the Common Law Procedure Act, 1854, a plea or replication is to have no effect as a plea or a replication on equitable grounds, unless it is stated to be so pleaded: but the statute contains nothing to prevent or destroy its operation as a legal answer. [Cresswell, J. It may be so: but the result will be, that every plea or replication will commence with the words "on equitable grounds."] The replication shews good reason why the defendant should upon equitable grounds be precluded from setting up the defence alleged in the plea: it states that Goodwin, the defendant, and Thomas Lawson, had notice of the non-execution of the deed by Pearce, and by note in writing consented and agreed to be liable thereon notwithstanding such non-execution by Pearce; and that the plaintiffs, relying upon such consent and agreement, gave time for the payment of the money: and that is admitted by the demurrer. It is submitted, therefore, that the replication is a good answer either at law or in equity.

[722] G. B. O. Harrison, contrà. The defendant is sought to be charged in this action as surety for Goodwin. If Pearce had executed the deed, the defendant would have had a right to resort to him for contribution, as well as to Thomas Lawson: his position, therefore, is materially varied by its non-execution by Pearce. In construing the deed, it is important not to lose sight of what was passing in the defendant's mind when he executed it. [Cresswell, J. What was passing in his mind at the time cannot affect the construction of the deed.] It may fairly be inferred that he only executed the deed upon the supposition that Pearce also would execute it. [Cresswell, J. What do you say to the passage cited from Sheppard's Touchstone?] That still, it is submitted, leaves it a question of fact for the jury whether the delivery was a valid and complete delivery,—a delivery to the party not being admitted by the plea. In another part of the same book,—p. 83,—it is said that a deed "shall ensure as much as may be according to the apparent intent of the parties; and therefore it is, that, if a feoffment be made of a manor with an advowson appendant, or a bargain and sale of land in possession and land in reversion together be made, and the feoffment is not well executed for want of livery of seisin or attornment, or the deed of bargain and sale is not inrolled; in these cases, albeit the advowson may pass without livery or attornment, and the reversion without inrolment, yet, because the intent doth appear to be that all shall pass together, therefore neither the advowson nor the reversion will pass by this deed." Here, the intent was that all three of the sureties should be bound. In *Seaton* v. *Heaton*, 2 Lev. 220, it was held, that, if three be jointly and severally bound, and the seal of one be torn off, the obligation is void in facto. [Cresswell, J. That would be the same as if a release were executed to that party: it would be a subsequent alteration of the instrument in a **[723]** material part.] So, here, something has been omitted to be done, the effect of which is to vary the liability of the defendant. In *Pym* v. *Campbell*, 6 Ellis & B. 370, parol evidence was held admissible to shew that a memorandum, though signed by the defendant, was not intended to enure as an agreement unless approved by a third person, and that such third person did not approve. [Cresswell, J. The argument on the other side is, that, the execution and delivery of the deed to the party being admitted, the defendant is without defence unless he shews that the thing delivered never was a deed. The question is, whether the plea shews a legal answer to the declaration.] In *Murray* v. *The Earl of Stair*, 2 B. & C. 82, 2 D. & R. 278, a subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing

witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: and the court held that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of the delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B. and until the securities were delivered up. In *Davis* v. *Jones*, 17 C. B. 625, 634, Jervis, C. J., said: "A written instrument does not necessarily operate from delivery; it is competent to a party to shew that it was delivered as an escrow, and that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event. That was expressly decided in *Murray* v. *Earl of Stair*." And, after stating the circumstances of that case, his Lordship added: "It was perfectly competent to the plaintiff, the agreement being silent on the subject,—to **[724]** shew by parol testimony that it was not intended to take effect until the happening of something else." [Cresswell, J. There is no question here as to the construction of the deed: the only question is whether the defendant is bound by it. If the defendant had pleaded, that, though he sealed and delivered the deed, he delivered it with intent that it should not take effect as his deed until the third surety (Pearce) had executed it, Mr. Hindmarch would probably not have argued as he has. It may be that it is open to the defendant to contend that the deed was delivered by the defendant as an escrow until its execution by Pearce, upon non est factum.] In *Latch* v. *Wedlake*, 11 Ad. & E. 959, in assumpsit on a contract for the delivery of coals from a colliery, it appeared that the agreement (for supplying such coals, and for the demise of a coal-wharf), purported to be made between the plaintiff and the partners in the colliery, three in number, and was executed by the plaintiff and two of the partners; and it was held, that, admitting such contract to be one by which partners might bind an absent co-partner or themselves, yet the judge, on the trial, ought not to decide, as matter of law, that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there were circumstances from which an intention could be inferred that no party should be bound unless all the partners signed: as, the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it; and the manner in which previous contracts between them of the same kind had been executed. In giving judgment, Lord Denman there said: "Wherever an instrument is to be executed by several parties, there must be some interval between the execution of each, and, if all be not present at the same time, the interval may be considerable; and it cannot be contended that **[725]** the mere fact of execution conclusively binds him, when that has been done on the faith that all will execute, and any one shall refuse." That case was evidently in the mind of the pleader when he drew this plea. [Cresswell, J. There was evidence there that the partners who signed the contract had applied to the co-partner, and that he refused to sign: the only question was, whether the judge was right in assuming that they signed for themselves, and that they were bound.] *Evans* v. *Bremridge*, 25 Law Journ., Ch. 102, 334, shews, that, under circumstances like these, the defendant would be discharged in equity. [Cresswell, J. The plea is not pleaded as an equitable defence. Crowder, J. It would be proved by calling the party himself, and by his stating that he executed the deed upon the faith that Pearce would also execute. That clearly would be no answer.] It is submitted that it is to be implied from the whole plea that the execution by the defendant was conditional. [Cresswell, J. I think not.] Then, the replication is bad: it sets up a parol agreement, which can be no answer to an action on the deed: *Davey* v. *Prendergrass*, 5 B. & Ald. 187. To make the replication good, the plaintiff must establish that he has a right to full relief in a court of equity. And it is a principle in equity, that, if there is a valid legal instrument in existence, no relief can be given until the instrument has been reformed: *Wood* v. *Dwarris*, 11 Exch. 493; *Jacobs* v. *Richards*, 18 Beavan, 300. If the plea is a good bar, a court of equity would not interfere: *Hunter* v. *Gibbons*, 1 Hurlst. & N. 459.

Hindmarch, in reply, was stopped by the court.

Cresswell, J. I am of opinion that the second plea is bad. The declaration is founded upon a deed which is set out upon the record, and confessed to have been **[726]** made between Robert Goodwin of the first part, Henry Lawson (the defendant), Thomas Lawson, and Joseph Pearce of the second part, and the plaintiffs (Cumberlege

and Baylis) and one Prescott of the third part,—the parties of the second part being sureties, and two of them only (viz. Robert Goodwin and the defendant) having executed it. By the deed, the parties of the second part jointly and severally covenanted for the due payment by Goodwin of certain annual premiums. The defendant by his plea does not say that he did not seal and deliver the deed, or that he executed it only on condition that he should not be bound by it unless it were executed by both his co-sureties, or that he was betrayed into executing it: but simply that the deed was made and executed by him in the faith that Pearce should join therein and execute the same, and that Pearce never did join therein or execute the same. I see nothing to lead the court to the conclusion that the defendant did not intend to bind himself by executing the deed. If he meant to insist that he delivered it upon condition that it should only be operative as a deed upon its being executed by Pearce, he should have so pleaded. It is not necessary to determine whether the matter stated in the replication would have been any answer either at law or in equity: though in *Murray* v. *The Earl of Stair* such matter was allowed to be given in evidence under non est factum.

CROWDER, J. I am of the same opinion. When the declaration states that the indenture was sealed and delivered by the defendant, in order to defeat that, the defendant must shew either that he delivered it as an escrow, or that there has been fraud. But here the plea merely alleges something that was passing in his own mind,—that he executed the deed on the faith that it would be executed by the third surety. That clearly is no answer.

[727] Harrison prayed to be allowed to amend his plea, by stating that the deed was executed by the defendant on the express condition that Pearce should also execute it, and that the condition was not performed,—pleading it as an equitable defence.

CRESSWELL, J. I think that would not make a good plea. But, if the defendant wishes to be allowed to plead an equitable plea, he must go to chambers and ask leave to add a plea.

Judgment for the plaintiffs.

PATRICK AND ANOTHER *v.* REYNOLDS. Jan. 31, 1857.

A company was projected for the filtration and supply of water. Whilst the bill for its formation was before a committee of the House of Commons, the engineer (upon the suggestion of counsel) employed a builder to erect a cistern for the purpose of testing the process of filtration (for which the engineer had obtained a patent.] The defendant was a member of the provisional committee, and the cistern was with his assent erected on land in his occupation: Held, no evidence to warrant a jury in inferring that the order for the work was given by the defendant's authority, or that the work was done upon his credit.

This was an action for work and materials done and provided by the plaintiffs for the defendant, at his request, and for money due on accounts stated. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in London after last Trinity Term, when the case made on the part of the plaintiffs was as follows: In the year 1850, a patent was taken out by one Thompson for filtering water; and Thompson, in conjunction with one Mullins, an attorney, attempted to form a company, to be incorporated by act of parliament, and to be called "The Wandle Water and Sewerage Company," for the purpose of working the patent, and supplying the southern parts of London with water. The defendant was a member of the provisional committee of the proposed company. Thompson was the engineer. Whilst the **[728]** bill for the formation of the company was before a committee of the House of Commons, a model of Thompson's invention being produced, it was suggested by the petitioners' counsel that it would be advisable to have a cistern erected upon a large scale, in order to shew practically the quantity of water that could be purified by the new process in a given time. Thompson accordingly applied to the plaintiffs, who are builders, to do the necessary work; and the spot fixed upon was, with the defendant's assent, some land in the defendant's occupation adjoining the river Wandle. The order for the work was given by Thompson and Mullens; and it was entered in the

plaintiffs' books as having been done for "The Wandle Water Company." The work was done in 1852. In August, 1854, a bill was delivered at the offices of the company, headed "The Wandle Water Company, Drs. to M. & T. Patrick:" and this action was commenced against the defendant early in 1855. There was no evidence that the defendant had at all interfered with the work, except that he was occasionally present on the ground with Thompson whilst it was going on. The bill before parliament was ultimately abandoned. In some of the plaintiffs' books,—those containing entries of materials and labour,—the cistern was described as "Thompson's Tank:" but, in the journal and ledger, the work was charged to the company. It was admitted by the plaintiffs that they knew Thompson to be the agent of the company.

It was submitted, on the part of the defendant, that, having thus dealt with Thompson, knowing him to be the agent of the company, the plaintiffs must be taken to have elected to treat him as their debtor, and, according to the cases of *Patterson* v. *Gandasequi*, 15 East, 62, and *Addison* v. *Gandasequi*, 4 Taunt. 574, could not afterwards sue the defendant.

The learned judge intimated that the defendant should **[729]** have the benefit of the point, though in his opinion it was mixed up with the question of fact whether credit was given to Thompson at the time.

On the part of the defendant it was proved, that he consented to become a member of the provisional committee upon the distinct understanding with Thompson and Mullens that he was to be borne harmless; and that he never directly or indirectly authorised Thompson to pledge his credit for the work in question.

The learned judge left it to the jury to say whether Thompson had authority to bind the defendant, and whether the plaintiffs had given credit to Thompson.

The jury found that credit had not been given to Thompson; and they returned a verdict for the plaintiffs for the amount claimed, viz. 60l. 15s.

Byles, Serjt., in Michaelmas Term last, obtained a rule nisi for a new trial on the ground that the verdict was against the evidence, and also on the ground that the learned judge misdirected the jury, "in not telling them, that, if the credit was given by the plaintiffs to the agent, with notice of the facts, the plaintiffs could not afterwards sue the defendant."

Lush now shewed cause. The jury having found that in point of fact credit was not given to Thompson, the point as to misdirection hardly arises. The order for the cistern, it appears, was given by Thompson, who was known to be acting as the engineer of the company: and the contention at the trial was, that the entry of Thompson's name in the plaintiff's books was an election to treat him as their debtor. But the books in which Thompson's name appeared were books containing mere memoranda as to the labour and materials bestowed upon the works; and the entries did not profess to denote to whom credit was given for the work. In the journal and **[730]** ledger, the work was debited to "The Wandle Water Company." There is no pretence, therefore, for saying that the plaintiffs ever elected to charge Thompson and not the defendant. [Williams, J. What authority had Thompson to pledge the defendant's credit?] There was abundant evidence of authority. [Willes, J. In *Bailey* v. *Macauley*, 13 Q. B. 815, where this subject underwent much discussion, it was held, that, in an action against a member of the committee of a projected railway company, for work and labour, goods supplied, and money paid, the jury are to consider whether the defendant, by taking upon him the character of a committee-man, and afterwards acting in the affairs of the company, has authorized the company's solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company, and on its behalf: and, then, whether the credit was given on the faith of his being so personally responsible. Here, there was no holding out, no authority given by the defendant to Thompson, and no credit given on the faith of the defendant's being personally responsible.] The defendant was an assenting party to the application to parliament? and the work was done in furtherance of that application, and was essential. It was a thing done within the scope of the general authority of the agents and advisers of the company: and it was, with the express sanction and permission of the defendant, erected upon land which if not his own was at least in his occupation. [Cresswell, J. It is clear that the defendant only consented to join the company upon the distinct understanding that he was not to be made personally responsible.] No doubt that was so as between him and Thompson and

Mullens: but the plaintiffs' rights are not to be affected by any private arrangements of that sort. If there was no evidence of previous authority, [731] there was at all events ample evidence of subsequent ratification.

Byles, Serjt., and J. Wilde, Q. C., in support of the rule, were stopped by the court.

Cresswell, J. We are all of opinion that there was no misdirection in this case: but we are equally clear that there was no evidence to warrant the verdict. There must, therefore, be a new trial, the costs to abide the event.

Williams, J. London juries have a great dislike to this sort of combination of attorneys and engineers in the getting up of companies. The parties had much better agree to enter a stet processus.

Cresswell, J. The rule will be absolute for a new trial, unless the parties agree to a stet processus.

Rule accordingly.

End of Hilary Term.

[732] In the Exchequer Chamber. Hilary Vacation, 1857.

The Van Diemen's Land Company *v.* Cockerell. Feb. 4, 1857.

[S. C. 26 L. J. C. P. 203; 3 Jur. N. S. 241; 5 W. R. 312.]

By an act incorporating a joint-stock company, the directors were empowered to make calls, giving twenty days' notice of the time and place of payment in the *London Gazette* and in two or more of the daily London newspapers: and it was enacted, that, if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should absolutely forfeit all his share in the capital stock of the company, and all profits and advantages thereof, to and for the use and benefit of the company: and all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the company, to the owner thereof, by notice in writing left at his usual or last place of abode, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen:"—Held,—by the Exchequer Chamber, on error,—no absolute forfeiture until after the thirty days' notice.—A., B., & Co. carried on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in September, 1847, and, in March, 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, and in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was (but without the knowledge of A.) affixed to the office in Austin Friars, directing that letters and communications for A., B., & Co., should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; and, after A. left England, B. gave directions that letters and communications for either of the partners should be forwarded to D. (who had been a member of the firm); and D. gave directions that all letters or communications for A. should be forwarded to E.; but E., had no authority to act for A. touching his private affairs.—A. was the holder of 200 shares in the company incorporated by the above mentioned act, and was one of the directors thereof. At a general meeting held in March, 1851, his shares were declared forfeited for non payment of calls, and, on the 15th of May, 1852, a notice of the forfeiture, inclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it; and it never reached the hands or came to the knowledge of A.:—Held,—by the Exchequer Chamber, on error,—not a sufficient service of the notice, although in the deed of transfer of the shares to him, in the resolution appointing

him a director of the company, and in every document signed by him in relation to the affairs of the company, he was described as "of 8 Austin Friars."—And, held, that, in an action against the company for improperly withholding the shares after a tender of the sum due for calls and interest, A. was entitled to recover their value at the market price of the day of the tender, deducting the amount of the calls and interest.

This was an appeal against a decision of the court of Common Pleas upon a special case stated in an action brought by the plaintiff below against the defendants below, a company incorporated by an act of the 6 G. 4, [733] c. xxxix., and a charter of King George the Fourth, in which action the plaintiff below charged the company with having wrongfully declared certain shares in the capital stock of the company to be forfeited: see the pleadings, 18 C. B. 454. The case was as follows:—

At the times of the passing of the act and the granting of the charter, and for several years afterwards, the plaintiff carried on business in partnership with certain other persons, under the firm of Cockerell, Larpent, & Co., at offices at No. 8 Austin Friars, in the city of London: and the plaintiff was the owner of 200 shares of the capital stock of the company.

Before the month of November, 1847, calls to the amount of 25l. had been paid on each of those shares. On the 4th of November, 1847, the 7th of June, 1849, and the 15th of August, 1850, calls of 1l. on each share of the stock of the company were duly made by the directors, and previous notice of the times and places of payment was duly given by advertisement, as directed by the act. These calls were payable on the 15th of January, 1848, the 18th of July, 1849, and the 25th of September, 1850, respectively. They have not been paid. The shares were 100l. shares.

The plaintiff proved that he did not know of the making of these calls, or any of them, except as in this case appears.

At the annual general meeting of the proprietors of [734] the company held pursuant to their act on the 31st of March, 1851, the plaintiff's shares were declared forfeited; and the following declaration was made, and entered in the books of the company:—

"The chairman then informed the meeting that the directors had felt it their duty to propose for forfeiture certain shares on which more than one call was in arrear, to the number of 551, the particulars of which were read by the secretary, as follows: [Here, amongst others, followed the number of the plaintiff's shares.] 200 shares late the property of John Cockerell, of 8 Austin Friars, in the city of London,—which were declared forfeited accordingly."

(Signed) "J. CATTLEY, Chairman."

In April, 1851, a call was in like manner made of 10s. on each share of the company; but no call was made on the plaintiff, or upon any shares as being his property, the directors and the company regarding his shares as forfeited.

At the annual general meeting of the proprietors held the 12th of March, 1852, the foregoing declaration at the meeting of March, 1851, was confirmed.

The firm of which the plaintiff was a member stopped payment in September, 1847. Its affairs were liquidated under an arrangement with their creditors under inspectors, of whom Mr. Horsley Palmer was one; and, after that month, the firm did nothing more than conduct to a conclusion the liquidation of their affairs for the benefit of their creditors. The firm was dissolved in March, 1848. In winding up the affairs under the inspectors, Mr. Noble, one of the firm, was the most active, attending at the premises at Austin Friars almost every day. Mr. Noble had no authority to act for the plaintiff as to his private affairs.

The premises in Austin Friars were not closed until two or three years after the stoppage.

[735] A Mr. James Edward Coleman acted as accountant for the inspectors in regard to the affairs of the firm: but he did not act and had no authority to act touching the private affairs of any of the members of the firm; and he never had any communication with the plaintiff, and never saw him. Touching the private affairs of the plaintiff, a Mr. John Horsley Palmer, a merchant of London, acted as the friend of the plaintiff, and by his directions, in paying the trust dividends to his private

creditors under a deed of arrangement hereinafter mentioned, and acted for him in nothing else.

No business connected with the private affairs of the plaintiff was transacted after the stoppage at the premises in Austin Friars. Letters addressed to him there, came there after he left England. The plaintiff left England in May, 1849, and went to reside on the continent, where he has ever since resided.

The plaintiff never slept at Austin Friars, or used the premises there otherwise than for business.

At the time of the stoppage of payment of the firm, the plaintiff occupied a house in Hyde Park Gardens, London, and another at Burton Hill, Wilts. He then gave up those houses, and afterwards became an inmate with his sister, at Loughton, Essex. He next went abroad; the premises in Austin Friars then being, and afterwards continuing to be, occupied as herein mentioned.

His shares were principally transferred to him. There were twelve deeds of transfer executed to and by him, in all of which he was described as of Austin Friars; and in the certificates of the same shares he was described as of Austin Friars. He was a director of the company from 1839, and attended several meetings. He was elected as of 8 Austin Friars. The plaintiff proved that notices and communications of every kind relating to the Van Dieman's Land Company were sent to his address there, [736] and that he never gave any directions that they should be sent in any other way.

Before leaving England, viz. on the 24th of November, 1848, the plaintiff made an arrangement with his private creditors, by a deed which was to be considered as part of the case.

A board, with an inscription of which the following is a copy, was affixed at the offices No. 8 Austin Friars, some time before May, 1852: but the precise time of its being affixed did not appear:—"Letters and communications for Cockerell, Larpent, & Co., to be left at the office of Mr. J. E. Coleman, 36 Coleman Street."

The plaintiff proved that the above board was put up without his knowledge or direct authority, otherwise than is to be inferred from the circumstances: nor did he know of the same until after the commencement of this action.

Before the plaintiff left England, it was the duty of the clerk at Austin Friars to forward all letters addressed to the plaintiff which came to Austin Friars, to the private residence of the plaintiff in Hyde Park Gardens, or the country.

After the plaintiff left England, Mr. Coleman gave directions that letters and communications for either of the partners should be forwarded to Mr. Noble, who had an office in the city; and Mr. Noble gave directions that all letters or communications for the plaintiff should be forwarded to the plaintiff's brother, Mr. S. P. Cockerell. Mr. Noble had no authority to act for the plaintiff touching his private affairs.

On the 15th of May, 1852, a clerk of the defendants' attorneys, on behalf of the defendants, went with the notice hereinafter mentioned to No. 8 Austin Friars, whereat the said business of the firm of Cockerell, Larpent, & Co. had formerly been carried on, and, finding the office shut up, and after seeing the said board, he [737] left with Mr. Coleman, at his office in Coleman Street, on the same day, a letter from the defendants' attorneys, of which the following is a copy:—

"19 Coleman Street,
"15th May, 1852.

"Dear Sir,—As we understand that the affairs of Messrs. Cockerell, Larpent, & Co. are in your hands, may we request that you will procure the acceptance of service of the accompanying notice on behalf of Mr. John Cockerell. We inclose the notice in duplicate, and will thank you to get the receipt on the one copy signed by the party accepting the service. "BISCHOFF & COXE.

"J. E. Coleman, Esq."

In the letter was the following notice, in duplicate, addressed to the plaintiff, and signed by Mr. Cattley, the clerk of the defendants:—

"Sir,—By order of the court of directors of the Van Diemen's Land Company, I hereby give you notice, that, at a general court of proprietors of the said company, held on the 31st of March, 1851, it was, amongst other things, resolved, that, in consequence of your having neglected to pay the calls on the shares standing in your

name, for the space of three calendar months next after the time appointed for payment thereof, the same shares, and all franchises and interest therein, and all the profits and advantages thereof, and all moneys theretofore advanced on account thereof, should be absolutely forfeited to or for the use and benefit of the said company; and the same were thereby declared to be forfeited accordingly; and you were thereby declared disfranchised and removed from the said company: but no advantage will be taken of such forfeiture until after the expiration of thirty days from the date of this notice. Dated this 15th day of May, 1852."

No answer was sent to this letter; and the above notice [738] never came to the hands or knowledge of the plaintiff: and it was to be taken that the same was lost, without prejudice to any question of service of notice. Notice to produce it was duly given.

Mr. Coleman, who was examined as a witness on behalf of the defendants, said, that to the best of his recollection he forwarded the notice to Mr. Noble. Mr. Noble stated that he had no recollection of having received or seen any letter sent by Mr. Coleman to or for the plaintiff in 1852, and that he never saw a document like the above notice,—a copy of which was shewn to him on his examination, by the defendants' counsel.

On the 20th of May, 1852, at a court of directors of the company, the following took place, and was duly entered in the books of the company:—

"The chairman informed the court that the secretary had attended at the office of the company's solicitors on Thursday, the 13th instant, and had there signed certain notices drawn up agreeably with the requirements of the act of parliament, addressed to those persons whose shares had been forfeited, as follows:—

"'Shares forfeited at the general meeting of proprietors, on the 31st of March, 1851,—

"'John Cockerell, 200 shares.'

"And the chairman further informed the court, that, after the expiration of thirty days from the delivery of the said notices, the shares would become finally and completely forfeited, unless payment of the overdue calls was made in the meantime."

Save as in this case appears, no notice of the forfeiture of the shares of the said plaintiff was ever given, nor did the plaintiff, or any other person authorised to act for him, know of the above resolutions until after this action was brought: nor did the plaintiff, or any person authorised to act for him, know of the alleged forfeiture until the end of the month of December, 1852, when [739] Mr. Palmer was verbally informed thereof, and thereupon communicated with the plaintiff.

On the 11th of January, 1853, the plaintiff caused to be tendered to the defendants a sufficient sum to cover the amount of the calls on the 200 shares, with interest thereon from the time they were payable, and stated he did so to enable him to sell the shares. The defendants refused to receive the same, on the ground that they considered the shares had been legally forfeited, and that they could not in any manner recognise the plaintiff's right to such shares.

It was proved by Mr. Wettenhall, a sharebroker called by the plaintiff, that the market-price of the shares on the day of the tender was 20l. a share. The price between that time and the time of trial fluctuated very much: they were as low as 14½, and as high as 26l. 10s. At the time of the commencement of the action, they were 14½, and at the time of the trial they were 13l. On the 4th of November, 1847, the prices were not quoted in the market. In June, 1849, after the second of the before-mentioned calls, they were worth 30s. On the 31st of March, 1851, they were worth 1l. or 1l. 10s. On March 12, 1852, and in May, 1852, the shares were not quoted at all: and the price of the shares did not rise until October, 1852; up to which date it was a fact that the shares were worth very little; that, until the following December, there was no quotation for them. They then rose to 5½, and on December 22nd to 40l. In the quotation it is assumed that all calls are paid.

The amount of the verdict was taken, by direction of the Lord Chief Justice, subject to the opinion of the court. The shares were treated as worth 19l. each on the day of the tender; his Lordship suggesting,—which was agreed to,—that 1l. a share be deducted, to allow for a depreciation of the market by the selling of 200 shares at one time. The value of the shares, after [740] allowing for the calls and interest, it was agreed would by this mode amount to 3000l.

The court was to be at liberty to draw all inferences that a jury would be justified

in doing, and to have all powers of a judge at nisi prius as to amendment and otherwise.

The first question for the opinion of the court was, whether the verdict was to stand for the plaintiff, or to be entered for the defendants, on any and what issues: If it was to be entered for the plaintiff,—secondly, upon what principle was the amount of damages to be ascertained.

If the court should be of opinion in the affirmative of the first question, the verdict was to be entered for the plaintiff according to the principle which the court might direct,—the amount to be settled by the court.

If the court should be of opinion in the negative of the first question, the verdict was to be entered for the defendants upon such issues as the court might direct.

The court of Common Pleas having given judgment for the plaintiff upon this special case,—18 C. B. 454,—the defendants brought error, pursuant to the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 32, which now came on for argument before Coleridge, J., Erle, J., Martin, B., Crompton, J., and Watson, B.

Byles, Serjt. (with whom were Hugh Hill, Q. C., and Unthank, for the plaintiffs in error (*a*). The main **[741]** question is, whether the shares of the plaintiff below were forfeited. The material facts are these:—The act of parliament authorising the incorporation of the company passed on the 10th of June, 1825. The charter of incorporation bears date the 10th of November in the same year. The plaintiff, who was a member of the firm of Cockerell, Larpent, & Co., carrying on business at No. 8 Austin Friars, was the proprietor of 200 shares of 100l. each in the company, and was one of the directors. On the 4th of November, 1847, a call of 1l. per share was made, which was payable on the 15th of January, 1848. The firm of Cockerell, Larpent, & Co. stopped payment in September, 1847; and the partnership was dissolved in March, 1848. On the 24th of November, 1848, the plaintiff executed a deed of arrangement with his private creditors. In May, 1849, he went abroad, and remained abroad until the time of the trial. On the 7th of June, 1849, a second call of 1l. per share was made, which was payable on the 18th of July; and on the 15th of August, 1850, a third call of 1l. per share was made, which was payable on the **[742]** 25th of September. None of these calls having been paid by the plaintiff, at a general meeting of the proprietor of the company, held on the 31st of March, 1851, his shares were duly declared forfeited; and, on the 15th of May, 1852, a notice of the forfeiture was served in the manner stated in the special case,—upon which service a subordinate question hereafter to be noticed arises. In December, 1852, the shares, which were worse than valueless at the time of the forfeiture, had risen considerably in the market; and on the 11th of January, 1853, the plaintiff tendered the amount of calls and the interest, and demanded the shares,—with which demand the directors refused to comply. The validity of the forfeiture depends upon the construction of the 14th section of the act of parliament, by which it is enacted, "that, if any subscriber or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, successors, or assigns, shall neglect or refuse to pay his, her, or their part or portion of the money to be called for

(*a*) The points marked for argument on the part of the plaintiffs in error were,—

"That, by the company's act, 6 G. 4, c. xxxix., s. 14, the plaintiff's shares were absolutely forfeited on non-payment of the calls for three calendar months:

"That the plaintiff, who had so forfeited his shares, could not by his own act, as, by tendering the amount of calls, without the assent of the company, purge the forfeiture:

"That, until the company waive the forfeiture, the plaintiff has no right to sue the company on the footing of the plaintiff being entitled to the shares:

"That, as the plaintiff had forfeited his shares, and the company had not agreed to waive the forfeiture, the company and its officers had the right to refuse to receive from the plaintiff the calls, and had a right to remove his name from the register book:

"That the notice in writing mentioned in the case was unnecessary, but was, if necessary, under the circumstances, sufficient, and was sufficiently served:

"And that if, by tendering the calls, and without the company's consent, the plaintiff could purge the forfeiture, then the shares still belong to the plaintiff, and he is not entitled to recover the full value of the shares, a recovery in the present action for breach of duty, not having the effect of changing the property in the shares."

by the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the appointed time of payment, then and in every such case the person or persons so neglecting or refusing shall absolutely forfeit all his, her, or their share or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company: and all shares which shall or may be so forfeited shall or may at any time or times thereafter be sold at a public sale, for the most money that can be gotten for the same, and the produce thereof shall go to and make part of the capital of the said company; but no advantage shall be taken of such forfeiture of any share or shares until after **[743]** thirty days' notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen; and that every such forfeiture so to be declared shall be an absolute indemnification and discharge to and for the proprietor and proprietors, or his, her, or their executors, administrators, successors, and assigns, so forfeiting, against all actions, suits, and prosecutions for any breach of contract or other agreement between such proprietor or proprietors, his, her, or their executors, administrators, successors, and assigns, and the said company, with regard to the future carrying on and managing of the said company." The true and natural meaning of that section, it is submitted, is, that the shareholder has, besides the interval between the making of the call and the day on which the amount is payable, a further period of three months for paying the call with interest; and that, if the money is not paid within that period, the shares shall be absolutely for the benefit of the company, with a power of sale: but, inasmuch as it is right and reasonable that the party should have notice of the forfeiture before it is enforced, the statute provides that no advantage shall be taken of "such forfeiture" until after thirty days notice given; and then it goes on to provide for the indemnification of the proprietor of the forfeited shares. The contention on the part of the defendant in error will be, that there is no absolute forfeiture of the shares by non-payment of the calls, until after the thirty days notice has been given, and the shares have been declared forfeited at a general or special general meeting of the proprietors; and that the notice was not well **[744]** served. The only reasonable construction of the statute, it is submitted, is, that the forfeiture is absolutely incurred immediately on default in payment within the three months next after the appointed time of payment,—at the election of the company. No words could be stronger or more plain. It is like the ordinary case of a lease, to be absolutely void to all intents and purposes on breach by the lessee of any of the covenants: the lessee cannot take advantage of the breach: but the lease becomes void, at the election of the lessor: *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401: and see the cases collected in 1 Wms. Saund. 287 d. [Crompton, J. You contend that there is no power to purge the forfeiture by payment of the calls before the expiration of the thirty days. If that be the true construction of the statute, what is the use of the notice?] The words upon which reliance will be placed on the other side,—"no advantage shall be taken of such forfeiture, until, &c.," —coupled as they are with a power of sale, mean that no advantage shall be taken by sale of the forfeited shares until the prescribed notice has been given. The shareholder has three months after the call is payable within which to pay the amount: and three months more are to elapse before a declaration of forfeiture can take place. [Martin, B. Would it be competent to the shareholder during or after the expiration of the second three months, but before the general meeting, to come and tender the amount due?] No. The forfeiture is absolute when the default is made,—absolute at the election of the company: but the power of sale does not come into operation until the declaration of forfeiture has been made, and notice thereof given: any other construction would make no distinction between the first and the second period of three months. [Crompton, J. The time for election is, at the general meeting. Suppose no declaration of forfeiture then takes place, what becomes of the shares?] They **[745]** are as they were. [Crompton, J. May the company play fast and loose, waiting the turn of the market?] There is no injustice in that: and, at all events, it is an inconvenience which applies equally to either

construction. Is the election to be given to the party who has made default, or to the company who have done no wrong? It is impossible to read the words "absolutely forfeited" in the sense of "liable to be forfeited," which is in truth the construction contended for on the other side. [Watson, B. The only notice which the shareholder has of the time and place of payment of the call is, by advertisement in the *London Gazette* and in two or more of the daily London newspapers: s. 13.] That is the notice which the shareholder has agreed to be bound by. [Martin, B. May not the true meaning of the 14th section be this,—the non-payment of the call within the first three months places the shareholder at the mercy of the company; but no forfeiture of the shares shall take place until the party has had thirty days' notice, such thirty days' notice to be given to him before the general meeting? That seems to make the whole consistent. Erle, J. It would be making "absolute" mean "inchoate." Coleridge, J. It is impossible to give the literal construction to the words "no advantage shall be taken," &c.] In *Sparks* v. *The Liverpool Water Works Company*, 13 Ves. 428, it was held that a shareholder was not entitled to relief against forfeiture under a bye-law of an incorporated company for water-works, providing that the members shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent; though the lapse arose from ignorance of the call, from accidental circumstances, and absence from town when the notice was sent. Sir W. Grant there said: "The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is es-**[746]**-sential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings they could not be carried on It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals; much less in these undertakings. In particular cases, interest might be a compensation: but, in the majority of cases, it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence. The party making default is no longer a member; but, if a party can in equity enter into a discussion of the circumstances, each may bring his suit." [Watson, B. In whom do you say the property in the shares is vested during the three months preceding the general meeting?] They would be in the same position as the forfeited lease, where the lessor has not yet declared his election to avail himself of the forfeiture. [Coleridge, J. There is no real analogy to the case of a lease. Watson, B. Suppose the company, after the time for payment of the call had arrived, and before payment, and before the time for holding a general meeting, came under the operation of the winding up acts,—would Cockerell have been liable as a contributory?] Probably he would. Then, as to the notice. The case shews that the shares were duly declared forfeited, and that notice was duly issued: the only question is as to the service. [Coleridge, J. The form of the notice seems to assume that the "forfeiture" was, the declaration of forfeiture made at the meeting.] The notice was served in the only way in which it could under the circumstances be served. The name of Mr. Cockerell stood in the books of the company as a director, and as residing at No. 8 Austin Friars. Twelve several deeds of transfer were executed to and by him, **[747]** in all of which he was described as of that place, as well as in the certificates of shares. In the deed of arrangement which he is stated to have executed, he is likewise described as of No. 8 Austin Friars. All communications addressed to him in connection with the company, were addressed to him there. That, therefore, clearly was the proper place at which to serve a notice relating to the company. The firm having failed, the premises in Austin Friars were shut up, and there was no person there to receive the notice, but a board was stuck up, intimating that all communications for Cockerell, Larpent, & Co., were to be addressed to 36 Coleman Street. [Martin, B. Is this matter of law or of fact?] Of law, seeing that the statute requires the notice to be served at the last place of abode of the party. [Martin, B. This notice was sent to No. 8 Austin Friars, four years after the premises were shut up. Watson, B. And it was not even left there.] The direction affixed there was complied with: but the notice seems never to have reached the hands of Mr. Cockerell. An office where a person is employed the greater part of the day, though he sleeps elsewhere at night, may properly be said to be his "place of abode:" *Haslope* v. *Thorne*, 1 M. & Selw. 103. What was done here would have been a good presentment of a bill made pay

able at the house in Austin Friars. [Martin, B. Because it would be the acceptor's duty to have some person there to pay the bill. Taking the words of the 14th section literally, the notice would not be well served if it were put into the party's hands; yet nobody could doubt that personal service would do? The last place of abode of Mr. Cockerell, I should say, was his sister's house at Loughton.] It is submitted that the notice was well served, or that the circumstances amounted to a dispensation with service. [Coleridge, J. If, as you contend, No. 8 Austin Friars was Mr. Cockerell's last place of abode, you should have **[748]** left the notice there.] In *Crosse* v. *Smith*, 1 M. & Selw. 545, notice to the drawers of non-payment of a bill of exchange, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, was held sufficient, without leaving a notice in writing, or sending it by post, though some of the drawers lived at a small distance from the place. *Goldsmith* v. *Bland*, Bayley on Bills, 6th edit. 276, is an authority to the same effect.

Montague Smith (with whom was Barstow), contrà, was not called upon (*a*).

Coleridge, J. I am of opinion that the judgment of the court of Common Pleas in this case was perfectly **[749]** correct. The question as to the notice turns principally on the fact of service, which I think was insufficient. The main and important point, however, is as to the construction of the 14th section of the statute 6 G. 4, c. xxxix., which enacts that a shareholder neglecting or refusing during the space of three calendar months next after the time appointed for payment of a call, to pay the same, with interest, "shall absolutely forfeit all his share or shares in the capital stock of the company, and all profits and advantages thereof, and all money theretofore advanced by him on account thereof." Undoubtedly, if those words had stood alone, there could be no question but that, by reason of the non-payment of the call, the shares ceased to be the property of the shareholder. But the words which follow make it impossible to put that construction upon the statute. I think the court of Common Pleas were right in substantially holding that the forfeiture was no more than an inchoate forfeiture, available to the company only upon the performance by them of certain conditions,—with power to the party to come in in the mean time and purge the forfeiture by payment of the amount of the calls and interest. Those conditions are as follows: and they are prefaced by strong words—"No advantage shall be taken (meaning, by the company,) of such forfeiture of any share or shares, until after thirty days' notice shall have been given by the directors of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode." That seems to be the first step to be taken by the company towards the forfeiture of the shares. The clause then goes on,—"nor,"—and here is implied a repetition of the words in the former part of the sentence, 'no advantage shall be taken of such forfeiture of any share or shares,—"unless the same shall be declared to be forfeited at some general or special general meeting of the **[750]** said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen." Upon that the consequence follows to the defaulting shareholder, that he shall no longer have an interest in or be affected by the transactions of the company. It is the business of the court to give, if possible, a consistent construction to the whole of the clause: and we can only do

(*a*) The points marked for argument on the part of the defendant in error, were as follows:

"As to the action,—that, assuming a forfeiture of the shares had been incurred by non-payment of the calls in question, there had never been the thirty days' notice required by s. 14 of the company's act to entitle them to take advantage of such forfeiture; and that the facts disclosed by the special case shewed, that, without such notice, the company had taken advantage of such forfeiture, to the plaintiff's damage:"

"As to the damages,—that, after tender, the plaintiff was entitled, as between him and the company, to all the rights of owners of the shares; that the case shews he might at the time of the tender have sold them at 20l. per share; and that, as against the defendants, he was entitled to take their value at no less than that sum; but that he was entitled to have them taken at the highest sum to which they rose before the commencement of the action, and that the time of the commencement of the action was not the proper time at which the calculation should be made."

that by holding the first part to be qualified by the subsequent words, and saying that, though the non-payment of the calls, with interest, within three months after the time appointed for payment thereof, operates an inchoate forfeiture, yet such forfeiture is not to be treated as absolute and indefeasible until the prescribed notice and declaration have been given and made. Independently, therefore, of the stringent consequences of holding the forfeiture to be absolute in the first instance, the language itself shews that it is to be dependant upon something which is to take place subsequently. And the reason for that is obvious enough; for, the 13th section provides that notice of the time and place of payment of the call shall be given "in the *London Gazette*, and in two or more of the daily London newspapers, as the said directors shall direct;" and that notice may never actually reach the shareholder, so as to enable him to pay the call within the time prescribed. For these reasons, I am of opinion, that, in order to complete the forfeiture, the notice must be given, and the forfeiture declared at the general or special general meeting of the proprietors. Upon this ground, therefore, I think the judgment of the court below was right, and must be affirmed.

MARTIN, B. I am entirely of the same opinion: and I would only just add, that it is impossible to discover any sensible reason for requiring the thirty days' notice, unless this be the true construction of the 14th section [751] of the statute. If nothing that the shareholder could do would cure the forfeiture, it would be idle to give him notice. It could, therefore, only be given for the purpose of affording him an opportunity to come in and by payment in the interim avert the consequences of his default.

CROMPTON, J. The words of prohibition contained in the 14th section,—"no advantage shall be taken of such forfeiture of any share or shares, until after thirty days' notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode; nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen," seem to me to be conclusive. The company are taking advantage of the forfeiture, by withholding the plaintiff's shares. This they cannot do without first complying with the conditions prescribed by the statute.

WATSON, B. The ground of forfeiture is, the nonpayment of the calls. The time and manner of working out the forfeiture are prescribed by the subsequent part of the clause.

Judgment affirmed, with costs.

Smith, for the defendant in error, asked for interest upon the judgment.

[752] COLERIDGE, J. The amount of the judgment was matter of arrangement in the court below.

MARTIN, B. The plaintiff may be very well contented with what he has got.

Interest refused.

COMMON BENCH REPORTS. New Series. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, and in the EXCHEQUER CHAMBER, in Easter and Trinity Terms, 1857. By JOHN SCOTT, Esq., of the Inner Temple, Barrister-at-Law. Vol. II. London, 1858.

[1] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS (PURSUANT TO THE 17 & 18 VICT. C. 125, S. 95) AND IN THE EXCHEQUER CHAMBER, IN HILARY VACATION, IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA.

The Judges present were,—Cresswell, J., Williams, J., Crowder, J., and Willes, J.

LEE AND OTHERS, Assignees of William Hawke, a Bankrupt, *v.* SANGSTER AND ANOTHER. Feb. 10, 1857.

[S. C. 26 L. J. C. P. 151; 3 Jur. N. S. 444; 5 W. R. 487.]

The circumstance of an action having been brought by the assignees of a bankrupt without first obtaining the leave of the court of bankruptcy, pursuant to the 12 & 13 Vict. c. 106, s. 153, gives the court in which the action is brought no power to stay the proceedings on motion.—Nor can the absence of such leave be pleaded as a defence to the action.—Neither is it a ground of objection on the part of the defendant, that the name of the official assignee has been used without his consent.

This was an action brought in the names of the official assignee and the trade assignees in respect of a debt alleged to be due from the defendants to the bankrupt. The defendants had been summoned under the 120th [2] section of the 12 & 13 Vict. c. 106, and admitted that they owed the estate 36l. 13s. 1d. (which sum they paid), the amount claimed being 43l.; and this action was commenced on the same day, to recover the entire sum.

Lush, on a former day in this term, moved for a rule calling upon the plaintiffs to shew cause why all further proceedings in this cause should not be stayed, on the ground that the action had been brought without first obtaining the leave of the commissioner, pursuant to s. 153, which enacts "that the assignees, with the leave of the court, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt." He submitted, that, although there were no prohibitory words in the act, the policy of the enactment was sufficiently obvious; and he referred to *Dance* v. *Wyatt*, 6 Bingh. 486, 4 M. & P. 201, where (upon the statute 7 G. 4, c. 57, s. 16) the objection was taken as a ground of nonsuit. He further objected that the action had been brought by the trade assignees in the name of the official assignee without his consent. [Cresswell, J. The trade assignees had a right to use the name of the official assignee, if he did not choose to interfere. Upon the other point there seems ground for a rule.]

Prentice, on a subsequent day, shewed cause. The 153rd section of the 12 & 13 Vict. c. 106, is a provision for the internal management of the bankruptcy; and the only persons who can complain of a breach of it are the creditors, and such breach clearly forms no ground of objection in the mouth of a defendant. It is placed in that [3] part of the statute which is introduced by the words,—"And with respect to the choice of assignees, and their rights and duties," and is evidently intended as directory to them. It is somewhat similar to the provisions as to what shall be done or omitted to be done by the directors, contained in acts for the incorporation and regulation of public companies,—an instance of which is to be found in the case of *The Thames Haven Dock and Railway Company* v. *Rose*, 2 Dowl. N. S. 104. The 108th section of the company's act (6 & 7 W. 4, c. cviii.) provided that the business and concerns of the company should be carried on under the management of twelve directors, to be chosen from amongst the proprietors holding ten shares each, to whom the general management and control of the business of the company was intrusted, and who were authorised to do all things necessary or expedient for carrying on the business and concerns of the company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said company: s. 112 provided, that, when and so often as any director should die or resign, or become disqualified or incompetent to act as a director, it should be lawful for the remaining directors to elect some other proprietor, duly qualified, in his place: s. 116 provided, that, at all meetings of directors, five should be a quorum: and s. 123 enabled the company to sue for calls. An action having been brought under the act for calls, the defendant (on the 8th of March) suffered judgment by default; and, on the 31st of May (in Trinity Term), he applied to set that judgment aside, on the ground, that, at the commencement of the suit, and during its continuance, the direction consisted of seven proprietors only instead of twelve. The court refused to interfere, as well on the ground of the delay in the defendant's application, as because the objection might have been raised by plea: and they [4] further held, that the provisions of the 108th and 112th sections of the act were directory only, and that the business of the company might well be conducted by seven directors, unless the shareholders should interfere to require the completion of the whole number; but that, at all events, those provisions were intended for the internal management of the company only, and could not be taken advantage of by a person in the position of a stranger. So, here, if there be anything in the objection, it should have been raised by plea; or, if it could be taken advantage of on summary application, such application should be addressed to the court of bankruptcy: *Ex parte Magnus*, 3 Mont., D., & De Gex, 693 (*a*).

Lush, in support of his rule. The words of the 153rd section are plain; and its object manifestly was, to prevent the estate of the bankrupt from being squandered by recklessly bringing actions. Under the 6 G. 4, c. 16, there was no power given to the assignees to summon debtors; nor any provisions giving them any control in the bringing or defending of actions. In this act, both are found: and the power conferred by the 120th section has been already exercised in this case. The only question is, whether this is a matter which the court can deal with upon motion. It clearly could not be pleaded; for, the consent of the court of bankruptcy might be obtained the next day. This, therefore, is the only way in which the objection can be presented. [Cresswell, J. Is there not a provision somewhat similar to this in the Winding-up Act, 11 & 12 Vict. c. 45? Prentice. The 60th section provides that "no action, suit, or other proceeding in any of Her Majesty's superior courts at Westminster or Dublin shall be instituted or brought or proceeded with by [5] the official manager, whether against a contributory of the company or any debtor or other stranger thereto, but with the leave or according to the general direction of the master, to be obtained in that behalf by the official manager, who shall accordingly apply for the same; and that no such action, suit, or other proceeding shall be proceeded with if the master shall, by writing under his hand, direct that the same shall be stayed or discontinued: Provided always, that the want of such leave as aforesaid shall not be set up as or in anywise constitute a defence to any such action, suit, or other proceeding."] The provisions of the Winding-up Acts are addressed to a

(*a*) See 6 G. 4, c. 16, s. 88; and see *Percy* v. *Roberts*, 1 Mylne & K. 4, and *Jones* v. *Yates*, 3 Y. & J. 373.

totally different object. That which the legislature had in view here, was, to prevent the bringing of improper actions, and to give the control and management of the proceedings when commenced to the assignees. [Williams, J. What is the consequence if the assignees sue without leave?] The assignees get no costs. [Williams, J. They are to have costs only in the event of their suing with the leave of the court. Cockburn, C. J. Is it compulsory on the assignees to summon the debtor under s. 120?] Leave to sue is never given by the commissioner unless the party has been previously summoned. Here, the action was commenced on the very day on which the defendants were summoned to appear.

COCKBURN, C. J. The point being a new one, we will take time to consider before we decide it.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

This was a rule obtained in an action brought by the assignees of a bankrupt, to stay proceedings, on the ground that the plaintiffs had brought the action without having first obtained the leave of the court of **[6]** bankruptcy, pursuant to the 153rd section of the Bankrupt Law Consolidation Act, 1849,—12 & 13 Vict. c. 106.

The language of that section at first sight seems strongly to support the present rule; for, it enacts that "the assignees, with the leave of the court first obtained upon application to such court, but not otherwise, may commence, prosecute, or defend any action," &c.

It was contended that the right of the assignees to sue, being a thing created by the act alone, must be taken with the qualification annexed to it by the act, viz. that they shall not have the right to sue, unless they shall have obtained the leave of the court of bankruptcy. But this argument would prove too much; for, it would shew that the fact of no such leave having been obtained would furnish a good plea to the action, and, consequently, that the present rule was misconceived.

On consideration, however, we are satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the court of bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the court of bankruptcy, it is difficult, if not impossible, to suggest how the court of common law in which the action was pending could interfere with the defendants' proceedings.

If the assignees neglect to obtain the requisite leave to sue or defend, the act provides that the costs to which they may be put shall not be allowed out of the bank-**[7]**-rupt's estate. And the court of bankruptcy may, it should seem, under the general powers conferred by the act, make such orders on the assignees with respect to the cause, as the court may deem right. But it appears to us that no recourse can be had to the court of common law in which the cause is pending.

We therefore think this rule must be discharged, but without costs.

Rule discharged, without costs.

WHITE *v.* THE GREAT WESTERN RAILWAY COMPANY. Feb. 20, 1857.

[S. C. 26 L. J. C. P. 158; 5 W. R. 488.]

In an action against a railway company for negligence in forwarding goods, whereby they lost a market, the declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them as such common carriers for hire and reward. Plea, traversing the averment that the defendants received the goods as common carriers. It appeared in evidence that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions, subject to which they were to be carried. The judge, holding that the conditions were reasonable, and the contract a special contract within the 17 & 18 Vict. c. 31, s. 7, and that consequently the defendants did not

receive the goods to be carried by them as common carriers, directed as a nonsuit: —Held, that the nonsuit was right.

This was an action against the Great Western Railway Company charging them, as common carriers, with negligence in the conveyance of goods, whereby they arrived at their destination too late for the market.

The declaration stated that, the defendants being common carriers by railway for hire, the plaintiff, on the 12th of November, 1855, caused to be delivered to them, at their request, and they accordingly then received from the plaintiff, a quantity of cheese, to be by them, as such common carriers, carried and conveyed on a certain railway, from Bath, to wit, to Basingstoke, for hire and reward then paid by the plaintiff to them in that behalf: yet the defendants, by the negligence and default of themselves and their servants, wrongfully, and contrary to their duty in that behalf, neglected and omitted to [8] carry or convey the said cheese as aforesaid for a long and unreasonable time in that behalf; and, by means thereof, the plaintiff lost a market for the sale of the said cheese, and was obliged to sell the same at a subsequent market, for a less sum of money than he could and would have done had the defendants carried and conveyed the said cheese as aforesaid within a reasonable time in that behalf; and the plaintiff was also necessarily put to great expense in and about the endeavouring to procure and in procuring the defendants to carry and convey the said cheese from Bath to Basingstoke aforesaid, and in and about necessary travelling to and from the said market by reason of the premises, and which became and were thereby wholly useless: Averment that all conditions precedent and all matters and things necessary to entitle the plaintiff to maintain the action, had happened and existed before suit: And the plaintiff claimed 50*l*.

The defendants pleaded, —first, that the plaintiff did not cause to be delivered to the defendants, nor did they receive from the plaintiff, the said cheese, to be by them carried and conveyed as alleged,—secondly, not guilty,—thirdly, that the said cheese in the declaration mentioned was delivered by the plaintiff to, and accepted and received by, the defendants, to be carried and conveyed under and subject to a certain contract and condition, which rendered them not liable for the loss, damages, or expenses in the declaration mentioned, to wit, that the company would not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train, whether at starting, or at any of the stations, or in the course of the journey, and that the company did not undertake to send goods by any particular train, if there were an insufficient number of trucks at the station, or the trucks could not be conveniently used for the purpose, [9] notwithstanding the goods might have been taken to the station before the time appointed by the company; and that the plaintiff's claim was a loss within the true intent and meaning of the said condition, and not otherwise,—fourthly, that, at the time of the delivery of the said cheese to the defendants as aforesaid, the plaintiff agreed to bear the risk of all loss or damage relating to the carriage or conveyance of the said cheese, in consideration of the defendants charging him at a reduced rate for the carriage thereof; and that the plaintiff was accordingly charged at such reduced rate, and the said cheese was carried and conveyed by the defendants under and subject to that agreement, and not otherwise; and that the loss or damage in the declaration mentioned was and is part of the loss or damage agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff joined issue upon each of the above pleas: And, for a further replication to the third plea, the plaintiff said that the contract in the declaration mentioned was made and entered into after the passing and coming into operation of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and that the said contract and condition in that plea mentioned was and is unjust and unreasonable within the true intent and meaning of that statute: And, for a further replication to the fourth plea, the plaintiff said that the agreement in that plea mentioned was made after the passing and coming into operation of the same act of parliament, and was and is a special contract within the true intent and meaning of the 7th section of the said act; and that such agreement was not signed by the defendants or by the person delivering the said cheese for carriage, as by the said act of parliament is required in that behalf.

The plaintiff also new assigned, to the third plea, that he sued the defendants in this action not only for [10] the loss arising as in that plea mentioned, but also for

that the defendants, after they had received into their custody the said cheese for the purpose of so carrying and conveying the same as aforesaid, wrongfully neglected and omitted to commence or set about the carrying and conveying of the said cheese, and wrongfully delayed so doing for a long and unreasonable time in that behalf, and not in consequence or by reason of any such delay, detention, or cause as in that plea mentioned; and to the fourth plea,—that he sued the defendant in this action not only for the loss arising as in that plea mentioned, but also for that the defendants, after they had received into their custody the said cheese for the purpose of so carrying and conveying the same as aforesaid, wrongfully neglected and omitted to commence or set about the carrying or conveying of the said cheese, and wrongfully delayed so doing for a wrong and unreasonable space of time in that behalf, and not during the risk, carriage, or conveyance in that plea mentioned, and that the loss occasioned to him the plaintiff by such last mentioned wrongful act was other than and no part of the loss in that plea mentioned.

The defendants took issue on the replications to the third and fourth pleas, and pleaded not guilty to the new-assignments.

The cause,—which was originally commenced in the county-court of Bath, and removed by certiorari, was tried before Channell, Serjt., at the last Summer Assizes for Somersetshire. The facts were as follows:—The plaintiff, who is a farmer residing at Timsbury in the county of Somerset, being desirous of forwarding a quantity of cheese to Bishopstoke, in the county of Hants, for sale at the market to be held there on Thursday, the 15th of November, 1855, caused it to be sent to the Bath Station of the Great Western railway on Monday, the 12th, paying the carriage to Basingstoke (where the **[11]** Great Western railway joins the South-Western line leading to Bishopstoke), and directing the servants of the Great Western Railway Company to forward it to its destination, which they assured him it would arrive at in time for the next Thursday's market. Relying upon this assurance, the plaintiff went on the 15th to Bishopstoke to attend the market, but the cheese did not arrive; and this action was brought to recover 26*l.* for the loss and expense incurred by the plaintiff in consequence.

It appeared that the course of transit from Bath to Bishopstoke is, by the Great Western railway from Bath to Reading, and thence to Basingstoke, and from Basingstoke by the South Western railway to Bishopstoke; that, in the ordinary course, the plaintiff's cheese should have started from Bath at 10 p.m. on Monday, arriving at Bishopstoke some time on the following day; but that, in consequence of the engine being of insufficient power to propel the whole train of trucks, the cheese was not forwarded from Bath until 4.30 p.m. on Tuesday; that it arrived at Reading on Tuesday night, and might have been sent on to Basingstoke at 5.30 a.m. on Wednesday, but, in consequence of the insufficiency of the "staff" at Reading, it was detained there till 5.30 a.m. on Thursday, and consequently did not arrive at Bishopstoke until the market was over.

It further appeared, that, at the time the cheese was delivered at the Bath station, the plaintiff received from the station-master a receipt for the carriage (2*l.* 12*s.* 11*d.*), of which the following is a copy:—

"GREAT WESTERN RAILWAY.

"Bath Station, Nov. 12th, 1855.

Name and Address of Consignee.	Goods or Cattle.	Tons.	cwt.	qrs.	lbs.	£	s.	d.
White,	100 cheese.	2	5	0	0	2	12	11
Bishopstoke.	S[tation] to S[tation].							
Owner's risk.	Delivery.							
						2	12	11

[12] "Received two pounds twelve shillings and eleven pence for conveyance of the above goods to Basingstoke on the conditions stated on the other side.

"For THE GREAT WESTERN RAILWAY,

"JOHN THOMAS."

The conditions printed at the back of the receipt (and to which the plaintiff affixed his signature) were (amongst others) as follows: -"Ninthly, that they [the company] will not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train, whether in starting, or at any of the stations, or in the course of the journey. The company do not undertake to send goods by any particular train if there be an insufficient number of trucks at the station, or the trucks cannot be conveniently used for the purpose, notwithstanding the goods may have been taken to the station before the time appointed by the company."

On the part of the defendants it was submitted that the goods were not received by them "as common carriers," as alleged in the declaration, but upon the special terms indorsed on the receipt and signed by the plaintiff.

For the plaintiff it was insisted that the conditions were unreasonable and therefore void by operation of the 7th section of the Railway and Canal Traffic Act, 1854,— 17 & 18 Vict. c. 31; and consequently that the contract must be treated as unconditional.

The learned judge, upon the authority of the case of *Hughes* v. *The Great Western Railway Company*, 14 C. B. 637, ruled that the defendants did not undertake to carry the goods in question as "common carriers," but upon the special terms mentioned in the conditions; and he accordingly nonsuited the plaintiff.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the condition under which the cheese was received by the defendants, **[13]** viz. that they the defendants did not undertake to send goods by any particular train, &c., did not apply to and disprove the cause of action upon the facts proved, and that the case ought to have been left to the jury.

Butt, Q. C., and Montague Smith, Q. C., in Hilary Term last, shewed cause. The material question is, whether the cheese was received by the defendants under a contract as common carriers or under a special contract. The 7th section of the 17 & 18 Vict. c. 31, enacts, that "every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or limitation being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned, that is to say, for any horse, 50*l*., for any neat cattle per head, 15*l*., for any sheep or pigs per head, 2*l*.,—unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the in-**[14]**-creased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 G. 4 & 1 W. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties, respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 G. 4 & 1 W. 4, c. 68, with respect to articles of the descriptions mentioned in the said act." Here, the goods were received upon a special contract within that section; consequently, the first plea was proved, and the nonsuit was

right. [Cresswell, J. The plaintiff contends that the special contract did not relieve the defendants from their ordinary liabilities as common carriers.] It may be that some of the stipulations are unreasonable, but still that will not affect those that are reasonable, or make the contract the less a special contract. In *The York, Newcastle, and Berwick Railway Company, App., Crisp, Resp.*, 14 C. B. 527, pigs were delivered by A. at a railway station at Alnwick, to be carried to Newcastle, A. paying the carriage, and receiving a ticket, intimating the terms upon which alone the company un-**[15]**-dertook to carry them, one of which was, that "the company be not responsible for the non-delivery of the stock within any certain or reasonable time, nor in time for any particular market, nor are they required to forward by any particular train." In an action by A. against the company, in the county court, for injury to the pigs from delay in the conveyance of them, the judge left it to the jury to say whether the company received the pigs as common carriers for hire for carriage, or whether they received them under the special contract set forth in the ticket. The jury having found against the company, —this court, on appeal, held that the judge had misdirected the jury, inasmuch as there was no evidence whatever that the company had received the pigs upon any other contract than that set forth in the special contract. That was followed by the case of *Hughes* v. *The Great Western Railway Company*, 14 C. B. 637: it was there proved, that, when the pigs were delivered to the defendants, the plaintiff signed a note in which it was stipulated "that the defendants would not be liable or responsible for the carriage or delivery of the pigs within any certain or definite time, nor in time for any particular market:" and the learned judge, holding that the contract alleged in the declaration, —which charged the defendants as common carriers, and alleged a breach of duty in not delivering the pigs within a reasonable time,—was not proved, nonsuited the plaintiff: and the court upheld the nonsuit. The decision in these cases is in strict accordance with all the rules of pleading: and the recent statute makes no difference. *Shaw* v. *The York and North Midland Railway Company*, 13 Q. B. 347, is an authority to the same effect. [Cockburn, C. J. The statute does not make the company cease to be common carriers, though it somewhat lessens their liability as such.] The question here is, not what character the company bears generally, but what is the na**[16]**-ture of the contract they have here entered into. If a special one, it ought to have been declared on as such, and the question as to the reasonableness of the conditions under s. 7 does not arise: see *Simons* v. *The Great Western Railway Company*, and *The London and North Western Railway Company, App., Dunham, Resp.*, 18 C. B. 805, 826; *Wise* v. *The Great Western Railway Company*, 1 Hurlst. & N. 63; *Pardington* v. *The South Wales Railway Company*, 1 Hurlst. & N. 392, 16 L. J. Exch. 105. In this latter case, Bramwell, B., says: "I think the proper construction of the act is, that the company shall not be allowed, by giving general notices, conditions, or declarations, to free themselves from liability for the loss or injury to the cattle carried by them, but that they may do so by making such conditions as shall appear just and reasonable; and that is quite consistent with their making a special contract with the party for whom they carry, with a view of protecting themselves from liability. It would be quite monstrous to say that such a bargain might not be made between man and man. It seems quite reasonable that the company should say, 'We will not be liable for any injury done to the cattle by our servants.' They receive a smaller sum for the carriage of the cattle in consequence of their being exempt by the contract from liability; and it would be very strange if we were to hold, that, after such a contract was made, the owner of the cattle might recover. I think the question of reasonableness under the statute does not arise: but, if it does, I think that such a notice would be reasonable."

Kinglake, Serjt., and Prideaux, in support of the rule. There was abundant evidence to shew that the injury complained of arose from the negligence of the company's servants. [Cresswell, J. Do you say that all the conditions are unreasonable?] They clearly are un-**[17]**-reasonable; and therefore the contract must be treated as unconditional. [Cresswell, J. If any part be reasonable, the contract upon which the goods were delivered to the defendants was not simpliciter the contract declared on. If there be any exception out of the ordinary responsibility of a common carrier, the declaration that the defendants contracted as common carriers is not made out: *Latham* v. *Rutley*, 2 B. & C. 20, 3 D. & R. 211.] *Latham* v. *Rutley* was not an action founded upon the breach of duty, but an action of assumpsit, and therefore not applicable here. The liability of the company as common carriers can only be

varied by the express provisions of the act, or by some special contract not at variance with its provisions. [Cockburn, C. J. There is no contract at all here but the special contract proved.] The fact of their having made a special contract, does not relieve the company from the duty arising from their public profession,—*Denton* v. *The Great Northern Railway Company*, 5 Ellis & B. 860,—or exempt them from responsibility for negligence: *Wyld* v. *Pickford*, 8 M. & W. 443. It was therefore competent to the plaintiff to declare generally, as he has done here: for, it is always sufficient for a plaintiff to allege so much of a contract or of a duty for the breach or non-performance of which he complains: *Cotterill* v. *Cuff*, 4 Taunt. 285. So, here, the duty to carry and deliver within a reasonable time arises out of the defendants' position as common carriers, and it was not necessary to shew in the declaration that it was subject to any exceptions or qualifications. [Cockburn, C. J. In *Hughes* v. *The Great Western Railway Company*, it was distinctly held that the circumstance of the company having received the pigs under a special contract was not consistent with the allegation that they received them as common carriers to deliver within a reasonable time. That case is precisely in point. The special contract there **[18]** differs in no degree from the contract proved here.] The circumstances of that case were very peculiar: the learned judge thought there was no evidence for the jury; and the counsel for the plaintiff, acquiescing in that ruling, consented to be nonsuited. The first part of the 17 & 18 Vict. c. 31, s. 7, imposes upon the company the liability of common carriers; and they are only enabled to get rid of the effect of that, by shewing that their primâ facie liability is limited by a special condition which the court or judge shall deem just and reasonable, and which shall be in writing, and signed by the party. In *Simons* v. *The Great Northern Railway Company*, 18 C. B. 805, there was a plea setting up the special contract, with an averment that the loss arose out of the circumstances provided against by the special contract. Indeed, in all cases since the passing of that act, the special contract has been pleaded. [Cockburn, C. J. How do you find the cases before the act, where the carrier's liability was limited by notice?] The practice was to declare generally, leaving the carrier to set up the qualification or restriction, *Clarke* v. *Gray*, 6 East, 564: but such notice did not protect the carrier against the consequences of gross negligence or felony of his servants: *Bodenham* v. *Bennett*, 4 Price, 31; *Birkett* v. *Willan*, 2 B. & Ald. 356; *Syms* v. *Chaplin*, 5 Ad. & E. 634; *Butt* v. *The Great Western Railway Company*, 11 C. B. 140.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

In this case, – which was argued before the Lord Chief Justice, and my Brother Crowder and myself, – it seems to the court that the question is one of mere special pleading. The declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them as such common carriers for hire **[19]** and reward. The plea traversed the averment that the defendants received the goods as common carriers.

It appeared in evidence that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions subject to which they were to be carried. It was contended that the conditions were unreasonable, and therefore void by operation of the statute 17 & 18 Vict. c. 31, and that the contract must be treated as unconditional. The learned judge thought the conditions reasonable, that the contract was special, and that the defendants did not receive the goods to be carried by them as common carriers, and directed a nonsuit.

The court is of opinion that he was right. The case of *Latham* v. *Rutley*, 2 B. & C. 20, 3 D. & R. 211, appears to be directly in point. That was assumpsit against the defendants as common carriers. The declaration stated that the plaintiffs, at the request of the defendants, delivered a parcel to them to be carried from London to Dover, and there delivered, and that the defendants, in consideration thereof, and for hire and reward, undertook to carry safely, but through their negligence the parcel was lost. The jury found that the contract for the carriage of this parcel was subject to the exception of fire and robbery, but that the loss was not within the exception. The plaintiff had a verdict, subject to a motion for a nonsuit. The Solicitor General, shewing cause, contended that the action was founded on the common law liability of carriers, and that the proviso in their favour did not alter the nature of the contract, but, if the loss happened by either of the causes excepted, that was matter of defence; whereupon Holroyd, J., – an admirable pleader, – observed: "It does not appear that

the defendants received the goods upon their common-law liability;" and the rule for a nonsuit was made absolute.

[20] It was argued in the present case, that the case of *Latham* v. *Rutley*, being in assumpsit, was not an authority. As far as the question determined at nisi prius in this case is concerned, it seems to the court to make no difference whether it was in assumpsit or case. But the recent case of *Walker* v. *The York and North Midland Railway Company*, 2 Ellis & B. 750, was in case. The declaration alleged that the goods were delivered by the plaintiff to the defendants as common carriers, and received by them as common carriers, to be carried, &c. Pleas,—secondly, a traverse of the averment that the defendants received the goods as common carriers on the terms alleged,—thirdly, setting out a special contract. Lord Campbell, in delivering the judgment of the court, says,—"The declaration alleges that the defendants received the goods as common carriers, with a common-law liability. The second plea says that they did not receive them on those terms; and the third plea, that they received them on certain conditions. Is there not evidence that the defendants had not received them on the terms alleged, which is the second issue? and that there was a special contract, which is the third?" The court cannot distinguish either of those cases from the present, and therefore think that the rule for setting aside the nonsuit must be discharged.

The York, Newcastle, and Berwick Railway Company, App., Crisp, Resp., 14 C. B. 527, is another authority to the same effect.

Rule discharged.

Prideaux, for the plaintiff, asked leave to appeal, under the 17 & 18 Vict. c. 125, s. 35.

Williams, J. Neither my Brother Willes nor my-**[21]**-self (*a*) heard the case argued, and therefore we could not take upon ourselves to give any leave to appeal. Besides, I conceive the case to be an extremely plain one.

Willes, J. *Wise* v. *The Great Western Railway Company*, 1 Hurlst. & N. 63, and *Pardington* v. *The South Wales Railway Company*, 1 Hurlst. & N. 392, are precisely in accordance with the judgment just pronounced. I must confess I thought the point had been settled in all the courts.

Prideaux continuing very perseveringly to urge the hardship of shutting the plaintiff out from contesting the propriety of the judgment, in a court of error, and suggesting that it was not a case in which the other side could be at all prejudiced by the delay.

Williams, J., said:—Without meaning to intimate the slightest doubt, but merely on the ground that neither of the members of the court now present heard the case argued, we will give the plaintiff time to apply to one of the other judges for leave to appeal. There will be ample time for that: for, my Brother Cresswell does not leave town for the circuit until Saturday, and the Lord Chief Justice and my Brother Crowder not until Monday next. All we can do is to stay the proceedings until Tuesday, to give you an opportunity to make your application to one of those learned judges.

The application was made, but not granted.

[22] Hall *v.* Conder and Another. Feb. 20th, 1857.

[S. C. 26 L. J. C. P. 138, 288; 3 Jur. N. S. 366, 963; 5 W. R. 742. Referred to, *Smith* v. *Neale*, 1857, 2 C. B. N. S. 89. Principle applied, *Dorab Ally Khan* v. *Abdool Azeez*, 1878, L. R. 5 Ind. App. 127.]

By an agreement,—reciting that the plaintiff "had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same within the united kingdom, and was desirous of taking out patents in France, Belgium, and such other places as might be found expedient," and further reciting that he had disposed of a moiety of the English patent, and had applied to the defendants to purchase the other moiety, and to assist him in taking out the foreign patents,—it was agreed that the defendants should pay to the plaintiff 2500*l.* in such manner as should be mutually agreed on, and also a proportion of the

(*a*) The only judges in court.

net profits: and, in consideration of such engagement on the part of the defendants, the plaintiff "agreed to make over and transfer, and did thereby accordingly make over and transfer to the defendants one half of the said foreign patents when the same should be obtained, and the above-mentioned one half of the English patent thereinbefore referred to."—A declaration on the above agreement, averring that the plaintiff was ready and willing to do and did all things necessary on his part to entitle him to the performance of the agreement, and to the payment of the 2500*l.* by the defendants, alleged for breaches,—first, that, although a reasonable time had elapsed, the defendants refused so pay the 2500*l.* or any part thereof,—secondly, that, although a reasonable time had elapsed, the defendants refused to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which the 2500*l.* should be paid,—thirdly, that, although a reasonable time had elapsed, the defendants refused to fix upon or agree with the plaintiff respecting the time or times at which the 2500*l.* or any part thereof should be paid.—The defendants pleaded, to the first breach, that, at the commencement of the action, no agreement had been come to as to the manner in which the 2500*l.* should be paid. They also demurred to the second and third breaches. And, as to all the breaches, they further pleaded,—secondly, that the invention was wholly worthless and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof,—thirdly, that, after the making of the agreement, and before the time for performing it had arrived, and before breach, and before the commencement of the suit, it was agreed that the defendants should pay and the plaintiff receive 200*l.* as the balance then to be paid of the 2500*l.* stipulated for, and that the said sum of 200*l.* should be in full satisfaction of all claims of the plaintiff in respect of the agreement until some profit should have been realized by the defendants from the invention and the letters-patent; that, in pursuance of such agreement, the 200*l.* were paid and received by the plaintiff in such full satisfaction as aforesaid; and that no profit had been realized from the invention.—The plaintiff demurred to each of these pleas:—Held, that the second breach was well assigned; for that the time for payment of the money had arrived: and, if the agreement as to the mode of payment was a condition, the defendants, by refusing to enter into any agreement, had rendered the performance of it impossible, and had either placed the plaintiff in the same position as if there had been no condition, or had become liable to a claim of the same amount, as damages for wrongfully refusing to agree.—Held also, that the second plea was bad; for, that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the meaning of the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. Held also, that the third plea was bad, being pleaded to all the breaches, and being no traverse to the first.—Whether the first plea afforded any answer to the first breach,—quære? for, semble, that, if no mode of payment of the 2500*l.* was agreed on, the money would be payable as the law directs where there is no stipulation for agreement.—Leave to add a plea to the second and third breaches (traversing the requests and breaches therein respectively alleged), refused. The court will not allow execution to issue notwithstanding proceedings in error, under the 150th section of the Common Law Procedure Act, 1852, unless the grounds of error assigned are so frivolous as to be clearly incapable of being sustained on argument.

This was an action of debt originally commenced in the Lord Mayor's court, London, and removed by habeas corpus into this court.

[23] The first count of the declaration stated, that theretofore, and before the commencement of this suit, to wit, on the 30th of January, 1856, it was agreed by and between the plaintiff and the defendants in the words and figures following, that is to say, "Upper Charles Street, Westminster. Memorandum of agreement made the 30th day of January, 1856, between W. K. Hall, of the United States of America, of the one part, and Francis Conder & Co., of No. 4 Upper Charles Street, Westminster, engineers and contractors, of the other part: Whereas the said W. K. Hall has invented a method for the prevention of boiler explosions, and has obtained a

patent for the use of the same within the United Kingdom, and is desirous of taking out patents in France, Belgium, and such other places as may be found expedient: And whereas the said W. K. Hall has already parted with or assigned away an interest of one-half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby declares that he has full right and title: And whereas the said W. K. Hall has applied to the said Francis Conder & Co. to assist him in taking out the said foreign patents, and also to purchase his above-stated interest in the said English patent: It is hereby agreed between the said parties that the said Francis Conder & Co. shall forthwith proceed to take out and secure such patents for France, Belgium, and such other places as may be mutually agreed on between the said parties to this agreement, with the exception of the United States of America: And it is further agreed that they shall pay to the said W. K. Hall the sum of 2500l. in such manner as shall be mutually agreed **[24]** on, and a further sum equal to one tenth of the net proceeds of one half the English patent, from and after the time that the said net profits shall amount to the sum of 20,000l. on the whole patent: And, in consideration of such engagement on the part of the said Francis Conder & Co., the said W. K. Hall agrees to make over and transfer, and does hereby accordingly make over and transfer to the said Francis Conder and Co. one half of the said foreign patents when the same shall be obtained, and the above-mentioned one half of the English patent hereinbefore referred to: And the said W. K. Hall further agrees to execute such further legal documents as may be requisite for the due carrying out of this agreement. In witness whereof the said parties have hereto set their signatures the day hereinbefore named. Francis Conder and Co. W. K. Hall." Averment, that, after the making of the said agreement as aforesaid, the plaintiff was ready and willing to do, and did, all things necessary on his part to entitle him to the performance of the said agreement, and to the payment of the said sum of 2500l. by the defendants: Yet the defendants, although a reasonable time had elapsed since the making of the said agreement, had wholly neglected and refused, and still did wholly neglect and refuse, to perform the same, in this, that they the defendants, although a reasonable time had elapsed, and they had been often requested to pay to the plaintiff the said sum of 2500l., had hitherto wholly neglected and refused, and still did wholly neglect and refuse, to pay the same, or any part thereof, to the plaintiff;—and in this, that they the defendants, although a reasonable time had elapsed since the making of the said agreement, and although they had been often requested so to do, had hitherto wholly neglected and refused, and still did wholly neglect and refuse, to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which **[25]** the said sum of 2500l. should be paid by them to the plaintiff;—and also in this, that the defendants, although a reasonable time had elapsed since the making of the said agreement, and although often requested so to do, had hitherto wholly neglected and refused, and still did neglect and refuse, to fix upon or agree with the plaintiff respecting the time or times, or respecting any time or times at which the said sum of 2500l., or any portion of instalment thereof, should be paid by them to the plaintiff, &c.

The declaration also contained counts for work and labour, money paid, &c., interest, and money due upon accounts stated.

First plea, to the first breach, that, at the commencement of this action, no agreement had been come to between the plaintiff and the defendants as to the manner in which the said sum of 2500l., should be paid by the defendants to the plaintiff.

The defendants also demurred to the first count so far as the same related to the breaches secondly and thirdly assigned, the ground of demurrer as to each of the said breaches being, "that no cause of action is shewn, the so-called breaches not having correlative obligations stated in or to be inferred from the said first count."

Second plea, to all the breaches, that the said invention was wholly worthless, and of no public utility or advantage whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof.

Third plea, to all the breaches, that, after the making of the agreement in the first count mentioned, and before the time for performing the said agreement in any respect had arrived, and before any breach thereof, and before the commencement of this suit, it was mutually agreed by and between the plaintiff and the defendants, that the defendants should pay to the plaintiff, **[26]** and the plaintiff receive from the

defendants, the sum of 200l. as the balance then to be paid by the defendants to the plaintiff of the said sum of 2500l. to be paid to the plaintiff according to the said agreement in the said first count mentioned; and that the said sum of 200l. should be in full satisfaction of all claims and demands of the plaintiff upon the defendants in respect of the said agreement, until some profit should have been realized to the defendants from the said invention and the said letters patent; that, in pursuance of the said agreement, they paid the plaintiff the said sum of 200l., and the plaintiff received the same, in such full satisfaction as aforesaid; and that, since the said payment to the plaintiff of the said 200l., no profit had been realised on the said invention by the defendants or by any person or persons claiming an interest therein through the defendants.

Fourth plea, as to the residue of the declaration, never indebted.

Fifth plea, as to the residue of the declaration, a set-off for money lent, &c.

Sixth plea, payment before action.

The plaintiff took and joined issue on the first, second, third, fourth, and sixth pleas, and joined in demurrer as to the second and fourth breaches.

He also demurred to the first plea, the ground stated in the margin being "that the defendants' obligation under the contract remained notwithstanding the absence of the said agreement," to the second plea, on the ground "that it was not necessary that the patent should have been good or new, or that the plaintiff was the first inventor, and, if it were, that it did not appear by the second plea but that the defendants knew the contrary when they made the contract declared on,"—and to the third plea, on the ground "that it was without meaning, and set up no valid contract."

[27] And for a further replication to the third plea, the plaintiff said that he was induced to enter into and make the said agreement in that plea mentioned, through and by means of the fraud, covin, and deceit of the defendants; and for a further replication as to the fifth plea, never indebted.

The defendants joined in demurrer as to the first, second, and third pleas, and took issue on the further replication to the third plea, and joined issue on the replication to the fifth plea.

The demurrer was argued in Hilary Term last.

Byles, Serjt. (with whom was Lush), for the plaintiff. The first breach, which alleges the non-payment of the 2500l., is a good breach. The consideration for the defendants' agreement to pay that sum is, the assignment of the plaintiff's interest in a patent already obtained in England, and also in patents about to be obtained in France and Belgium. The first question arises upon the meaning of the agreement to pay the plaintiff the 2500l. "in such manner as shall be mutually agreed on." The context shews that those words have no reference to time: The word "manner" must, therefore, receive its ordinary construction,—"form" or "mode"; for instance, in cash, or in notes, or through a banker, or in any way which does not import the giving of time. It may, indeed, be doubtful whether it amounts to anything more than is ordinarily implied in every agreement for the payment of money, to pay upon request: and, if so, the bringing of the action is a sufficient request. But, assuming that the words in question mean that something is to be agreed upon between the parties before the money is to be paid,—that they are to agree, not merely as to the mode, but also as the time of payment,—the declaration contains a general averment of performance of all conditions precedent on the part of **[28]** the plaintiff to entitle him to the payment of the money: the money, therefore, being due, in the absence of any agreement as to the time and mode of payment, such payment must be made as the law directs where there is no stipulation. The first plea, which addresses itself to that breach is, that, at the commencement of this action, no agreement had been come to between the plaintiff and the defendants as to the manner in which the 2500l. should be paid. This plea, it may be conceded, cuts from under the plaintiff the averment that all things were done that were necessary to entitle him to have the agreement performed by the defendants: but the allegation of readiness and willingness remains; and that is enough to sustain the breach: notes to *Peeters* v. *Opie*, 2 Wms. Saund. 352, citing *Lancashire* v. *Killingworth*, Com. Rep. 117, 12 Mod. 530, 1 Lord Raym. 686, *Rawson* v. *Johnson*, 1 East, 203, *Bordenave* v. *Gregory*, 5 East, 107, and *Laird* v. *Pim*, 7 M. & W. 474. The second and third breaches, which allege a refusal on the part of the defendants to agree as to the manner or the time of payment of the money, are clearly unexceptionable breaches. The second plea, which is addressed

to all the breaches, amounts to this,—"Your patent which you have agreed to assign to us, is liable to be defeated by plea, or by scire facias, by reason of want of public utility or novelty." Be it so, still the plaintiff has that which he professes to sell. [Cockburn, C. J. The agreement commences with a recital that the plaintiff "has invented a method for the prevention of boiler explosions, and has obtained a patent for the use of the same." If he is not the first inventor, the patent is of no avail. Are the defendants to pay this large sum, when they find the patent void?] It may be that they may have a remedy against the plaintiff, should it so turn out: but non constat that the invalidity of the contract would be discovered or set up. [Cockburn, C. J. Are the defend-**[29]**-ants bound to take the chance of that?] The law will not regard the value of the consideration for the defendants' promise, however worthless or inadequate it may appear to be: *Haigh* v. *Brooks*, 10 Ad. & E. 309, 323, 2 P. & D. 477, 3 P. & D. 452. That was an action upon a promise made by the defendant in consideration of the plaintiff's giving up a guarantee which turned out to be worthless: and, in giving judgment Lord Denman (10 Ad. & E. 320) says,—"We are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof. Here, whether or not the guarantee could have been available within the doctrine of *Wain* v. *Warlters*, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." That principle is strictly applicable here. [Williams, J. The case seems rather to fall within that class of cases in which it has been held that there is no implied warranty of title or quality, on the sale of an ascertained chattel.] Assuming the absence of fraud, the maxim "Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis," applies. Or, the case may be assimilated to that of a man selling **[30]** a lease after a forfeiture has been incurred: if the party takes the benefit of the contract, he is not to be absolved from paying the price, because it turns out, without any fraud on the part of the seller, that the thing is of less value than was anticipated. In *Kintrea* v. *Perston*, 1 Hurlst. & N. 357, 25 Law J. Ex. 287, it was held that a contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease; and, in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. Assuming that the objection to the patent is tenable, there is a chance that the defect will not be discovered. [Cresswell, J. That would be tantamount to making the defendants pay the plaintiff a large sum for the chance of successfully defrauding the public. The suggestion is, that the plaintiff deceived the crown by alleging that he was the first inventor: and the invalidity of the patent may be shewn under the plea of non concessit.] So far, at all events, as concerns foreign countries, the invention may be new. [Cockburn, C. J. The whole rests upon the fact of the plaintiff being the true and first inventor: the agreement starts with that recital.] The surrender of a doubtful right is a good consideration for a promise to pay a stipulated sum: *Longridge* v. *Dorville*, 5 B. & Ald. 117. A defeasible contract may still be of some value. [Williams, J., referred to *Gompertz* v. *Bartlett*, 2 Ellis & B. 849. There, an unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect. It was held that the purchaser was entitled to recover back the price from the vendor, on the ground **[31]** that the article sold as a foreign bill did not answer the description by which it was sold: though it would have been otherwise (the sale being without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill. Lord Campbell, in giving judgment, there says: "The law is, I think, accurately laid down in the passage cited from

Addison on Contracts (2nd edit. p. 152). If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable: but he is answerable, if the bill be spurious. *Jones* v. *Ryde*, 5 Taunt. 488, and *Young* v. *Cole*, 3 N. C. 724, 4 Scott, 489, are strongly in point. *Young* v. *Cole* is indeed a very strong case; for, the things sold there as Gautemala bonds were in one sense of the words Gautemala bonds; but they were not what was professed to be sold, viz. bonds binding on the Gautemala government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case, the purchaser may recover." In the cases put of the lease or the agreement for a lease, there is not, as in the case put by Lord Campbell, a total failure of consideration. Cresswell, J. In *Haigh* v. *Brooks*, the defendant had the very thing he contracted for, both parties knowing what it was that they were bargaining about.] So, in the case of the bezar stone,—*Chandler* v. *Lopus*, Cro. Jac. 4, and in the case of the gold bar, the purchaser got the thing he bargained for. [Williams, J. But in those cases, as in *Gompertz* v. *Bartlett*, the thing did not answer the description by which it was sold.] Here, the article contracted for is identified: it is a patent which the plaintiff had obtained for "a method for the prevention of boiler explosions." So long as that patent is a subsisting patent, the defendants are liable on their agreement; though, should it be avoided for want of novelty, or as not being the proper subject of a patent, **[32]** they may have a remedy by cross-action, or may claim to reduce the damages. The third plea is clearly bad. *Cumber* v. *Wane*, 1 Stra. 426, and the authorities cited in the notes to that case in 1 Smith's Leading Cases, 246, et seq. shew that payment of a smaller sum cannot be pleaded in satisfaction of a larger liquidated debt. It is true the plea states that the smaller sum was agreed to be paid before breach. But there is no chasm between the making of the contract and the breach of it, in which there could be a rescission of the contract. [Cresswell, J. The language of the plea would seem to imply that 2300*l.* of the stipulated sum had already been paid.] Exactly so.

Field, contrà. It was a condition precedent that the manner,—that is, the time as well as the mode,—of payment of the 2500*l.* should be mutually agreed upon. There is no cause of action as alleged in the first breach, until such agreement was come to. [Cockburn, C. J. When were the parties to agree as to the time and mode of payment? If that be left uncertain, the law infers that the payment shall be made in a reasonable time.] The uncertainty vitiates the whole contract: *Cope* v. *Albinson*, 8 Exch. 185. In *Milnes* v. *Gery*, 14 Ves. 400, an agreement was entered into for the sale of premises according to the valuation of two persons, one chosen by each party, or of an umpire to be appointed by those two in case of disagreement; and a bill for a specific performance, praying that the court would appoint a person to make the valuation, or otherwise ascertain it, was dismissed, Sir W. Grant, M. R., saying, "The more I have considered this case, the more I am satisfied, that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered, was, to purchase at a price to be **[33]** ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed." An instance of this kind of uncertainty in a contract, is found in the case of *Taylor* v. *Brewer*, 1 M. & Selw. 290, where, a person having performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right;" and it was held that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. The second plea is clearly a good answer to the declaration. The contract is executory. It purports to pass to the defendants a legal right (as to a moiety) to the alleged invention for the time the patent has to run. It must be assumed that the parties intended the one to sell and the others to buy something of value. In *Purvis* v. *Rayer*, 9 Price, 488, 518, Lord Chief Baron Richards says: "It is a general rule in equity, founded on principles of honesty and the dictates of good sense, that, if

a person, generally speaking, offers anything for sale, the vendee, or he who becomes the purchaser, is entitled to see that the vendor has it with the qualifications and in the way in which he, the vendee, understood that he bought it; that is, so as to afford him an assurance of having bought what he wanted, and meant to buy, or at least what was offered or professed to be sold,—or he may reject the contract." [Cresswell, **[34]** J. Those observations, apart from the facts with reference to which they are made, are not very intelligible.] The point decided in the case was, that, if a contract be made for the sale of leasehold property unconditionally and without a stipulation in terms on the part of the vendor that he means to sell his interest only in the residue of the term, and that he will not warrant his lessor's title,—he is bound to shew to the satisfaction of the purchaser that his lessor, or the original grantor of the term, was entitled to grant the lease. He cannot otherwise oblige the purchaser to complete the contract made for the purchase of the premises. [Cresswell, J. *Spratt* v. *Jeffery*, 10 B. & C. 249, 5 M. & R. 188, seems to be an authority against you. There, by contract, A. agreed to sell to B. the two leases and goodwill in trade of a public-house, and shop adjoining, for 4250*l.*, "as he holds the same," for twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and, upon payment of the said sum of 4250*l.*, A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises: and it was held that the true meaning of this agreement was that the vendee was to purchase the two leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title.] *Purvis* v. *Rayer* is confirmed by *Souter* v. *Drake*, 5 B. & Ad. 992, where it is distinctly laid down that, in every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and that, without shewing such title, the seller cannot maintain an action at law against the buyer for refusing to complete the purchase. The terms of the instrument in *Spratt* v. *Jeffery* shewed that both parties **[35]** intended to waive the question of title. Here, if the defendants had paid the money, they would have been entitled to recover it back: *Cripps* v. *Reade*, 6 T. R. 606. [Cresswell, J. In that case the defendant had not that which he professed to sell; and the purchaser was evicted. Here, however, the plaintiff had the patent.] True; but it was worthless. In *Morley* v. *Attenborough*, 3 Exch. 500, 509, Parke, B., says,—"With respect to executory contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed." Here, the object of the contract was, the purchase of the invention. That has not been attained. The case differs, therefore, from *Haigh* v. *Brooks*, where the defendant got all he bargained for, and all that the plaintiff professed to sell. So, in *Kintrea* v. *Preston*, all that the plaintiff intended to sell was the agreement. In *Hastie* v. *Couturier*, 9 Exch. 102, the plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn to proceed to a safe port in the united kingdom. The plaintiffs accordingly shipped at Salonica 1180 quarters of Indian corn; and, on the 22nd of February, 1848, the master signed a bill of lading making the corn deliverable "to order of the plaintiffs, or to their assigns, he or they paying freight as per char-**[36]**-terparty." The plaintiffs indorsed the bill of lading, and sent it together with the charterparty to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo "at and from Salonica to the port of discharge in the united kingdom," &c., "corn warranted free from average, unless general, or the ship be stranded." On the 1st of May, 1848, B. employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charterparty and policy of insurance, and they advanced 600*l.* on the cargo. The custom of corn factors is, to sell under a del credere commission, and when so selling not to mention the purchaser. On the 15th of May, 1848,

the defendants sold the cargo to C., and sent him a bought-note, which stated that he had bought of them "1180 quarters of Salonica Indian corn of fair average quality when shipped, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the united kingdom: payment at two months from this date, upon handing over shipping documents." On the same day, the defendants wrote to B. advising him of the sale, but without making any mention of the purchaser, or of commission. The vessel sailed from Salonica on the 23rd of February, and, having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and, on the 24th of April, it was sold. On the 23rd of May, C. gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought an action against the defendants to recover the price of the cargo, and declared specially on a del credere guarantie: and it was held in the Exchequer Chamber,—reversing the judgment of the court of Exchequer,—that the con-**[37]**-tract was for the sale of a cargo supposed to exist and capable of transfer to the purchaser, and that, inasmuch as it had been sold to other persons prior to the time of the contract, the plaintiffs could not recover. And that decision was affirmed by the House of Lords; see *Couturier* v. *Hastie*, 5 House of Lords Cases, 673. [Cockburn, C. J. That case would be more to the purpose if this patent had been repealed before the making of the contract.] *Strickland* v. *Turner*, 7 Exch. 208, is also a strong authority in favour of the defendants. There, E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence by letter with the trustees, upon the subject of the purchase, and, from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased: it was held, that, as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase money from the executrix, on the ground that the money had been paid without consideration. The third plea affords a good answer to the plaintiff's claim. [Williams, J. It is pleaded to all the breaches. How do you apply it to the first breach?] It is an informal traverse of that breach. At all events, it shews a new substituted contract before breach. It was perfectly competent to the parties to make a new agreement: *Taylor* v. *Hilary*, 1 C. M. & R. 741. [Williams, J. The plea seems to me to be perfectly unintelligible. How can the 200l. be "the balance then payable" of the 2500l.?]

[38] Lush, in reply. The cases cited on the first point, have no application. *Cope* v. *Albanson*, 8 Exch. 185, was the case of a mere proposal, which never ripened into a contract, and therefore no action would lie. *Milnes* v. *Gery*, 14 Ves. 400, was a contract for sale at a price to be fixed in a given manner: the price, which was the essence of the contract was never ascertained. Besides, it by no means follows that an action may not be maintained upon an agreement, although a court of equity will not decree specific performance, because the price is not ascertained. *Taylor* v. *Brewer*, 1 M. & Selw. 290, has no analogy whatever to this case. Every debt is payable at the time and in the manner the parties mutually agree upon. The meaning of the contract here evidently is, that the 2500l. is payable presently in cash, unless the parties shall otherwise agree. Assuming that the money was not payable at the plaintiff's option, the second breach, which charges a refusal to enter into an agreement respecting the manner in which the payment was to be made, clearly is a good breach: it throws the refusal to agree entirely upon the defendant. [Cockburn, C. J. Suppose the parties met, and could not agree upon the manner of payment, what is to happen?] That difficulty affords a strong argument to shew that the parties could not have intended the agreement to be a condition precedent. Everything is fixed but the time of payment. Suppose one of the parties died or became insane immediately after the execution of the agreement, would the defendants get the benefit of the patent without paying the money? The last breach, at all events, stands clear of the objection suggested by the Lord Chief Justice. As to the second plea, it is said that the agreement is all executory. As regards the English patent, however, it amounts to an

absolute assignment in equity; and, as to the foreign patents, it amounts to an agreement to assign them when taken out: and, consistently with **[39]** that plea, the defendants may have had the full benefit of the English patent. It may be that the invention is, as the defendants allege, wholly worthless, and yet the defendants may have acquired large profits from the working of it. There is no allegation of fraud. The recital that the plaintiff had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same within the united kingdom, is the language of both parties to the agreement: *Bowman* v. *Taylor*, 2 Ad. & E. 278, 4 Nev. & M. 264. With respect to the last plea, it is difficult to imagine what it means. It is addressed to all the breaches; and, as to the first breach, it is clearly bad, and consequently it is bad altogether. [Cresswell, J. The third plea is manifestly a bad one.]

Cockburn, C. J. There was a case partly heard a few days ago, one of the points in which has some bearing on this case. It may, therefore, be desirable to hear that case out before we dispose of this (*a*).

Cur. adv. vult.

Williams, J., now delivered the judgment of the court.

The first question arising on this record is, whether the plea to the first breach is good, viz. that, when the action was commenced, no agreement had been made as to the manner in which the 2500*l.* should be paid. The question stands thus:—2500*l.* was to be paid on an event that has happened (viz. the sale of a moiety of the patent) in such manner as might be agreed on. The money was due: if any particular mode of payment was agreed on, payment in that mode would fulfil the contract; but, if no mode was agreed on, there is much **[40]** ground for contending that the money then due must be paid as the law directs where there is no stipulation for agreement. This question, however, only involves a small amount of costs; for, we are of opinion that the second breach is good. It alleges that the defendants, although a reasonable time has elapsed, have wholly refused to enter into any agreement respecting the manner in which the money was to be paid. The time for payment of the money had arrived. If the agreement as to the mode of payment is a condition, the defendants, by refusing to enter into any agreement, have rendered the performance of it impossible, and have either placed the plaintiff in the same position as if there had been no condition, or have become liable to a claim of the same amount, as damages for wrongfully refusing to agree.

The question raised by the demurrer to the second plea,—which is pleaded to all the branches, viz. that the alleged invention was wholly worthless and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof,—is not free from difficulty.

With regard to the sale of ascertained chattels, it has been held that there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied. The law on this subject was fully explained by Parke, B., in giving the judgment of the court of Exchequer in *Morley* v. *Attenborough*, 3 Exch. 500, which, as far as title is concerned, he thus sums up,—"From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in *Ormrod* v. *Huth*, 14 M. & W. 651, it would seem that there is no implied warranty of title on the sale of goods; and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty or an equivalent to it by declarations or conduct: and the ques-**[41]**-tion in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty." And the law is quite as firmly established, that, on the sale of a known ascertained article, there is no implied warranty of its quality: *Chanter* v. *Hopkins*, 4 M. & W. 399. But there is another class of cases in which it has been held that a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy: of which *Young* v. *Cole*, 3 N. C. 724, 4 Scott, 489, and *Gompertz* v. *Bartlett*, 2 Ellis & B. 849, are strong authorities. In the latter case, Lord Campbell says it is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In this case, the thing sold was ascertained, viz. a moiety of a patent granted by her Majesty: there was no express warranty; and, whether it be said that the question

(*a*) The case alluded to was *Smith* v. *Neale*, post, p. 67.

raised on this plea impeaches the plaintiff's title to the thing sold, or its quality, no warranty can be implied. But, did the plaintiff profess to sell and the defendant to buy a good and indefeasible patent right? or, was the contract merely to place the defendant in the same situation as the plaintiff was in with reference to the alleged patent?—in which case, his position would be similar to that of the plaintiff in *Kintrea* v. *Preston*, 1 Hurlst. & Norm. 357. The plaintiff professed to have invented a method for the prevention of boiler explosions. It is not alleged that he was guilty of any fraud. He must, therefore, have been an inventor; for, if he was not, he must have known it, and would have been guilty of fraud in pretending to have invented. Whether he was the true and first inventor within the meaning of the statute of James, is another question. The first material allegation in the plea is, that the alleged invention was wholly worthless, and of no utility to the public. Now, that was a matter as much within the [42] knowledge of the defendants as of the plaintiff. The next allegation, viz. that it was not new as to the public use thereof in England, and that the plaintiff was not the first and true inventor, was also a matter as much within the knowledge of the defendants as of the plaintiff. They had the same means of inquiring into the fact, and of learning whether it had been in use, or the invention had been previously made known in England. Why, therefore, should we assume that the plaintiff meant to assert that the patent was indefeasible, and that the defendants purchased on that understanding, rather than that, each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent such as it was, each acting on his own judgment? We think that the latter was the true nature of the contract, and that there was no warranty express or implied, and that the case does not fall within *Young* v. *Cole* or *Gompertz* v. *Bartlett*, which proceeded on the somewhat nice distinction before pointed out; nor is it within the principle upon which the case of *Chanter* v. *Leese*, 4 M. & W. 295, and 5 M. & W. 698, was decided; for, there the plaintiff contracted that the defendants should have the exclusive right to sell certain things for which patents had been obtained: there was no doubt as to what the parties contracted for; and as the plaintiff, if one of the patents was invalid, could not confer the privilege which he agreed to confer, and for which the defendant contracted to pay, the consideration for the defendants' promise failed, and (to use the language of Lord Abinger), the whole resting in contract, and nothing having been done under it, the contract was at an end. Here, the plaintiff was capable of fulfilling all that he contracted to do; he had already done it in equity. The defendants might have had all that they contracted to receive, and were therefore bound to pay.

[43] On these grounds, we hold that the plea gives no answer to the declaration. The last plea was disposed of during the argument. It is pleaded to all the breaches. As to the first, it cannot be treated as a traverse of the breach, and, the breach being admitted, it gives no answer.

Judgment accordingly.

May 7th. Field, who had unsuccessfully applied for leave to amend at the time judgment was given, on the 17th of April moved for leave to add a plea to the second and third breaches, traversing the requests and breaches therein respectively alleged (*a*). [Crowder, J. Having taken your chance upon the issues in law, you now wish to raise issues of fact. Have you any authority for that?] It is submitted that it is warranted by the 222nd section of the 15 & 16 Vict. c. 76, which enacts that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be [44] so made." There are issues of fact now upon the record which must be tried. [Cress

(*a*) A previous application for the same purpose had been made to Coleridge, J., at Chambers, and referred by him to Cresswell, J., before whom the parties attended at Kingston on the 20th of March, when the learned judge refused to make any order, saying that the defendants might apply to the court.

well, J. In effect you want to deny the contract declared on.] Not so. [Cresswell, J. The plaintiff declares on an absolute agreement to pay him 2500*l.* in a manner to be agreed on. You want to set up a conditional purchase. That is a denial of the contract stated in the declaration.] The written contract cannot be varied or controlled by the facts sought to be pleaded. That which the defendants are desirous of putting in issue is, something which has happened since the making of the contract, —the agreement subsequently come to. [Cockburn, C. J. If there are any circumstances to shew that justice requires that you should be allowed to put a new defence upon the record, we ought at least to have them on affidavit.]

Affidavits were afterwards (on the 22nd) produced, and a rule nisi granted. These affidavits stated, in substance, that, on the day on which the agreement was signed, viz. on the 30th of January, 1856, the plaintiff called at the defendants' office, and stated that he was in want of an immediate advance of money, and proposed to sell them the moiety of his invention for 2500*l.*; that the deponent (one of the defendants) told him, that, as it was quite uncertain whether the invention would turn out well or not, they were not willing to pay so large a sum otherwise than out of the profits, but that they had no objection to the plaintiff being the first person remunerated out of the profits (which all parties then believed were likely to be realized), or to advance a small sum to meet the plaintiff's present necessities; that the plaintiff assented to this, and it was then agreed that 2500*l.* should be the price, but that a small part only, the amount of which was not then fixed, should be paid in cash, and the balance should be paid out of the proceeds of the invention, less the costs of working the same; and the memorandum declared upon **[45]** was prepared upon the spot, with the intention of expressing such agreement; that, on the 9th of February, the plaintiff called again on the defendants, and they then advanced him 20*l.* on account of the sum which it had been so agreed should be paid in cash; and on the 19th he again applied for a further sum, and the defendants expressed their willingness to pay him the further sum of 200*l.* down as the balance of the sum which they had agreed to pay in that manner, but they declined to pay any more of the 2500*l.* until profits had been realized to that extent; and the plaintiff then expressly assented, and the defendants thereupon paid him 200*l.* in cash, and he then wrote out and signed a receipt, as follows: — "London, February 19th, 1856. Received of Francis Conder & Co. the sum of 200*l.* as the balance of the sum agreed to be paid by them to me for the transfer of my patent for the prevention of explosions in steam-boilers, previous to the realization of any profit on the same. W. K. Hall:" that it was at such last-mentioned interview also agreed that the foreign patents should be immediately completed, and they were so completed by the defendants; and, in the month of July following, the plaintiff applied to the defendants for an advance of money to enable him to go to Paris with the view of selling the French patents, and they thereupon advanced him 25*l.* for that purpose, and he thereupon signed a receipt as follows: —"London, July 2nd, 1856. Received of Messrs. Conder & Co. the sum of 25*l.* for expenses attending sale of foreign patents. W. K. Hall:" and that neither at such time, or at any other time than the said 19th of February, 1856, did the plaintiff ever apply to the defendants for any payment on account of the 2500*l.*, nor did he at any time, except as above stated, ever request the defendants, or either of them, to make any agreement or arrangement respecting the manner or times of payment of the 2500*l.*, nor had the **[46]** defendants, or either of them, ever refused to make such agreement or arrangement, but, on the contrary, they did, on the said 19th of February, make and enter into such agreement and arrangement as aforesaid for the purpose of carrying out the first agreement so made between the plaintiff and the defendants as aforesaid.

Lush, on a subsequent day (May 5th), shewed cause, principally upon an affidavit of the plaintiff, alleging that the 2500*l.* was agreed to be paid to him by the defendants, without any regard to the profits of the invention, and that the receipt for the 200*l.* was prepared by the defendants, and his signature thereto obtained by fraud and coercion. The learned counsel submitted that the application was unconscientious and merely for the purpose of delay, that the proposed defence was manifestly in contradiction to the written agreement, and that, if the defendants had originally pleaded as now proposed, the judgment would probably have been for the plaintiff in a particular in which it now (somewhat erroneously) stood entered for the defendants, viz. as to the demurrer to the first plea. [Cresswell, J. The court intended to give judgment for the defendants on that issue. The rule was advisedly and carefully and accurately drawn in

the form in which it appears. Although the argument for the plaintiff on that issue was plausible, the court gave judgment against it. Cockburn, C. J. There being issues of fact to be tried, the plaintiff cannot be prejudiced by allowing the proposed traverses. If there is a defence, the defendants ought not in consequence of a mere slip of the pleader to be shut out from it.]

Field, in support of the rule. The case is clearly within the 222nd section of the Common Law Procedure Act, 1852: and there can be no just reason why the [47] defendants should be deprived of the privilege of trying the case before a jury on its merits. It is contended on the other side that the second breach is good, as shewing a refusal by the defendants to come to some arrangement as to the mode of payment. The agreement of the 19th of February is in truth the very agreement which the original agreement of the 30th of January contemplated.

Cur. adv. vult.

Willes, J. In this case a rule was obtained by Mr. Field calling upon the plaintiff to shew cause why the defendants should not have leave to add a plea to the second and third breaches, traversing the requests and breaches therein respectively alleged. Against this rule cause was shewn on a former day in this term, when the court took time to look into the affidavits. At the request of the Lord Chief Justice and my learned Brothers, I have done so; and I now proceed to give our judgment.

The action is brought for the breach of an agreement to pay 2500*l.* for the purchase of a moiety of a certain patent. By that agreement it was stipulated that the defendants should pay the plaintiff the 2500*l.* "in such manner as should be mutually agreed on:" and, after the usual averments, the declaration sets out three breaches, —first, that, although a reasonable time had elapsed, and the defendants had been requested, they refused to pay the 2500*l.* or any part thereof,—secondly, that, although a reasonable time had elapsed, and the defendants had been requested, they refused to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which the 2500*l.* should be paid,—thirdly, that, although a reasonable time had elapsed, and the defendants had been requested, they refused to fix upon or agree with the plaintiff respecting the time or times at which the 2500*l.*, or any portion or instalment thereof, should be paid. To that [48] declaration the defendants pleaded several pleas, the one mainly relied on being, "that the said invention was wholly worthless and of no public utility or advantage whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof." Upon the validity of that plea there was an argument, which resulted in a judgment for the plaintiff. The pleas were dated the 27th of November, 1856: and it appears from the affidavits filed in answer to this rule, that repeated applications had been made as well by the plaintiff as by his attorney for payment of the money; and that the defendants did not on those occasions object that no mode of payment had been mutually agreed on, but insisted that the plaintiff was not entitled to recover at all. It seems, then, that the defendants would not at that time have agreed on any mode of payment: and it is clear that the plea which is now sought to be added is an after thought. Still, if it were a plea which could in any manner avail the defendants, and the plaintiff could sustain no detriment by its being put upon the record, it ought to be now allowed. Upon consideration, we think that on neither ground ought the proposed plea to be allowed. If it had been pleaded in November last, the plaintiff might have discontinued, and might have called upon the defendants then to agree as to the manner of payment, and might have brought a fresh action and gone to trial at once. It is plain, therefore, that the plea is in the nature of a dilatory plea, and puts the plaintiff in a worse position than he would have been in. Then, would it be any advantage to the defendants to have this plea upon the record? Clearly not. They state in their affidavit that they never agreed to pay the 2500*l.* absolutely and at all events, but only out of the net profits to be derived from the patent. That is not consistent with the terms of the written agreement. If, therefore, they were allowed to add the plea, they could not raise upon it the point of [49] law they propose to rely upon. We therefore think the rule should be discharged, and that the plaintiff's costs should be costs in the cause.

Rule discharged accordingly.

June 4.—The issues of fact came on for trial at the sittings at Westminster after Easter Term, when a general verdict was found for the plaintiff.

The defendants having brought a writ of error herein,—the grounds of error stated in the memorandum filed with the masters pursuant to the 149th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, being, "that the declaration discloses no undertaking on the defendants' part, either express or to be inferred, to make any agreement or arrangement as to the manner or as to the time of payment of the said sum of 2500*l.*; and also that it is not alleged that the agreement or arrangement which they were requested to make was a reasonable one either as respects the manner or as respects the time of payment,"—

Lush, on the 27th of May, obtained a rule calling upon the defendants to shew cause why the plaintiff should not be at liberty to issue execution, notwithstanding the proceedings in error, the errors assigned being frivolous. He referred to the 150th section, which provides, that, "if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue." [Cockburn, C. J. I think we can hardly say that the grounds of error assigned are frivolous, where the case has been fully argued, and the court below has taken time to consider its judgment. Willes, J. The material question which was before the court upon the demurrers, **[50]** viz. that arising upon the alleged invalidity of the patent, is finally disposed of by the verdict.]

Knowles, Q. C., and Field, on the 3rd of June, shewed cause. The right to bring a writ of error is one which the courts have always been very slow to interfere with. The agreement here declared upon is a very peculiar one. And, after the court has thought fit to take time to consider its judgment, it can hardly be said that the matter is so plain and clear that so large a sum as 2500*l.* should be handed over to a foreigner, without giving the defendants an opportunity of taking the opinion of a court of error. In *Gardner* v. *Williams*, 3 Dowl. P. C. 796, Parke, B., upon an occasion similar to this, observes, "How can we say that an objection is frivolous upon which the court granted a rule nisi! A party is entitled to a writ of error ex debito justitiæ; and, unless the causes of error are clearly frivolous, we cannot interfere." There, after a verdict for the plaintiff in an action for slander, the defendant obtained a rule nisi for arresting the judgment on two grounds, but the court afterwards discharged the rule without hearing the counsel against it. The defendant then brought a writ of error, suggesting the same grounds: and it was held that these grounds could not be considered as frivolous within the meaning of the rule of Hilary Term, 4 W. 4, r. 9,—which was in terms the same as the 150th section of the Common Law Procedure Act, 1852. [Cresswell, J. I must protest against that case being considered as an authority.] The plaintiff will sustain no prejudice, the error day being so near at hand,—June the 18th. [Lush observed that it would be too late to set the case down for argument for that day. Willes, J. That is a mistake. Under the Common Law Procedure Act, 1852, s. 155, and the 68th rule of Hilary Term, 1853, the case may **[51]** be set down four days before the actual day of argument: this was so decided in the Exchequer Chamber in *Parr* v. *Jewell*, 16 C. B. 684, 700 (*a*).] The defendants are willing to afford every facility in expediting the argument. [Cockburn, C. J. The bona fides of the defendants may be very properly tested by their bringing the money into court.] They have already given bail which are perfectly unexceptionable.

Lush, in support of the rule. The state of the record is very different now from what it was when the demurrers were before the court. There was then a plea upon the record, that the alleged invention was worthless and not new, and that the plaintiff was not the true and first inventor. That plea is now virtually off the record, no evidence having been offered at the trial in support of it. There was also a plea alleging, that, before the time for performing the agreement, and before breach, an agreement was come to between the parties, under which the plaintiff received 200*l.* in full satisfaction of all claims and demands of the plaintiff upon the defendants in respect of the said agreement, until some profit should have been realized to the defendants from the invention. That was found to be untrue in point of fact. The attention of the court upon the argument was mainly addressed to the second plea. When the statute provides, that, if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue, the intention evidently was, that the court or judge should exercise some judgment on the matter. If the errors assigned are manifestly not arguable, they are within the meaning of the statute frivolous. No

(*a*) And see *Kernot* v. *Pittis*, 17 Jurist, 932.

argument has been or could be suggested upon either of the grounds assigned here. [Cockburn, C. J. I think it is [52] hardly justifiable to argue the case over again before us.] If the defendants were not bound to enter into an agreement to pay the money, they were bound absolutely to pay it without agreement.

COCKBURN, C. J. I am of opinion that this rule must be discharged, not on the ground of any doubt I entertain as to the propriety of the judgment pronounced by the court on the former occasion, but on the ground that it is the undoubted right of the suitors of this court against whom judgment has been given, to take the opinion of a court of error. Such being the undoubted right of the suitor, I think we ought to be extremely cautious in interfering with it. And, unless we see that a writ of error has been brought upon grounds which are clearly frivolous, and altogether incapable of being sustained upon argument, we are bound not to exercise the power which the statute gives us. In the present case, although I entertain no doubt as to the correctness of the judgment which is called in question, still I cannot say that the matter is not open to argument: and, as it is stated on affidavit that the writ of error is brought, not for the purpose of delay, but bonâ fide and under the advice of counsel, it is not a case for the exercise of our discretion.

CRESSWELL, J. The plaintiffs in error must undertake to argue the case, if possible, on the error day after this term.

The rest of the court concurring,

Rule discharged, — "the defendants (the plaintiffs in error) by their counsel hereby undertaking to do all in their power to expedite the argument of the errors assigned between the said parties."

[53] The case came on for argument in the Exchequer Chamber on the 18th of June, before Lord Campbell, C. J., Lord Chief Baron Pollock, Coleridge, J., Erle, J., Crompton, J., and Bramwell, B.

June 18th. Whateley, Q. C. (with whom was Field), for the plaintiffs in error. The declaration discloses no undertaking on the part of the defendants to enter into any agreement as to the manner or the time of payment of the 2500*l.*, or to pay that sum at all events. The true effect of that stipulation in the contract is, that the defendants will pay the 2500*l.* in the event of a subsequent agreement being come to for its payment and for the time and manner of paying it. [Lord Campbell, C. J. Is it not an agreement that they will agree as to the manner of payment?] Not absolutely. Until the mutual agreement is come to, nothing is payable. [Lord Campbell, C. J. One of the breaches assigned is, the refusal to enter into an agreement. The plaintiff would be entitled to recover so much as the jury may think he ought to receive by reason of the second agreement not having been made.] Suppose the parties had met for the purpose of endeavouring to come to some arrangement as to the manner and time of payment, but were unable to agree, by reason of the one requiring present payment and the other a postponed payment, what is to happen? [Lord Campbell, C. J. In that case there would be a breach of the agreement. Pollock, C. B. Suppose this had been the case of the sale of goods to be delivered immediately, with a stipulation for payment in a manner to be agreed upon on a future day, and the purchaser refused to come to any agreement, when would the money be payable?] In a reasonable time probably. [Crompton, J. In the case put by the Lord Chief Baron, the contract is broken by the refusal to agree as to the mode of payment, and the money becomes payable immediately.] [54] Then, there is a plea that the patent was void. [Lord Campbell, C. J. We had that matter discussed recently in the court of Queen's Bench, where we held such a plea bad, the defendant having had what he contracted for: *Gompart* v. *Bartholl*, 2 Ellis & B. 849. Coleridge, J., referred to *Chanter* v. *Leese*, 4 M. & W. 295, 5 M. & W. 698.] The plaintiff professes to sell a valid patent. [Lord Campbell, C. J. No. There is no warranty. If you could have shewn fraud, that would have been another matter. Bramwell, B. Suppose the defendants had worked the patent for fourteen years, and then discovered it to be invalid, setting aside the difficulty as to the statute of frauds, could they recover back the money they had paid for it?] No: that would be unreasonable. [Lord Campbell, C. J. To make anything of this point, there must have been either a warranty or fraud. No fraud is alleged; and there is no warranty as to the quality of the thing contracted for.] Supposing the money to have been paid, and the invention to turn out not to be new, the money would be recoverable

back as upon a failure of consideration. [Lord Campbell, C. J. Not in the absence of a warranty.] A man is not bound to accept and pay for chattels which are not what the seller professed to sell and the buyer intended to buy: *Young* v. *Cole*, 3 N. C. 724, 4 Scott, 489. [Lord Campbell, C. J. There, the plaintiff professed to sell Guatemala bonds, whereas what he delivered were not genuine Guatemala bonds. That was like the case of the forged bill (*a*)[1], or the scarlet cuttings (*b*).] The party there did not get the thing he contracted for. So, here, a patent is not a patent at all unless it confers an exclusive privilege; which a void patent cannot do. [Lord Campbell, C. J. The thing contracted for here was a real patent **[55]** under the Great Seal, although, by reason of circumstances not within the knowledge of either party at the time of the contract, it might ultimately prove valueless.] If the court are prepared to hold, that, under this contract, the defendants were bound to accept a patent for an invention which was wholly worthless and not new, there is an end of the argument. [Erle, J. Many a patent for an old and worthless invention (so to speak) has been upheld by the aid of a skilful advocate.]

Montague Smith, Q. C., contrà, was not called upon.

Lord Campbell. Mr. Whateley has urged all that could be urged upon both points. We are all of opinion that the judgment of the court of Common Pleas was right, and should be affirmed.

Judgment affirmed (*a*)[2].

[56] Horler *v.* Carpenter. Feb. 10, 1857.

[S. C. 26 L. J. C. P. 136; 3 Jur. N. S. 494; 5 W. R. 486. For subsequent proceedings see 3 C. B. N. S. 172.]

The declaration stated that the defendant, as executor of one J., was accustomed and liable to pay over under her will to one A. certain rents and moneys received by him under the will to the use of A., and that, in consideration that the plaintiff would advance moneys to A., the defendant promised to repay her any such sums as she might so advance, from and out of the first money which he (the defendant) should receive on account of A., to wit, out of the first moneys to be by him thereafter received on account of the aforesaid rents and moneys, as and when he should receive the same: Averment, that plaintiff afterwards advanced to A. moneys in the whole amounting to 58*l.* 8*s.*, and A. thereupon gave her an authority to receive the amount from the defendant; that the defendant afterwards received 20*l.* on account of the said rents and moneys, and paid the same to the plaintiff, but afterwards, and before he received any more, purchased A.'s interest in the said rents and moneys, and took an assignment thereof, and thereby disabled himself from performing his contract with the plaintiff, and had ever since received the rents and moneys in his own right. Plea, that, at the time of the purchase of A.'s interest, the defendant had no notice or knowledge that the plaintiff had advanced A. more than the 20*l.* so paid by him to the plaintiff, or that A. had given the plaintiff an authority to receive any further sum:—Held, that the plea was a sufficient answer to the declaration: for, that the defendant's promise did not attach until the authority was given, and A., by parting with his interest, deprived himself of the power to give such authority.

The first count of the declaration stated that the defendant, before and at the time of the making of the promise thereinafter in that count mentioned, was the executor of the last will and testament of one Mrs. Jenkins, deceased, and, as such executor, under and by virtue of the provisions of the said will, had been and was accustomed

(*a*)[1] *Jones* v. *Rade*, 5 Taunt. 488, 1 Marsh. 157.

(*b*) *Bridge* v. *Wain*, 1 Stark. N. P. C. 504.

(*a*)[2] The defendants afterwards brought a writ of error returnable in parliament: and, upon application to a judge at Chambers, an order was made for payment into court of the amount of the damages and costs, and for its payment out to the plaintiff upon his giving security to the satisfaction of the master for the restitution of the money in the event of the judgment being reversed by the House of Lords. [No appeal to the House of Lords is reported.—Ed. E. R.]

and liable to pay over to one Thomas Adams certain rents and moneys received and to be received by the defendant under the said will for the use and behoof of the said Thomas Adams: and thereupon, in consideration that the plaintiff would lend and advance to the said Thomas Adams moneys of her the plaintiff, he the defendant promised the plaintiff, upon the said Thomas Adams giving the plaintiff an authority to receive the amount from the defendant, to repay to the plaintiff any such sums as she the plaintiff might so lend and advance, from and out of the first money which he the defendant should receive on account of the said Thomas Adams, to wit, from and out of the first moneys to be by him thereafter received on account of the aforesaid [57] rents and moneys, as and when he should receive the same, and to hold himself responsible to the plaintiff for the same: Averment, that the plaintiff, confiding in the said promise and undertaking of the defendant, did afterwards lend and advance to the said Thomas Adams divers large sums of money, in the whole amounting, to wit, to 58*l.* 8*s.*; and the said Thomas Adams did thereupon give to the plaintiff an authority to receive the said amount from the defendant, who then had due notice of the premises: and the defendant afterwards received, on account of the said rents and moneys, 20*l.*, and paid the same to the plaintiff: but afterwards, and before he received any further portion of the said rents and moneys, the defendant purchased of the said Thomas Adams all his interest of and in the said rents and moneys, and took an assignment of the same from the said Thomas Adams, and thereby disabled himself from performing his said contract with the plaintiff according to the said terms thereof, and had ever since received as they became due the said rents and moneys in his own right, and the plaintiff had never yet been paid the residue of the said sum of 58*l.* 8*s.*, or any part thereof, out of the said rents and moneys, or otherwise.

Fourth plea,—that, at the time of the said alleged purchase by and conveyance to him of the said interest of the said Thomas Adams of and in the said rents and moneys, he had not due notice and did not know that the plaintiff had advanced to the said Thomas Adams any further or other sum than the said sum of 20*l.* so paid by the defendant to the plaintiff as aforesaid, or that the said Thomas Adams had given to the plaintiff an authority to receive any such further or other sum; and that the said Thomas Adams had not then given to the plaintiff any such authority.

The plaintiff demurred to the fourth plea, one ground of demurrer stated in the margin being, "that, as the [58] defendant's contract was absolute, he was not discharged or excused on account of want of notice by or to him of the facts mentioned in the plea."

The defendant joined in demurrer; and the case was argued in Hilary Term last, before Cockburn, C. J., Cresswell, J., and Williams, J.

Holl, in support of the demurrer (*a*). The proper construction of the contract declared on is, not that the defendant contracted to repay the advances out of money received on account of Adams, these being mere words of description: but it imports an absolute undertaking to repay the advances out of moneys to be received for rents under the will. The defendant, by purchasing Adams's interest, has put it out of his power to perform his contract. [Cresswell, J. The declaration charges that the defendant promised to repay to the plaintiff the advances made by her to Adams, out of moneys to be received by him on account of Adams, that money was advanced upon the faith of that promise, and that the [59] defendant repaid the plaintiff 20*l.*, but afterwards, and before he received any further portion of the rents and moneys, by purchasing Adams's interest therein, disabled himself from performing

(*a*) The points marked for argument on the part of the plaintiff, were,

"First, that, as the first count of the declaration discloses an absolute contract on the defendant's part to re pay the plaintiff's advances to Thomas Adams, out of moneys to be received by him on account of Thomas Adams, the defendant was not entitled to notice of such advances, or discharged or excused from payment for want of such notice:

"Secondly, that the defendant could and might and ought to have ascertained for himself whether the authority in the fourth plea mentioned was or was not given:

"Thirdly, that it was consistent with the plea demurred to that an authority might have been given to the plaintiff to receive the whole amount advanced by him from the defendant in general terms, and that a fresh authority was not necessary in respect of each instalment of the advances."

his contract with the plaintiff. To this the defendant pleads, that, at the time of the purchase, he had no notice or knowledge that the plaintiff had advanced Adams more than 20l., or that Adams had given her an authority to receive more. If the defendant had had such notice, in all probability he would not have purchased on the same terms. The equity of the case is against the plaintiff, whatever the strict law may be. Cockburn, C. J. Does the defendant by having purchased Adams's interest, cease to receive the moneys "on account of Adams?"] Even if the contract means that the advances are to be repaid out of moneys to be received "on account of Adams," the effect would be, that, upon an authority being given by Adams, there was an equitable assignment of his interest, and a contract at law to carry out that equitable assignment. In the notes in 2 White & Tudor's Leading Cases, 575 (to *Row* v. *Dawson*, 1 Ves. sen. 331, and *Ryall* v. *Rolls*, 1 Ves. sen. 348), it is said: "In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much money. Nor is it necessary, as it would appear by some of the decisions at law, that the party receiving the order should, in some way, enter into a contract: *Burn* v. *Carvalho*, 4 Mylne & Cr. 702, 703." In *M'Gowan* v. *Smith*, 26 Law Journ., Ch. 8, A. owed B. money upon a contract: the money was payable by instalments: B. gave an order upon A. for payment of a portion of such money to C.: A., at the request in writing of B., made two payments under the order to C., but refused to be personally bound by the terms of it? B. became insolvent, and some money was still due to C. **[60]** under the order: C. filed a bill against A. and the assignees of B. for an account and payment: and it was held that the order operated as an equitable assignment, and that C. was entitled to an account of the money then due under it, without regard to any payments made by A. [Williams, J. You need not have recourse to the doctrine of equitable assignment here; for, there is a statement of consideration, —that the advances were made at the request of the defendant.] The defendant cannot be permitted by his own act to put it out of his power to perform his contract. [Cockburn, C. J. His obligation remains as if he were still the recipient of the money on account of Adams. He still receives the money under the will; and Adams is still entitled, except in so far as he has parted with his rights to the defendant.] When the defendant purchased Adams's interest, he ceased to receive the moneys payable under the will on Adams's account, and received them in his own right. The declaration does not state how much he has received: but so much as he has received he was bound to pay over to the plaintiff. Suppose the purchaser of Adams's interest had been a third person; the defendant, though he would still receive the rents under the will, would receive them on account of the purchaser, and not on account of Adams. [Cresswell, J. A creditor proves a debt in bankruptcy, and assigns his interest in the dividends: the assignees would pay the dividends on account of the creditor; and the recipient would receive them on account of the creditor.] Not in equity, after notice of the assignment. [Cresswell, J. We are here dealing with legal rights.] Assuming that the defendant did receive the money on account of Adams, the declaration sufficiently alleges that he so received it. Whatever construction, therefore, the court puts upon the contract, the declaration is good. Then, as to the plea. [Williams, J. How do you get over the averment in the plea, that **[61]** Adams did not give the plaintiff an authority to receive money beyond the 20l.?] The contract is an absolute one, to repay the money advanced on Adams giving an authority; and by his own act the defendant has incapacitated himself from performing it. The defendant could not either at law or in equity discharge himself from that obligation: *Calvert* v. *Gordon*, 7 B. & C. 809, 1 M. & R. 497; *Gordon* v. *Calvert*, 4 Russ. 581, 1 Sim. 253. In *Ford* v. *Tiley*, 6 B. & C. 325, by agreement, A. stipulated that he would, as soon as he should become possessed of a certain public-house, execute a lease thereof to B. from the 21st of December, 1855, for fourteen or twenty-one years. At the time of making the agreement, the house was upon lease, which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, and then to pay an annuity, and, subject thereto, to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees had joined in a lease to C. for twenty-three years. It was held that A., having thereby put it out of his power, so long as the latter lease of 1825 subsisted, to grant any lease to B., had committed a breach of his agreement, and was liable to an action for such breach, although the first lease had not expired. So, in *Lovelock* v. *Franklyn*,

8 Q. B. 371, the plaintiff declared upon a contract by the defendant, then holding land for a term of years, to assign all his interest to the plaintiff on payment by the plaintiff, within seven years from a day named, of 140*l.*, assigning for breach, that, before the seven years had expired, the defendant assigned all his interest to a stranger: and it was held, on special demurrer, that the breach as laid was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on. [Williams, J. Upon looking more closely at the plea, I find it is not a traverse of the allegation in the declaration: it merely states that Adams **[62]** had not then,—that is, at the time of the purchase of his interest (*a*)—given the plaintiff an authority to receive the money. Cockburn, C. J. The plaintiff must shew that the contract into which the defendant entered, was one of indefinite duration, —an undertaking on his part to re-pay advances, whenever made, on her obtaining an authority from Adams.] It is submitted that the defendant has bound himself to repay any advances out of each money he should first receive after the authority given. It is like a continuing guarantie for advances to be made. [Williams, J. The defendant pleads that he had no notice of any further advance. What right would he have to withhold the money from Adams, if there had been no assignment?] Having undertaken to re-pay the plaintiff's advances, he was bound to ascertain whether or not any authority had been given. The effect of the contract was, to preclude Adams, in equity, from dealing with his interest without giving notice to the plaintiff of his intention so to do. The plea, therefore, clearly is no answer to the declaration.

Prideaux (with whom was Byles, Serjt.), contrà (*b*). It cannot be permitted to the plaintiff, when one construction of his declaration fails him, to turn round and rely upon a totally different one,—especially since duplicity is no longer a ground of demurrer. The contract **[63]** declared upon was, to repay, not all moneys that might be advanced, but all such moneys as the defendant might receive on account of Adams, and be authorised by him to pay over to the plaintiff. There is nothing upon the face of the declaration to shew that the two events upon which the defendant's liability to pay over the money depends have happened. The promise, it is submitted, was conditional upon the defendant's receiving the rents on account of Adams, and receiving an authority from him to pay them over. The case in principle very much resembles that of *Beswick* v. *Swindells*, 3 Ad. & E. 868, 5 N. & M. 378. There, by the condition of a bond for payment of 400*l.*, it was recited that the obligor was about to marry E. E., linen-draper, and thereby to become possessed of a stock in trade, now hers, and that in consideration thereof it was agreed that he should execute a bond to the obligee to pay the children of E. E. by her late husband 300*l.* within twelve months next after E. E.'s death, in the event thereinafter specified: and the condition therefore was, that, if S. (the obligor) shall within twelve months next after the decease of E. E., pay to her child or children, &c., 300*l.*, "if upon an account of the stock in trade and effects in the linen-drapery business, if then carried on by the said S.," the same "shall amount to the sum of 400*l.*, but, in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then, if the said S." shall pay to the child or children, &c., 120*l.* within twelve months next after the decease of E. E., the said obligation shall be void, &c. Plea, that E. E. died, and that, before her death, and ever since, S. had ceased to carry on the business, and that he had not at or since the time of her death any stock in trade, &c. Replication, that, at the end of twelve months from E. E.'s decease, there were, and still are, children of E. E. by her late husband living: It was held, on demurrer, that, as **[64]** the recited agreement was, to pay in the event after specified, and the condition was, to pay 300*l.* or 120*l.* according to an account to be taken of the business, if then carried on, the obligor might discharge himself by pleading that he had discontinued the business. If the argument on the other side be tenable, the defendant would equally

(*a*) Cresswell, J., so states, p. 59.

(*b*) The points marked for argument on the part of the defendant, were, —

"First, that the plea is good; secondly, that the declaration is bad; thirdly, that the plaintiff has no cause of action against the defendant by reason of the purchase by the defendant of the interest of Adams, or otherwise, under the circumstances in the declaration mentioned; and that the declaration does not disclose any breach of contract or other cause of action against the defendant."

Quære, what information these points give as to the matters intended to be argued?

have been liable to re-pay the moneys advanced by the plaintiff, if the assignment of Adams's interest under the will had been made to a third person. *Ford* v. *Tiley* and *Lovelock* v. *Franklyn* have no application: the contracts there were unconditional, in the one case to grant a lease, in the other to assign; and the defendant was to be liable to a penalty if he did anything to disable himself from performing his engagement. Besides, there fraud was suggested. Then, whatever the construction of the declaration, the fourth plea is a good answer to it. The promise is, to pay a certain amount upon receiving an authority so to do. The record shews that the money was advanced, the authority given, and the amount paid. It clearly could not be a continuing authority. The declaration speaks of one amount and one authority: and the plea shews that that authority has been given and acted upon; and the plea alleges that the defendant had no notice that more was due.

Holl, in reply. The contract clearly contemplates the payment of more than one sum: when it speaks of money to be received under the will, it uses the singular number; when of payments to be made, the plural. The defendant was to pay upon the authority being obtained, not upon his having notice of it. [Williams, J. You cannot treat it as an original assignment of the fund by Adams. If you could, your argument would be very much fortified. Cockburn, C. J. The defendant in effect says, "As to the first transaction, I acted upon the authority. You make a second advance, and give me no no[65]tice of your having done so: and I, in ignorance of that state of things, purchase Adams's interest."] Having entered into this engagement, it was incumbent on the defendant, before he did anything to prevent him from carrying out the contract, to inquire whether or not further moneys had been advanced. *Beswick* v. *Swindells*, 3 Ad. & E. 868, 5 N. & M. 378, is clearly distinguishable. The engagement to pay the 300*l.* or the 120*l.* was conditional upon the trade being carried on at the wife's death. On the other hand, *Ford* v. *Tiley* and *Lovelace* v. *Franklyn* are distinct authorities to shew, that, assuming this to be in the nature of a continuing guarantee, there was an implied contract on the part of the defendant not to do anything to prevent himself from performing it.

Cockburn, C. J. (addressing Holl). How do you propose that we should deal with the declaration? If you do not mean to stand upon the fact of the defendant's having incapacitated himself from performing his contract, the declaration is in so uncertain a shape that the defendant ought not to be called upon to answer it.

Holl asked time to consider whether or not he would apply for leave to amend; but, on a subsequent day (January 23rd), he intimated that he would stand by his declaration.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court.

In this case, which was argued before the Lord Chief Justice, my Brother Cresswell, and myself, the court is of opinion that the defendant is entitled to judgment.

The declaration is, in substance, that the defendant, as executor of Mrs. Jenkins, was liable to pay over to one T. Adams certain rents received and to be received [66] by the defendant under the will of Jenkins to the use of T. Adams, and that, in consideration that the plaintiff would lend money to Adams, he, the defendant, promised that, on Adams giving authority to the plaintiff to receive it, he would pay to her the money advanced to Adams, out of the first moneys received on his account; that the plaintiff lent Adams 58*l.* 8*s.*; that Adams gave the plaintiff an authority to receive it from the defendant, who had due notice; that the defendant afterwards received 20*l.* on account of Adams, and paid it over to the plaintiff, but, before he received any more, bought Adams's interest, and so disabled himself from performing his contract, and afterwards received the rents on his own account, and never paid the plaintiff the residue of the 58*l.* 8*s.*

The promise to pay to the plaintiff the money advanced by her to Adams was, therefore, subject to two conditions,—first, that the defendant should receive money on Adams's account,—secondly, that Adams should give an authority for the defendant to pay it to her.

Then, the plea states, that, before the defendant purchased, he had no notice or knowledge that the plaintiff had advanced more than 20*l.*; and that Adams had not then given the plaintiff an authority to receive more than that sum.

The plaintiff's counsel contended that the defendant was liable, because he had disabled himself from fulfilling his contract. But that seems to be founded on a

fallacy. This contract was not, to repay all that should at any time be advanced: but, all that the defendant should receive and be authorised to pay over: and that he fulfilled. As he had not notice of any further advance, he cannot be said to have purchased in fraud of his contract. He had fulfilled the only contract that had then attached; and Adams, by giving a further authority after he had parted with his interest, acted in fraud of [67] his contract to sell. The defendant's promise did not attach until the authority was given; and Adams, by selling, deprived himself of the power to give such authority. If the plaintiff was defrauded, it was by Adams, and not by the defendant.

We are, therefore, of opinion that the plea is a sufficient answer to the declaration, and that our judgment must be for the defendant.

Judgment for the defendant.

SMITH *v.* NEALE. Feb. 20th, 1857.

[S. C. 26 L. J. C. P. 143; 3 Jur. N. S. 516; 5 W. R. 563. Commented on, *Felthouse* v. *Bindley*, 1862 63, 11 C. B. N. S. 874; 7 L. T. 835. Adopted, *Watts* v. *Ainsworth*, 1862, 1 H. & C. 88. Confirmed, *Rouse* v. *Pickslay*, 1866, L. R. 1 Ex. 342. Referred to, *Burton* v. *Rust*, 1872, L. R. 7 Ex. 280. Distinguished, *In re New Eberhardt Company*, 1889, 43 Ch. D. 129; *Reece* v. *Jennings*, [1910] 2 K. B. 522.]

A written proposal, containing the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of mouth, is a sufficient agreement within the 4th section of the statute of frauds.—An agreement whereby all that is to be done by the plaintiff constituting one entire consideration for the defendant's promise, is capable of being performed within a year, and no part of what the plaintiff is to do constituting such consideration is intended to be postponed until after the expiration of the year, is not within the 4th section of the statute of frauds, notwithstanding the performance on the part of the defendant is or may be extended beyond that period. In an action for the breach of an agreement to make the necessary periodical payments for stamp-duty to keep alive a patent which had been assigned to the defendant: -Held, that "non concessit," in the absence of any fraud, or of any warranty that the alleged invention was new or was a manufacture within the statute of James, puts in issue merely the fact of Her Majesty having granted the patent, and not its validity.

This was an action for an alleged breach of contract.

The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, certain "improvements in the manufacture of toys, models, and other like articles of ornament or utility;" and thereupon, theretofore, to wit, on the 5th of March, 1853, Her Majesty, Queen Victoria, by letters-patent under the great seal, and dated the day and year last aforesaid, granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within the united kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, for the term of [68] fourteen years from the said 5th day of March, 1853, subject, amongst the other usual conditions, to the condition that the same should be void, and the powers and privileges thereby granted should cease and determine, at the expiration of three years and seven years respectively from the date thereof, unless there should be paid before the expiration of the said three years and seven years respectively the stamp duties in the schedule to the statute in such case made annexed expressed to be payable before the expiration of the third year and the seventh year respectively, and such letters patent, or a duplicate thereof, should be stamped with proper stamps shewing the payment of such respective stamp duties, and should when stamped be produced, before the expiration of such three years and seven years respectively, at the office of the commissioners of patents for inventions: That afterwards, and before the expiration of three years from the date of the said letters patent, to wit, on the 21st of June, 1855 (the stamp duty payable before the expiration of the said three years not having been paid), it was agreed by and between the plaintiff and the defendant, that the said letters-patent should be conveyed to the defendant and any friend of the plaintiff, in trust for a society (in which the defendant was interested) called

"The Ladies' Guild," subject to the following conditions,—that the plaintiff should receive 5 per cent. on the selling-price of all articles sold, in which her patent was employed, payable quarterly; that the defendant should provide for the next payment on the said patent, that is to say, for the said stamp-duty payable before the expiration of the said three years from the date of the said patent; that, if the payments made to the plaintiff were not equal to 50*l.* in the first year, and 75*l.* in every subsequent year, the plaintiff should have the right, on giving one month's notice, and re-paying any payments made to keep up the patent, to reclaim it, unless the **[69]** deficiency in the year was made up within the month; and that, in the event of the guild not being carried on, the patent should revert to the plaintiff, subject to the re-payment of moneys paid to keep it up: That afterwards, and before the time for preparing the said conveyance had elapsed, the plaintiff and defendant agreed that the said conveyance should be made to the defendant and Henry Dircks upon the said trusts, and that such conveyance should be prepared by the defendant: That all conditions necessary, matters, and things on the plaintiff's part, to entitle her to sue the defendant in respect of the breaches thereinafter mentioned, were performed and happened; yet, by the default of the defendant, no such conveyance was prepared or executed, nor were the said letters-patent conveyed to the defendant and the said Henry Dircks or any other person according to the said agreement, or otherwise; and the defendant neglected and refused to prepare any such conveyance, and exonerated and prevented the plaintiff from executing the same, although a reasonable time in that behalf had elapsed before the suit; nor did the defendant provide for the next payment on the said patent, but neglected and refused to do so, although the time for providing for and making such payment had elapsed before the suit: whereby the powers and privileges granted by the said letters-patent ceased and determined at the expiration of three years from the date thereof, and the plaintiff was deprived of divers profits which she might and otherwise would have made, had the said letters-patent continued in force, she having up to the expiration of the said three years fulfilled all other conditions in the said letters-patent up to that time to be fulfilled: And the plaintiff claimed 600*l.*

The defendant pleaded,—first, that he did not agree as in the declaration was mentioned.

Secondly, that, after the making of the said first-men-**[70]**-tioned agreement, and before any breach thereof, in the year 1855, the said agreement in the declaration first mentioned was rescinded and abandoned by the mutual consent of the plaintiff and the defendant, and the plaintiff then absolved and exonerated the defendant from his said promises, and the performance of the same.

Thirdly, as to so much of the declaration as related to the first-mentioned agreement, and the breaches thereof, that the agreement and promise in the declaration first mentioned was made subject to the condition mutually agreed upon between the said parties, that the said agreement should determine, and that the said letters-patent should revert to the plaintiff, and that the plaintiff should forthwith, on demand, pay to the defendant all moneys which might have been at any time paid by the defendant for the purpose of keeping up the patent, in the event of the said society called "The Ladies' Guild" not being carried on: that, before the said next payment on the said letters-patent had become due and payable, that is to say, before the expiration of three years from the date of the said letters-patent, and before any breach of the first-mentioned agreement by the defendant, it had become impossible to carry on the said society called "The Ladies' Guild," and the said society called "The Ladies' Guild" had ceased to be carried on within the meaning of the said agreement,—of all which the plaintiff before the expiration of the said period of three years from the date of the said letters-patent had notice.

Fourthly, as to so much of the declaration as related to the said first-mentioned agreement, and the breaches thereof, that the plaintiff was not the first and true inventor of the said manufacture as in the said declaration is mentioned; by reason whereof the said letters-patent in the declaration mentioned were at the time of the making of the said alleged agreement null and void.

[71] Fifthly, as to so much of the declaration as related to the said first-mentioned agreement, and the breaches thereof, that Her said Majesty did not by her said supposed letters-patent in the declaration mentioned, grant to the plaintiff the sole privilege to make, use, exercise, and vend the said invention within the United

Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, as in the declaration was alleged.

Sixthly, as to so much of the declaration as related to the first-mentioned agreement, and the breaches thereof, that the plaintiff had not fulfilled all the conditions in the said letters patent until the expiration thereof as in the declaration mentioned, in this, that the said letters patent were made by Her said Majesty subject to a condition that the plaintiff by an instrument in writing under her hand and seal should particularly describe and ascertain the nature of the said invention and in what manner the same was to be performed, and cause the same to be filed in the great seal patent office within six calendar months next and immediately after the date of the said letters-patent; and that the plaintiff did not within six calendar months next and immediately after the date of the said letters patent in the declaration mentioned cause any instrument in writing under the hand and seal of the plaintiff particularly describing and ascertaining the nature of the said invention and in what manner the same was to be performed, to be filed in the said great seal patent office: whereby and by reason whereof the said letters-patent, and all liberties and advantages whatsoever thereby granted, had utterly ceased, determined, and become void before the making of the said agreement in the declaration first mentioned.

The plaintiff joined issue upon each of these pleas.

The cause was tried before Willes, J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—The defendant, a [72] gentleman of fortune, who from benevolent motives took an active part in the management of a charitable institution called "The Ladies' Guild," the object of which was the employment of females in suitable works, entered into a negotiation with the plaintiff, who had in 1853 obtained a patent for "improvements in the manufacture of toys, models, and other like articles of ornament or utility," for the use of her patent in promoting the objects of the institution; and, on the 21st of June, 1855, in answer to a proposal on her part to sell him the patent, he wrote to the plaintiff, as follows:—

"I regret that the pecuniary position in which I find myself must prevent my accepting the proposals contained in your letter, though probably not more than you might fairly expect to obtain as the purchase of your patent. The fact is, that I have spent so large a sum, upwards of 5000*l.*, in the effort (hitherto unsuccessful) to make the guild a self-supporting institution, and have lost so much money in other efforts of a somewhat similar nature, in which I embarked, I fear, with more zeal than prudence, that I am obliged at present to exercise great caution in the conduct of the business, lest I should lose, for want of funds, the chances of success, still uncertain, which appear at length to be opening before me. One of these chances consists in the sale of toys, &c., manufactured under your patent: and I venture under the circumstances to appeal to the interest you have always exhibited in the application of your invention for the promotion of industrial education, as a motive which may induce you to entertain, for the sake of helping to support an institution by which these purposes may be carried out, proposals which you might not be disposed to entertain if they were made by persons who had their own interest only in view. These proposals are as follows: First, that the patent should be conveyed to myself and any friend of yours, in trust for the Ladies' [73] Guild, subject to the following conditions. Secondly, that you shall receive 5 per cent. on the selling price of all articles sold, in which your patent is employed, payable quarterly. Thirdly, that I should provide for the next payment on the patent. Fourthly, that, if the payments made to you are not equal to 50*l.* in the first year, and 75*l.* in any subsequent year, you shall have the right, on giving one month's notice, and re paying any payments made to keep up the patent, to reclaim it, unless the deficiency on the year is made up within the month. Fifthly, that, in the event of the guild not being carried on, the patent should revert to you, subject to the re payment of moneys paid to keep it up.

"Any assistance which you may kindly give in the way of making models, &c., for perfecting or extending the business, will, I am sure, be always much prized by us. And, from the progress which has been made under your friendly supervision, I hope that the manufacture may be continued in a satisfactory manner, without those demands on your time which it has hitherto required, and for giving which you must allow me to offer my sincere thanks. "E. V. NEALE."

In consequence of this letter, a meeting between the parties took place, when the plaintiff orally accepted the defendant's proposal, and it was arranged that the defendant should prepare a draft deed for assigning the patent. A draft in an unfinished state was afterwards submitted to the plaintiff, but it never was completed. The Ladies' Guild, however, were allowed to have the possession and use of the patent until long after the time when the next payment (50*l.*) for keeping up the patent ought to have been made; but, the payment not having been made, the patent became void. There was conflicting evidence as to the novelty of the invention,—the plaintiff's witnesses swearing that such a [74] combination of materials had never been used before; and a witness who was called on the part of the defendant as positively swearing that it had been in use long before the date of the patent, and producing specimens of articles made by himself.

The specification, which was filed on the 5th of September, 1853, described the plaintiff's alleged invention as follows:—

"My said invention consists of improvements in the application of well-known materials in a peculiar manner, enabling me to produce toys, and other like articles, which are pretty accurate models of whatever they are constructed to represent, accompanied with the appearance of lightness, while at the same time possessing much strength and durability; whereas, most of the articles known as toys, and particularly such as are intended to illustrate models of household furniture and utensils, being formed principally, if not altogether, of wood, plaster, tin, lead, and similar materials, affording objects of an exceedingly rude as well as mostly of a very fragile character.

"For the better understanding of my said improvements, I will now proceed to describe one method of fabricating model articles of furniture, whether to be used for toys, models, or ornamental purposes, as the same process will apply alike to all, in regard to the main principle I have in view, and which I claim as my invention.

"In forming models, or other like articles, such as tables, chairs, couches, and similar framed work, it is requisite to employ the wire known as bonnet-wire, covered with fine thread, silk, or other suitable material; and, for the broad surfaces of such articles, thin wood or tin-foil may be used, but I prefer employing paste-board, which must be cut to the desired form of all flat or nearly flat surfaces, as the table-tops, and seats and [75] backs of couches and chairs. The thread-covered wire, or other wire, is then to be divided into suitable lengths for sets of legs, frames, or the like.

"I recommend using bonnet-wire, to facilitate the attachment of wire to wire, or of wire to the paste-board, wood, tin-foil, or other materials employed, as this is readily effected by stitching them with a needle and thread, passing the needle through the binding on the wire wherever it requires to be attached by stitching another part thereto. When the skeleton of a toy, model, or ornamental article is thus formed, the flat surfaces, if made of card-board, may be coated with tin-foil, oiled or varnished, which prepares it for the next operation, which might otherwise change its form or figure. It is next requisite to give the wire framing suitable substance, communicating to it also any fluted, figured, or other appearance that may be requisite: this is effected by covering the wire, and likewise the card or past-board, where necessary, with a composition of whitening mixed with glue or size, such as is ordinarily used by carvers and gilders, or any similar compound will answer the same purpose, so that the wire is embedded in the material, thereby serving to strengthen it, however light in appearance; and, at the same time, its plasticity favours any ornamental embossing of the surface, and which may be further heightened in effect by painting, varnishing, gilding, or bronzing. When the objects so prepared require the addition of imitative upholstery, the same may be completed in the usual manner, with remnants of the silk and other articles employed.

"I would here observe that the composition may be used strong and plastic for covering wire and other framework, but it may be reduced with warm water, and brushed over flat surfaces requiring only a thin coating. Other compositions, principally formed from [76] gutta percha or paper maché, variously combined, might be employed. I do not, however, restrict myself to any particular composition, so long as it is one that will spread over the wire, receive an ornamental surface, and in its application bear out the principle of my invention: neither do I confine myself to any particular mode of attaching the wires, for which fine wire may sometimes be used; nor to the kind of wire, as to the metal, size, or covering of the same; nor to any particular class of the articles described, except that I do not claim any of the applica-

tions of wire covered with gilders' composition employed for picture, mirror, and like works of furniture, for which the same has hitherto been in use. And I do declare that what I claim as my invention is, namely, -

"The employing of wire, with or without paste-board or thin wood, covered with any thickening adhesive composition, when wire forms the skeleton or principal framework of toys, models, and other like articles of ornament or utility, as described."

On the part of the defendant, it was objected that there was no valid contract, inasmuch as the proposal contained in the defendant's letter of the 21st of June, 1855, which related to a matter not to be performed within a year, ought, to satisfy the 4th section of the statute of frauds, to have been accepted in writing; that the invention was not new; and that the defendant was at all events entitled to a verdict upon the plea of non concessit, on the ground that the alleged invention was not the proper subject of a patent.

In leaving the case to the jury, the learned judge told them, that, if one person proposes, and the other assents, it is a bargain: and that they were to consider whether there was a bargain between the plaintiff and defendant in June: and he left the question of novelty to them on the second issue.

[77] The jury returned a verdict for the plaintiff upon all the issues, damages 75*l*.

Norman, in Hilary Term last, obtained a rule calling upon the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection on the part of the learned judge, -first, "in not telling the jury that there was no evidence of the contract stated in the declaration, upon the ground that the contract was one which by the 4th section of the statute of frauds was required to be in writing,—secondly, in not directing the jury that the plaintiff was not the first inventor, if the application of wire and composition to similar purposes was known and in use before the date of the patent,—thirdly, in not directing the jury to find a verdict for the defendant on the plea of non concessit." Upon the first point, he referred to *Donellan* v. *Read*, 3 B. & Ad. 899, *Cherry* v. *Heming*, 4 Exch. 631, *Boydell* v. *Drummond*, 11 East, 142, *Tress* v. *Savage*, 4 Ellis & B. 36, *Clay* v. *Yates*, 25 Law J. Exch. 237, 1 Hurlst. & N. 73, Chitty on Contracts, 6th edit. 2, and the notes to *Peter* v. *Compton* (Skin. 353), 1 Smith's Leading Cases, 4th edit. 241,—upon the second, to *Saunders* v. *Aston*, 3 B. & Ad. 881, *Brunton* v. *Hawkes*, 4 B. & Ald. 541, *Whitney* v. *Emmett*, 1 Baldwin (American) 303, *Regina* v. *Cutler*, 1 Macrory, P. C. 119, 137, *Losh* v. *Hague*, 1 Webster's P. C. 200, Hindmarch on Patents, 95, 96, and *Huddart* v. *Grimshaw*, 1 Webster's P. C. 85, -and upon the third, to *Nickels* v. *Ross*, 8 C. B. 679, and *Platt* v. *Else*, 8 Exch. 364.

He also complained of the direction of the learned judge as to the definition of an "agreement," and that the verdict was against the evidence,—citing *Boyd* v. *Hurd*, 25 Law Journ., Exch. 246 (*a*)[1]. But the rule was **[78]** not granted on these points,—the court being of opinion that the direction in this respect was correct, and the learned judge not being dissatisfied with the verdict.

Knowles, Q. C., and H. James, shewed cause. There is no pretence for the first charge of misdirection. Why was the learned judge to tell the jury there was no contract, when the defendant's letter of the 21st of June, containing the proposals upon which the declaration is framed, was proved to have been assented to? All the terms of the contract are in writing, and there is the signature of the party to be charged, which is all that the law requires: notes to *Berkmar* v. *Darnell* (1 Salk. 27), 1 Smith's Leading Cases, 224, 231 (*a*)[2]. In *Boydell* v. *Drummond*, 11 East, 142, the agreement was signed only by one. There was nothing to be done by the plaintiff which could possibly extend beyond the year. The authority of *Donellan* v. *Read*, 3 B. & Ad. 899, cannot be questioned since the decision of the court of Exchequer in *Cherry* v. *Heming*, 4 Exch. 631, 19 Law Journ., Exch. 65. The authorities upon the subject of acceptance by parol of a proposal in writing, are collected in *Dunlop* v. *Higgins*, 1 House of Lords Cases, 381: in all of them the terms are similar to those used here. In *Gaunt* v. *Hill*, 1 Stark. N. P. C. 10, there was neither proposal nor acceptance. So, in *Cope* v. *Albinson*, 8 Exch. 185, the defendant's offer was not accepted. In neither of those cases was there an unqualified proposal, requiring only

(*a*)[1] "It may perhaps be taken as a general principle, that, when a parol agreement takes place, which it is understood is to be put into a written form, it is not binding until it is put into that form." Per Pollock, C. B.

(*a*)[2] And see the notes to *Peter* v. *Compton*, 1 Smith's Leading Cases, 241.

acceptance to complete it: see Chitty's Statutes, 2nd edit., vol. 2, p. 146. [Willes, J., referred to *Morley* v. *Tinkler*, 1 C. M. & R. 692.] In that case there was no acceptance. [Crowder, J. This [79] would not be an agreement requiring a stamp,—an acceptance by parol of a written offer or proposal not being within the stamp-act: *Hudspath* v. *Yarnold*, 9 C. B. 625 (*b*).] The 4th section of the statute of frauds applies not to the solemnities of the contract, but to the procedure: *Leroux* v. *Brown*, 12 C. B. 801, 824. The answer to the first point, therefore, is, that this is not a case within the statute of frauds at all: and, if it is, there is a sufficient signed contract to satisfy the statute. Then, as to the second branch of the rule, there was abundant evidence of novelty; and the question was properly left to the jury. As to the third branch, the question is, whether the plaintiff warranted the thing he contracted to sell. [Cresswell, J. If there is no warranty, we must treat the plea of non concessit as simply putting in issue the fact whether the patent passed the great seal or not. The objection to this part of the summing up seems to be, that the learned judge refused to leave the question of novelty to the jury on non concessit: but he had already left it to them upon the former plea. Norman. The question intended to be raised by non concessit is, whether or not the alleged invention was the proper subject of a patent. [Cresswell, J. Yes: provided there is a warranty.] In *Bedells* v. *Massey*, 8 Scott, N. R. 337, 7 M. & G. 630, Tindal, C. J., says: "The plea [non concessit] puts in issue, not merely the existence of the letters-patent, but the legal effect of them as stated by the plaintiffs." But he goes on to say,—"I see no inconvenience to the plaintiffs from allowing this plea: they have only to produce the letters-patent to shew that they have truly and properly stated the effect of them in the declaration." And Maule, J., says: "Non concessit seems to have been frequently pleaded; and it appears to me to be the only way in which a defendant can put in issue whether that [80] which the plaintiff alleges to have been granted to him is within the terms of the grant, if truly construed." [Cresswell, J. *Nickels* v. *Ross*, 8 C. B. 679, went far beyond that: it was held that a patent may be impeached under non concessit. The question of novelty is not pertinent to the question whether the article is a manufacture within the statute of James.] There being no express warranty here, the case comes within the rule in *Chanter* v. *Hopkins*, 4 M. & W. 399. The plaintiff contracted to sell the patent such as it was. [Cresswell, J., referred to the judgment of Parke, B., in *Morley* v. *Attenborough*, 3 Exch. 500.] If it were a question for the jury, *Steiner* v. *Heald*, 6 Exch. 607,—it was properly left to them. In *Lawes* v. *Purser*, 26 Law Journ., Q. B. 25, to a declaration for money due by the defendants to the plaintiff for the payment of 10s. per ton by agreement upon and in respect of 500 tons of a substance used in manure, manufactured or sold by the defendants pursuant to the plaintiff's permission or authority, by means of the use of an invention comprised in letters-patent granted to the plaintiff, the defendant pleaded, that, at the time of the agreement, and at all times since, the letters patent were void, and the plaintiff had no such right or privilege as supposed; that the defendants were before and at the time of the agreement entitled as of right, and without licence or permission from the plaintiff, to use the supposed invention, and sell the said manure, and the plaintiff never did grant any licence to the defendants, and the same if given would have been void, and the defendants had no benefit from the agreement, and there was not any sufficient consideration for making the agreement or paying the money claimed. It was held, on demurrer, that the plea was no answer to the plaintiff's claim. Wightman, J., said: "The declaration is upon an executed contract. The plea is, that there was no consideration for the [81] contract. Now, it appears that the defendant has had all that he bargained for. It is said that this is analogous to the case of a party who has no title assuming to grant a right that every one else exercised: but that is not the case here, because, for all that appears, the defendant has had the same benefit as he would have had if the patent were a valid one."

Montague Smith and Norman, in support of the rule. The first question is, whether the contract declared on is a valid contract within the statute of frauds. It is submitted that it is an agreement not to be performed within a year, and therefore within the 29 Car. 2, c. 3, s. 4. The Guild, no doubt, had the benefit of it for a certain time: but, upon the face of it, it clearly was not to be performed within the year; part only of the money (50*l.*) being payable within the year, and the residue not

(*b*) But see *Hegarty* v. *Milne*, 14 C. B. 627.

until the expiration of three years, besides something to be done during the whole period the patent should enure. It must be borne in mind that this is not a contract for the absolute sale of the patent. *Donellan* v. *Read*, 3 B. & Ad. 899, was the case of an executed consideration, and the plaintiff had actually performed his part within the year. [Cresswell, J. The contract must, with reference to this point, be good or bad at the time it is made.] No case has held, that, where the contract is executory on both sides, it is good because it may on the one side be performed within the year. [Cresswell, J. In *Donellan* v. *Read*, performance by the landlord was a necessary ingredient; it was the consideration for the annual payments.] Parke, B., says in *Cherry* v. *Heming*, 4 Exch. 635,—"In *Donellan* v. *Read*, the court considered that the words 'not to be performed' meant, not to be performed on either side, and did not include cases where the contract was performed on the one side. That was certainly in accordance with the opinion expressed by [82] Lord Tenterden in *Bracegirdle* v. *Heald*, 1 B. & Ald. 722." In *Drant* v. *Brown*, 3 B. & C. 665, 5 D. & R. 582, A. entered into a written agreement with B. for the hire of a piece of land for the purpose of making bricks. C. afterwards made an offer in writing to let another piece of land to A. upon the terms contained in the agreement between him (A.) and B., and at a subsequent time A. verbally accepted this offer. In an action by C. for a breach of some of the terms of this contract, it was held that the written offer made by C. was admissible in evidence without being stamped. [Crowder, J. There was no complete agreement in writing there. What part of this agreement do you say was to be performed by the plaintiff beyond the year?] The fourth clause. [Willes, J. Not necessarily. The fifth clause seems the strongest one for you,—"that, in the event of the Guild not being carried on, the patent should revert to you, subject to the re-payment of moneys paid to keep it up." The words "subject to," however, do not make a covenant: *Wolveridge* v. *Steward*, 3 M. & Scott, 561, 1 C. & M. 644, 3 Tyrwh. 637, —reversing *Steward* v. *Wolveridge*, 9 Bingh. 60, 2 M. & Scott, 75: they amount to a condition for her benefit.] A signature by one party to the contract is not sufficient: *Gaunt* v. *Hill*, 1 Stark. N. P. C. 10; *Drant* v. *Brown*. Both must be bound: *Lees* v. *Whitcombe*, 5 Bingh. 34, 2 M. & P. 86; *Sykes* v. *Dixon*, 9 Ad. & E. 693, 1 P. & D. 463. In *Warner* v. *Willington*, 3 Drewry, 523, 531, Kindersley, V. C., says: "A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and, when the terms of such contract are reduced into writing, and signed, that is sufficient to bind the party signing: but, if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties." [Willes, J. He afterwards says, 532, "Taking it, then, as a memorandum, not of an agreement, but of [83] an offer not then finally accepted, the question is whether there has been a sufficient acceptance by the plaintiff before the defendant retracted. Now, what is alleged by the plaintiff as an acceptance was, his sending the draft lease. This raises another question, viz. whether acceptance can be by parol without writing; and it is singular that I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient. But I think, upon principle, that parol acceptance would be sufficient; because, when one party has signed a written proposal, and the other expressly accepts it by parol, —as, if he says in express terms 'I accept the proposal,' it appears that that reduces it to a case of parol agreement come to between the parties, and a memorandum of the agreement signed by one, in which case it is clear that the signature of one party is sufficient to bind him, although the other has not signed."] That is founded upon a dictum of the Lord Keeper (Cowper) in *Coleman* v. *Upcot*, 5 Vin. Abr. 527, 528, "that, if a man (being in company) makes offers of a bargain, and then writes them down and signs them, and another person then takes them up and prefers his bill, there will be a sufficient agreement;" the authority of which dictum is questioned in Dart on Vendors, 100. [Crowder, J., referred to *Bird* v. *Blosse*, 3 Ventr. 361, "One wrote a letter signifying his assent to the marriage of his daughter with J. S., and that he would give her 1500*l.*; and afterwards, by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his letter; and at some time afterwards declared that he would agree to what was proposed in his first letter. This letter was held a sufficient promise in writing within the statute of 29 Car. 2, called the statute against frauds and perjuries, and that the last declaration had set the terms in the first letter up again."] That which is called a proposal there was in [84] truth an acceptance. That class of cases met with the disapprobation of Sir J.

Mansfield in *Allen* v. *Bennet*, 3 Taunt. 169, 173; and some further doubt is cast upon them in *Huddleston* v. *Briscoe*, 11 Ves. 583, 592. In *Morley* v. *Tinkler*, 1 C. M. & R. 692, there never was any agreement at all on the part of the plaintiff: the offer was conditional. The decisions on the stamp act are applicable here: no stamp is requisite on a mere proposal: *Vallans* v. *Fletcher*, 1 Exch. 20. To constitute a complete agreement, the memorandum must shew the acceptance, as well as the proposal. [Williams, J. In *Coleman* v. *Upcot*, 2 Eq. Cas. Abr. 45, Lord Keeper Harcourt "decreed defendant to perform this agreement, for that it was directly within the statute of frauds, as being an agreement signed by the party to be charged with the same, and there was no need of its being signed by both parties: and plaintiff by his bill has submitted to perform his part of the agreement. This, though it was not at first a contract, but conditionally only, if the other would accept of it, yet, when the other had accepted of it, it was all one."] The filing of the bill there reduced the whole into writing. The statute is not confined to cases where neither party can perform the contract within the year. *Donellan* v. *Read* and *Cherry* v. *Heming* were both cases where upon an executed consideration the defendants would have been liable, however void the agreement. Where a corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation: *Finlay* v. *The Bristol and Exeter Railway Company*, 7 Exch. 416; *Lowe* v. *The London and North Western Railway Company*, 18 Q. B. 632. *Sweet* v. *Lee*, 3 M. & G. 452, 4 Scott, N. R. 77, was the case of an unexecuted agreement. In *Birch* v. [85] *The Earl of Liverpool*, 9 B. & C. 392, 4 M. & R. 380, it was held that a contract whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, was determinable at any time within that period upon the payment of a year's hire, was an agreement not to be performed within a year, within the meaning of the statute of frauds. *Bracegirdle* v. *Heald*, 1 B. & Ald. 722, and *Williams* v. *Jones*, 7 D. & R. 548, 5 B. & C. 108, are to the same effect. An instrument void as a lease for not being by deed, after the 8 & 9 Vict. c. 106, may still be valid as indicating the terms of the holding: *Tress* v. *Savage*, 4 Ellis & B. 36; *Stratton* v. *Pettitt*, 16 C. B. 420; *Davis* v. *Jones*, 17 C. B. 625. The statute has always been construed with strictness: *Cocking* v. *Ward*, 1 C. B. 858; *Kelly* v. *Solari*, 9 M. & W. 54; *Sard* v. *Bourdillon*, ante, vol. i. p. 188. The rule is well stated by Tindal, C. J., in *South* v. *Strawbridge*, 2 C. B. 808, 814,—"Assuming that the 4th section of the statute of frauds does apply to actions upon considerations that are executed, it seems to me that the contract in the present case is not within its terms. It speaks of 'any agreement that is not to be performed within the space of one year from the making thereof': pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell* v. *Drummond*, 11 East, 142, the rule to be extracted from which is, that, where the agreement distinctly shews upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute: but that, where the contract is such that the whole may be performed within a year, and there is no stipulation to the contrary, the statute does not apply." Then, the learned judge ought to have di-[86]-rected the jury to find for the plaintiff on the issue on non concessit instead of leaving it to them, as he did, upon the facts. The effect of the plea of non concessit was fully considered in *Cooke* v. *Blake*, 1 Exch. 220. The allegation that the plaintiff was an inventor, was material and traversable: *Routledge* v. *Grant*, 4 Bingh. 653, 1 Moore & P. 717. The mere application of a known article to a new use, the mode of application not being new, but, before the date of the patent, having been used in applying analogous articles to the same purpose, is not a manufacture within the meaning of the statute, and cannot be made the subject of a patent. [Cresswell, J. Wire is old; plaiting is old: is the making of wire-rope not the subject of a patent?] No: a patent might be taken out for the machinery for plaiting or twisting it. *Darcy* v. *Allin*, Noy, 173, *Walker* v. *Congers*, Godson on Patents, 56, Phillips on Patents, 127, 134, *Brunton* v. *Hawkes*, 4 B. & Ald. 541, *Kay* v. *Marshall*, 5 N. C. 492, 7 Scott, 548, *Pow* v. *Taunton*, 9 Jurist, 1056, *Hotchkiss* v. *Greenwood*, 11 Howard's (American) Rep. 248, and *Bean* v. *Smallwood*, 2 Story's (American) Rep. 408, were also referred to.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

In this case the plaintiff sought to recover damages for non-performance of a contract alleged to have been entered into by the defendant with her, whereby she was to assign a patent which she had obtained for making toys, in trust for an institution called the Ladies' Guild, which was under the management of the defendant; which patent was to be used by the Guild for making toys; and the plaintiff was to have 5 per cent. upon the profits made thereby, and the defendant was to provide [87] for the next payment to be made in respect of the patent; and, if the profits made did not reach a certain sum in the first and subsequent years, the plaintiff should have the right, upon giving one month's notice, and repaying any payments made to keep up the patent, to reclaim it, unless the deficiency in the year was made up within the month: and, in case of the Ladies' Guild not being carried on, the patent was to revert to the plaintiff, subject to her repaying any moneys paid to keep it up.

The declaration alleged as a breach that the defendant had not provided for the next payment to be made in respect of the patent.

The defendant pleaded, amongst other pleas, a denial of the alleged contract, that the invention patented was not new, and non concessit.

At the trial, it was proved, that the defendant had made the plaintiff a written proposal, signed by him, containing the terms of the proposed contract, to which she had assented by word of mouth; that she had allowed the Guild to have the possession and use of her patent until and after the time when the next payment to be made fell due, and had in all other respects fulfilled the terms of her agreement with the defendant: that the next payment had not been made by the defendant: and that, consequently, the patent became void.

Conflicting evidence was given as to the novelty of the invention.

The defendant took several objections to the plaintiff's right to recover, viz. that no valid contract had been proved; that the invention was not new; and that, at all events, the defendant was entitled to a verdict upon the plea of non concessit, upon the ground that the invention was not the proper subject of a patent. The case was, however, left to the jury, who found all the issues for the plaintiff, with 75*l.* damages.

[88] The defendant, in Michaelmas Term last, obtained a rule to set aside the verdict, and for a new trial, on the ground of alleged misdirection of the learned judge, —first, in not directing the jury that there was no evidence of the contract stated in the declaration, upon the ground that it was, within the 4th section of the statute of frauds, an agreement "not to be performed within the space of one year from the making thereof," and that the proposal signed by the defendant, having been accepted by parol only, was not sufficient to satisfy the statute, —secondly, in not leaving to the jury that the plaintiff was not the first inventor, if her application of wire and composition, &c., to similar purposes was known and in use before the date of the patent, —and, thirdly, in not directing the jury to find a verdict for the defendant on the plea of non concessit.

With respect to the first point, we think it may be disposed of, either by reference to the terms of the agreement, by which all that was to be done by the plaintiff constituting one entire consideration for the defendant's promise was capable of being performed within a year, and that it does not appear from its terms, which were undoubtedly agreed to in part, that any part of what the plaintiff was to do constituting such consideration, was intended to be postponed until after a year from the time of making the agreement; so that *Donellan* v. *Read*, 3 B. & Ad. 899, and the judgment of Lord Wensleydale in *Cherry* v. *Heming*, 4 Exch. 631, are authorities in favour of the plaintiff;—or, by holding, as we are prepared to do, upon the authority of the opinion expressed by Vice-Chancellor Kindersley in *Warner* v. *Willington*, 3 Drewry, 532, that a proposal signed by the person to be bound, and accepted by word of mouth by the person to whom it is made, is a sufficient agreement to satisfy the 4th section of the statute of frauds.

[89] Upon the second question, viz. that of novelty, it is enough to say that there was evidence on both sides, which the judge seems to have left to the jury, reminding them of what was proved on each side, and pointing out the improbability of the evidence of one witness for the defendant, which no doubt the jury must have disbelieved. This was not misdirection; and, as to this part of the case, there is no complaint against the verdict on any other ground.

With respect to the third and last point, viz. whether the judge ought to have directed the jury to find a verdict for the defendant upon the plea of non concessit,

on the ground that the invention was not the proper subject-matter of a patent,—it is necessary to consider the effect of this plea as pleaded to the present declaration, which alleges a contract for the assignment by the plaintiff of the letters-patent, to be used as therein mentioned by the Guild: and we apprehend that this is a correct expression of the contract, and that such a contract involves no warranty that the invention was new, or was a manufacture within the statute of James, but merely that Her Majesty had granted to the plaintiff the letters-patent which she proposed to assign. In short, the defendant in this case, as in *Hall* v. *Conder*, ante, p. 22, contracted for the use of the plaintiff's right such as it was, without regard to whether it could be sustained upon litigation or not: and there is nothing unreasonable or uncommon in such a bargain. Upon this construction of the declaration, the plea of non concessit would be bad if it put in issue more than the granting of the letters-patent: and, where a plea is capable of two constructions, one of which would make it bad and the other good, it ought to be construed so as to make it good. Therefore, non concessit, in this case, only puts in issue the grant by Her Majesty to the plaintiff of the letters-patent; and [90] all the learning introduced by Mr. Norman, in his laborious argument for the defendant, as to what sort of invention is the proper subject of a patent, was foreign to the question actually raised by the plea. The learned judge was right in ruling that proof of the letters-patent entitled the plaintiff to a verdict upon this issue.

All the points raised for the defendant being thus disposed of, the rule must be discharged.

Rule discharged.

End of Hilary Vacation.

[91] Cases Argued and Decided in the Court of Common Pleas, and in the Exchequer Chamber, in Easter Term, in the Twentieth Year of the Reign of Victoria.

The judges who usually sat in Banco in this Term, were,—Cockburn, C. J., Cresswell, J., Crowder, J., and Willes, J.

[93] Goodman *v.* Spencer. April 20th, 1857.

[S. C. 26 L. J. C. P. 177; 3 Jur. N. S. 414; 5 W. R. 524.]

The Gun-Barrel Proof Act, 1855,—18 & 19 Vict. c. cxlviii.,—does not exempt gun-barrels which have been provisionally proved at Birmingham from the necessity of provisional proof in London, if required to be marked there with the definitive proof-mark of the Gun-Makers' Company.

This was an action against the proof-master of the Gunmakers' Company for refusing to receive for proof and to prove and mark certain gun-barrels of the plaintiff, in breach of his alleged duty under the Gun-Barrel Proof Act, 1855, 18 & 19 Vict. c. cxlviii.

The first count of the declaration stated that the plaintiff, after the making and coming into operation of the Gun-Barrel Proof Act, 1855, caused to be sent and taken to the proof-house of the Gun Makers' Company, maintained by them for the purposes in the said act mentioned, divers barrels of him the plaintiff constructed for small-arms, and which by the provisions of the said act were required to be proved by definitive as well as by provisional proof, that is to say, one rifled barrel, and two double-barrelled shooting-pieces for firing small-shot, and which said barrels had been theretofore duly proved by provisional proof at the Birmingham proof-house, as required by the said act, and had been duly marked as so proved, and which said barrels were at the time they were so sent and taken in the proper state for proof by definitive proof: and the plaintiff was desirous of having the said barrels proved by definitive proof, and was ready and willing to leave the same at the Gun Makers' Company's said proof-house, and to have the same duly proved by such definitive proof, and marked as so proved, and to do all things necessary to entitle him to have the same so marked and proved; and all things so necessary were then done and happened, of all which the defendant, then and thence hitherto being the proof-master of the said last-mentioned company,

then had notice, and was then requested by the plaintiff to receive the said barrels so brought to the said proof-house as aforesaid, [94] and to prove the same thereat by definitive proof according to the said act, and to mark the same as duly proved, if the same should be found of proof: Yet the defendant, contrary to his duty as such proof-master, would not receive the said barrels nor prove the same as aforesaid, and refused so to do; whereby the plaintiff was prevented from having the said barrels so proved, and was put to expenses, and divers other expenses to which he had been put were rendered useless: And the plaintiff claimed 50*l*.

Second count,—And the plaintiff also said that the averments and allegations in the first count mentioned were true, and that he was and is personally interested in having the said barrels so received, proved, and marked as in the first count mentioned, and in having the same re-delivered to him, and that he had sustained, or might sustain, damage by the non-performance by the defendant of his duty as such proof-master in that behalf as aforesaid, and that performance of such duty had been demanded by the plaintiff of the defendant, and been refused by him: And the plaintiff claimed a writ of mandamus commanding the defendant to receive the said barrels at the said proof house of the said Gun-Makers' Company, and duly prove the same thereat by definitive proof, according to the scale in force under the said act, and to duly mark such barrels when proved (if found of proof) as duly proved as aforesaid, according to such scale, and, upon re-payment of all sums actually paid by such company in respect of the carriage of such barrels and their delivery at such proof-house, and their re-delivery when proved, and on payment of the charges for proving and marking as proved, by the said act authorized, to deliver the said barrels so proved and marked as proved to the plaintiff.

Second plea,—that the plaintiff was not at the time of the said barrels being so sent and taken as in the decla-[95]-ration alleged, ready or willing to allow the said Gun-Makers' Company to prove the said barrels by the provisional proof in the said act mentioned, and that the said barrels were never proved by the said Gun-Makers' Company by the provisional proof in the said act directed; and that the said Gun-Makers' Company were always ready and willing to prove the said barrels by the provisional proof in the said act directed,—of all which premises the plaintiff always had notice, and the plaintiff always refused to allow the said Gun Makers' Company to prove the said barrels by the provisional proof in the said act directed; wherefore the defendant so refused to receive and prove the said barrels as in the declaration in that behalf was alleged.

To this plea the plaintiff demurred, the ground stated in the margin being, "that provisional proof by the Gun Makers' Company is not a condition-precedent to definitive proof by that company; but that they are bound to prove definitively barrels which have been duly proved provisionally at the Birmingham proof-house." Joinder.

Mellor (with whom was Field), in support of the demurrer (*a*). The question presented for the consideration of the court upon this demurrer is, whether the Gun-Makers' Company in London and also the Gun-[96] Makers' Company at Birmingham are bound respectively to receive for definitive proof gun-barrels which have been provisionally proved at the other place. It appears that all barrels are manufactured at Birmingham, and that, previously to the 53 G. 3, c. 115, the only proof house was that of the Gun Makers' Company in London. That act established a proof-house at Birmingham, for the proof of barrels there. It being found that that statute was extensively evaded, another act was passed, 55 G. 3, c. 59, to amend the former act. The second section of the amended act required that every barrel for the making of any gun, fowling-piece, &c., or any other description of fire-arms usually called small-arms, should be sent immediately from the manufacturers themselves to the proof house of the Gun-Makers' Company or to the proof-house established by that

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That the Gun Barrel Proof Act, 1855, does not require that gun barrels which have been duly proved provisionally at the Birmingham proof-house, should be again proved provisionally at the proof house of the Gun Makers' Company, before being definitively proved by the said last mentioned company, as required by the said act: and

"That the Gun Makers' Company were bound to prove the barrels in question by definitive proof."

act, &c. In 1855, the two companies united for the purpose of obtaining the act which now regulates the proof of gun-barrels in England, 18 & 19 Vict. c. cxlviii. This act begins with a recital of the charter of the Gun-Makers' Company (14th March, 1637), and of the two first-mentioned acts; and then proceeds to recite that "it is expedient that better provision be made for insuring that small-arms made in England be properly and carefully manufactured, and, in order thereto, that better provision be made for the proving and marking as proved of all such parts of small-arms as for securing the safe user thereof ought to be proved, and that further powers be conferred on the two companies [viz. the Birmingham Company and the Gun-Makers' Company of London] respectively for insuring compliance with the requirements of this act; and that it is expedient that all smooth-bored single barrels be proved once only, and by definitive proof, and only when in the state in that behalf by this act provided, and that all rifled barrels and double barrels be proved by provisional and also by definitive proof as respectively by this [97] act provided." By the interpretation clause, s. 4, "Small arms" includes small arms of every description, and whether of present use or of future invention, respectively, adapted for the discharge of bullets, shots, or other projectiles, either by means of the explosion, ignition, or other action of gunpowder, gun-cotton, fulminating powder, or other substance, whether of present use or of future invention or application, or by means of the expansion of steam or gas, or by any other means, not being merely mechanical means, except air-guns as at present manufactured: "Barrel" includes every barrel of every small-arm and every breech of every small-arm, and every part of every small-arm, which part would in the user of the small-arm contain all or any part of the charge of the small-arm, and every part of every small-arm, in form, or through which part, in the user of the small-arm, all or any part of the charge thereof would be exploded or discharged: "Barrel" also includes all barrels welded, forged, or cast, finished or unfinished, or in any other progressive state of manufacture, and any and every part of a barrel: "Double Barrel" includes every barrel constructed for every small-arm consisting of two or more barrels: "Provisional Proof" means proof of a barrel liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small-arm in a finished state: "Definitive Proof" means proof of a barrel not liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small arm in a finished state: "Proof" includes "provisional proof" and "definitive proof," and means, as the case requires, "provisional proof" or "definitive proof." The 76th section enacts that "each of the two companies shall from time to time maintain a proper public proof-house, with all necessary things for proving barrels thereat, and shall at all times keep the same in proper order and condition for the proving of all such barrels [98] as are from time to time sent to such respective public proof-house for proof thereat, and shall keep there a set of standard plugs to determine the size of barrels brought to be proved." Section 77 enables the Gun-Makers' Company from time to time to make such rules and regulations as appear to them necessary for receiving at their proof-house barrels for proof, and for proving them, and marking as proved the same, according to the provisions of this act, and for re-delivering the same when so proved and marked. The 78th and subsequent sections in like manner enable the Birmingham Company to make rules for regulating the management of their proof-house. The 84th section makes the proof-master of the Gun-Makers' Company responsible for the execution by himself or his assistants of the several duties with respect to the receiving, proving, marking as proved, and delivering barrels by the act imposed on the Gun-Makers' Company: and s. 85 imposes a like responsibility on the proof-master of the Birmingham Company. The clause upon which the question in this case mainly turns is the 86th, which enacts that "each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof), as duly proved according to such scale; and, upon repayment of all sums actually paid by that company in respect of the carriage of such barrels and their delivery at such proof-house and their re-delivery when proved, and on payment of the charges for proving and marking as proved by this act authorised, shall deliver the barrels so proved and marked as proved to the persons entitled to receive the same." This clause, it is submitted, applies to all barrels brought for proof, whether for provisional or for de-[99]-finitive proof. The 87th section enacts, that, "after the

commencement of this act, a barrel shall not be used in the making of any small-arm, unless the barrel have been duly proved at the proof-house of the Gun-Makers' Company, or at the Birmingham proof-house, or at some other public proof-house established by law, and duly marked as proved." The 88th section provides, that, "after the commencement of this act, a small-arm shall not be sold or exchanged, or exposed or kept for sale, or exported, unless the barrel or barrels thereof have been duly proved," &c. Section 89 enacts that "every double barrel provisionally proved according to this act, and at any time thereafter reduced in strength in any progressive stage of the manufacture thereof, shall for the purposes of this act be deemed an unproved barrel, except for the purpose of receiving and until it shall have received the definitive proof." The 90th enacts, that, "if any barrel which shall be marked as proved under this act shall by any process of manufacture, or by any other means whatsoever other than the user and wear and tear thereof, be unduly reduced in substance or strength so as that the mark thereon does not duly represent the proof which if then duly proved it would bear, every such barrel shall for the purposes of this act be deemed an unproved barrel." Sections 91 and 92 provide for the cases of the removal or defacing of the proof-mark. Section 93 enacts that "all barrels from time to time brought to the proof-house of the Gun-Makers' Company, the Birmingham proof-house, or any other public proof-house established by law for proof, shall be proved according to the rules, regulations, and scale in that behalf according to the provisions of this act in force." The 113th section imposes a penalty not exceeding 20*l.* upon every officer or other person engaged in the management of the proof-house of the Gun-Makers' Company, or the Birmingham proof house, acting contrary to or neglecting his duty in any of the **[100]** following (amongst other) particulars, —"1. Not receiving at the proof-house any barrel duly brought or sent thereto for proof: 2. Not duly proving at the proof-house any barrel duly brought or sent thereto for proof: 3. Not duly marking as proved any barrel duly proved at the proof-house, and duly found of proof: 4. Not duly delivering to the person entitled thereto any barrel duly proved at the proof-house, and duly found of proof." Schedule (B.) contains rules and regulations applicable to the proof of small-arms. It begins with classifying them as follows:—First class, —comprising single-barrelled military arms of smooth bore. Second class, —comprising double-barrelled military arms of smooth bore, and rifled arms of every description, whether of one or more barrels, or constructed of plain or twisted iron. Third class, —comprising every description of single-barrelled birding and fowling-pieces for firing small shot; and also those known by the names of Danish, Dutch, Carolina, and Spanish. Fourth class, —comprising every description of double barrelled birding and fowling-pieces for firing small shot. Fifth class, —comprising revolving and breech loading small-arms of every description and system." The "rule of proof" is as follows:—"The gunpowder used for proof shall be of equal quality and strength with that which is now used by the board of ordnance. The balls used for the proof of barrels of all classes shall be of lead and spherical, and of the size and weight prescribed by the scale for proof. Barrels for arms of the second class and of the fourth class, and for breech-loading arms of the fifth class, shall be proved provisionally and definitively, and barrels for all other arms shall be proved once definitively." The "conditions precedent to proof," are as follows:—"Barrels for arms of the first class shall not be qualified for proof until they shall be in a fit and proper state for setting up. Barrels for arms of the third class shall not **[101]** be qualified for proof until they shall be in a fit and proper state for setting up, with the proper breeches in; and all barrels lumped for percussioning shall be proved through the nipple-hole, with the proper pins or plugs in. Barrels for arms of the second and fourth classes. For provisional proof: If of plain metal, shall be bored and ground, having plugs attached, with touch holes drilled in the plugs, of a diameter not exceeding one sixteenth of an inch. If any touch hole shall be enlarged, from any cause whatever, to a dimension exceeding in diameter one tenth of an inch, the barrel shall be disqualified for proof. Notches in the plugs instead of drilled touch holes shall disqualify for proof. If of twisted metal, they shall be fine bored, and struck up, with proving plugs attached, and touch holes drilled as in the case of plain metal barrels. For definitive proof, The barrels, whether of plain or twisted metal shall be in a finished state, ready for setting up, with the breeches in the percussioned state, break-offs fitted and locks jointed; the top and bottom ribs shall be rough struck up, pipes, loops, and stoppers on. All rifle-barrels must be rifled, the top and bottom

ribs of double barrels shall be struck up, pipes and stoppers on, the proper breeches in, and the thread of the screws shall be sufficiently sound and full for proof. Barrels for revolving-arms of the fifth class shall have the cylinders with the revolving action attached and complete. Barrels for breech-loading arms of the fifth class shall be subject to provisional proof, according to the class to which they belong, and to definitive proof when the breech-loading action is attached and complete." Provision is then made for the marks of proof, and the mode of affixing them. The proportion of powder for the proof of arms of the second class is twice as great for provisional proof as it is for definitive proof,—4812 grains for the former, and 2406 grains for the latter; and for the fourth class 3850 grains for **[102]** provisional, and 2406 grains for definitive proof. And a separate fee is payable for each description of proof. All gun-barrels are manufactured in the rough state in Birmingham or its neighbourhood; those called London made being finished in London. Single barrels undergo but one, the definitive, proof; and, before they are submitted to that proof, they are reduced to the condition in point of strength at which they are intended to be used. Where they are intended to be worked into double barrels, they are submitted to the provisional proof, to ascertain their fitness to be manufactured into double-barrelled guns. It is convenient, therefore, to the gun trade that the barrels should be provisionally proved before they are welded together, and that that provisional proof should be applied at Birmingham; for, the application of the provisional proof after the barrels are welded together subjects them to an undue risk. There is nothing in the statute to make it a condition precedent to their being definitively proved, that the barrels should have undergone the provisional proof at the same place. [Cockburn, C. J. Is there anything in the statute making the provisional proof by the one company conclusive on the other? What is there, when a barrel marked as provisionally proved by the one company is presented to the other for definitive proof, to satisfy them that the provisional proof-mark is properly applied?] The act (s. 99) makes it a misdemeanor to place the proof-mark on an unproved barrel. Besides, the provisional proof-mark of the Gun-Makers' Company might equally be forged. [Cockburn, C. J. It may be that the Gun-Makers' Company are bound to know their own mark: but there is nothing to make it obligatory upon them to give credit to the Birmingham proof-mark.] There is nothing to enable the Gun-Makers' Company to recognise their own mark with more certainty than that of the Birmingham Company, or foreign proof-marks, the provisions as to **[103]** which are in ss. 105-109. [Crowder, J. The Gunmakers' Company would equally refuse to recognize the provisional proof-mark if it were clearly proved to be the Birmingham mark: the broad question is, whether the Gun-Makers' Company are bound to prove and to mark with the definitive proof-mark barrels which have been provisionally proved at Birmingham. Cresswell, J. By s. 106, barrels with foreign proof-marks (registered) are exempted from the provisions of the act, unless they purport to be of English manufacture, in which case they are to be deemed unproved barrels.] Convenience to the trade and to the public will manifestly be best attained by adopting the more liberal and natural construction of the statute. [Cockburn, C. J. Before the passing of the Gun-Barrel Proof Act, 1855, the two companies were independent of each other. Do they not still remain so?] The principal alteration effected by that act is, the introduction of provisional proof.

Byles, Serjt (with whom was T. Jones), contrà (*a*). The main ground upon which the defendant relies has already been anticipated by the Lord Chief Justice. These proof-marks are provided for the protection of the public, for insuring the proper manufacture of small-arms, and for securing as far as may be the safe user thereof. The material sections are the 86th, 87th, and 88th. The 86th provides that each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same **[104]** thereat according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof) as duly proved according to such scale: and the 87th and 88th sections respectively prohibit the use

(*a*) The point marked for argument on the part of the defendant was,—"That, inasmuch as the plaintiff refused to allow the Gun-Makers' Company to prove the barrels by provisional proof, the plaintiff was not entitled to complain of the defendant's having refused to prove them by definitive proof."

of barrels in the making of any small arm, or the sale or exposure for sale of a small-arm, unless the barrels thereof have been duly proved at one or other of the legal proof-houses,—not partly at the one, and partly at the other: "proved" must mean entirely proved. There is nothing in the act to require the one company to give credit to the provisional proof-mark of the other, much less to compel them under a penalty to recognize it. These marks are easily forged: but each company may have peculiar means of identifying its own mark, by private arrangements not patent to the ordinary class of forgers. Various things are requisite to entitle a barrel to the provisional proof-mark. When required to impress the piece with the definitive proof-mark, the Gun-Makers' Company are called upon to vouch that the provisional proof-mark has been properly put upon it. Is that reasonable, where the provisional proof is made by the other company? [Cresswell, J. Would they be justified in putting their definitive proof-mark upon a piece the barrels of which had been provisionally proved by the Birmingham Company?] It is submitted that they would not: but it is one thing to say that they are justified, and another that they are bound, and that under a penalty. So far from there being anything in the act of parliament to compel the Gun-Makers' Company to do that the omission of which is complained of, the 115th section expressly provides, "that, except as is by this act expressly provided, this act or anything therein shall not take away, lessen, alter, or prejudice any of the estates, franchises, ordinances, rules, regulations, rights, powers, or privileges of the Gun-Makers' Company, and this act, or anything therein, shall not in any manner de [105] rogate from or affect the charter of that company." And there is nothing unreasonable in the defendant's objection. Suppose a gun bursts in consequence of defective proof, which company is to be charged with negligent performance of its duty, if one proof is made at each place. It would be a case of divided responsibility, which in most cases is no responsibility at all.

Mellor, in reply. The company could not incur any liability, as suggested, provided they duly make the proof they profess to make. The manufacturer or the seller alone incurs liability, if he sells or exposes for sale an improperly proved gun. [Cresswell, J. What evidence are the companies to have of the provisional proof, before they can be called upon to mark a barrel with the definitive proof-mark?] The provisional proof-mark is sufficient evidence. [Cresswell, J. The statute does not say so.] It does not in terms: but it is submitted that that is the necessary effect of the 86th section, coupled with the conditions and regulations contained in the schedule. [Cockburn, C. J. There is no express provision, that, with a view to definitive proof, it must appear that the barrel has already been provisionally proved. Crowder, J. The question is, whether that is not of necessity involved in the 86th section.]

Cockburn, C. J. I am of opinion that the second plea is a good answer to the action, and consequently that our judgment must be for the defendant. It is clear, from the general scope of the act of parliament, that what was intended under the new system of proof introduced thereby was, that, with reference to certain descriptions of small-arms, there should be a provisional proof of the barrel in an unfinished state, and a further and definitive proof when the piece has attained its more finished condition preparatory to mounting, and that the provisional proof should have precedence of [106] the definitive proof, and that neither of the two companies is bound to prove and mark as definitively proved any barrel so requiring provisional proof, unless it has previously undergone such provisional proof. The question is, whether, one company having proved a barrel provisionally, the other is bound on request to make the definitive proof. I am of opinion that there is nothing in the act to make it obligatory upon either company definitively to prove barrels which have been provisionally proved by the other. It appears, that, previously to the passing of the 18 & 19 Vict. c. cxlviii., the two companies, the Gun Makers' Company of London, and the Birmingham Company, had each an entirely separate and independent existence: and I find nothing in that act to denote that they are to be considered as amalgamated. I readily concede that it would make little or no difference to the public if the provisional proof by the one company were to be binding upon the other. But all I can say is, that that is matter for legislative consideration, and that we are bound by what the legislature has said. If there were any doubt upon the language of the 86th section and the scale therein referred to, there is a clear and unambiguous provision in s. 115, that, "except as is by this act expressly

provided, this act or anything therein shall not take away, lessen, alter, or prejudice any of the estates, franchises, ordinances, rules, regulations, rights, powers, or privileges of the Gun-Makers' Company, and this act or anything therein shall not in any manner derogate from or affect the charter of that company." Now, it would, I apprehend, be materially interfering with the interests and privileges of the Gun-Makers' Company to hold them to be bound to give the definitive proof to barrels which have been provisionally proved by the Birmingham Company. There being nothing in the act making it obligatory upon them to do so, we must infer from [107] the absence of any such provision that it was not intended: and the saving of the company's rights by s. 115 leads my mind irresistibly to the conclusion that the legislature did not intend that the two descriptions of proof should be made by the two companies indiscriminately, or that it should be incumbent on either to give faith and credence to the proof-mark of the other. I therefore think the defendant has not been guilty of the breach of duty with which he is charged, and consequently that he is entitled to the judgment of the court upon this demurrer.

CRESSWELL, J. I am of the same opinion. It is very possible, that, if this matter had been properly presented to the minds of the legislature at the time of the passing of the recent act, some more clear provision upon the subject would have been introduced. I find this to be quite clear,—that certain descriptions of small-arms are required to be proved in two ways, viz. by provisional and by definitive proof; and that each of the two companies is bound to prove all such barrels as are presented to them for proof. But I do not find anything in the act which says that either company shall be satisfied with the provisional proof of the other. I therefore think the whole proof must be made by one company.

CROWDER, J. I also am of opinion that the defendant is entitled to judgment in this case: and the ground of that opinion is, that the statute 18 & 19 Vict. c. cxlviii. was passed, as the preamble states, for the purpose of uniting in one act, and extending, the powers already vested, whether by charter or by statute, in the two companies; and that, in construing it, we must deal with it as if it consisted of two separate acts each applicable to each company. There is nothing in any [108] part of it to shew that what is done under it by the one company is to form part of any proceeding by the other. The only practical alteration with regard to the proofing of small-arms is, that, as to certain descriptions of arms, an additional proof is required: but there is nothing to warrant the conclusion that the provisional proof may be made by the one company, and the definitive proof by the other. I cannot, however, see that the safety of the public would be in any degree endangered if that were so. But, looking at the whole scope of the act, and more particularly at the saving of rights contained in the 115th section, I am unable to come to any other conclusion than that the acts of the two companies are to be wholly independent of each other: and it is upon that ground, and upon that ground alone, that I have arrived at the conclusion that the defendant is entitled to the judgment of the court.

WILLES, J. I am of the same opinion. The preamble shews that there were two companies having a separate and distinct existence before the passing of this act,—the Gun-Makers' Company, which was incorporated by charter of Edward the Second,—and the Birmingham Company, which was established in the year 1813, for the convenience of the Birmingham gun-trade. Down to the year 1855, it had not been thought necessary that the description of guns called small arms should be submitted to more than one proof. But, in consequence of the modern improvements in the manufacture of guns, it was thought by persons experienced on the subject to be expedient, in the case of barrels to be reduced in strength by the operation necessary to convert them into guns of particular descriptions, viz. rifled-arms or double-barrelled guns, that there should be two proofs,—one, of the barrel in its original state,—the other, when it should be in the state in which it is to be [109] actually used. Accordingly, this act for the first time introduces the necessity of provisional and definitive proof,—the two when made constituting the proof necessary before the gun can in its complete state be sold or used. I see nothing in the act to put this double proof upon a different footing from the proof which was required before its passing: it merely substitutes the two operations for the single one; and, unless there is something in the act which expressly provides the contrary, the entire operation which constitutes the proof must take place either in Birmingham or in London. I find nothing of that kind in the statute. On the contrary, the 86th section enacts that "each of the two

companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof), as duly proved according to such scale." The language of that section seems to me to be carefully distinct as to proof by each company and at each place. It is said that the safety of the public is equally well secured by the proof taking place at Birmingham as in London. Whether that be so or not, I cannot tell. Looking at the scale for proof contained in the schedule, I am not sure that the provisional proof might not be made less carefully at the one place than at the other, without any actual failure to fulfil its directions: and I can quite conceive that the person having the greater skill or prestige should strive to retain it. At all events, there is nothing in the act to impose upon the Gun-Makers' Company the duty which is sought by this action to be imposed upon them, and consequently the action is not maintainable.

Judgment for the defendant.

[110] WYATT *v.* THE DARENTH VALLEY RAILWAY COMPANY. April 25th, 1857.

An application, under the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, c. 36, for leave to issue a sci. fa. against a shareholder on a judgment against the company, was founded upon an affidavit which stated that two writs of fi. fa. had been issued against the company, and returned nulla bona; that deponent believed, from inquiries which he had made of the secretary and a shareholder, that the company had not at the time of the recovery of the judgment, or since, any property, goods, or chattels, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction; and that the deponent, as clerk to the company's solicitor, had transacted much of their legal business, and thereby became well acquainted with their position and circumstances: —Held, sufficient.—It is no answer to a motion for a scire facias against a shareholder of a joint-stock company, under the 8 & 9 Vict. c. 16, s. 36, upon a judgment obtained against the company, that the company is indebted to the shareholder against whom execution is sought, to a greater amount than that of his unpaid calls, for moneys disbursed by him as a director on behalf of the company.

Vaughan Williams, on a former day in this term, obtained a rule calling upon one Eli Richards to shew cause why a scire facias should not issue against him as a shareholder of the Darenth Valley Railway Company, to have execution to satisfy a judgment obtained by the plaintiff against the company for 131l. 14s. 11d., pursuant to the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 36.

The affidavit upon which the motion was founded was that of the managing clerk of the plaintiff's attorney, which stated, in substance, that the action was brought to recover 276l. 19s. 2d., claimed to be due to the plaintiff from the company as the balance of his costs of and attending the procuring and passing the Darenth Valley Railway Act, 1853 (16 & 17 Vict. c. lxii.); that judgment was signed against the company, for want of appearance, on the 18th of October, 1856, for 287l. 7s. 2d.; that writs of fi. fa. were duly issued thereon on the 24th of October, into Middlesex and Kent, and afterwards returned nulla bona; that two several sums of 64l. 9s. 7d. and 84l. 2s. 8d., had been recovered against other shareholders, leaving an unsatisfied balance of 131l. 14s. 11d.; that the deponent had made many inquiries from persons connected with the company, and likely to be informed on the subject, and particularly from two persons named (one of them being or having been the secretary of the company), as to whether the company had any property, goods, or chat[111]tels, and from such inquiries he believed that the company never had, and at all events did not at the time of the recovery of the said judgment, or at any time after, have any property, goods, or chattels whatever beyond their books, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction of the said judgment from the said company by execution against their property and effects; that the plaintiff's attorney had been solicitor to the company, and that the deponent, as his clerk, attended to and transacted much of the legal business thereof, and thereby became well acquainted with the position and circum-

stances of the company; that Mr. Richards was, as appeared by the register, owner of fifty shares in the company, upon which there remained to be paid up 5l. per share; and that he had been duly served with notice of this application.

Raymond shewed cause. The affidavit upon which this rule was obtained is not sufficient to satisfy the court that due efforts have been made to obtain satisfaction from the property of the company. The deponent does not shew that any application whatever has been made at the principal, and for anything that appears the only, office of the company: he states that he has made inquiries; but not there. [Cresswell, J. Is it not a sufficient primâ facie denial of their having any available property? Possibly it might be answered.] The case of *Hitchins* v. *The Kilkenny and Great Southern and Western Railway Company*, 10 C. B. 160, shews that a mere return of nulla bona amounts to nothing. The affidavit here does not carry the case a step further than did that which, in *King* v. *The Parental Endowment Assurance Company*, 11 Exch. 443, was held insufficient. In that case, an application under the 7 & 8 Vict. c. 110, by a judgment-creditor of a joint-stock company, for **[112]** leave to issue execution against a shareholder, was founded on affidavits, which stated that a writ of fi. fa. was issued by the plaintiff against the goods of the company, and placed in the hands of the sheriff, to be executed; that the sheriff returned nulla bona; that the chief office of the company was closed, and that no business, to the best of the deponent's belief, was carried on there; and that he believed that any execution against the property and effects of the company would be wholly unavailing: and it was held, that the facts disclosed did not shew that the plaintiff had used due diligence to obtain satisfaction of his judgment by execution against the company, since there was no affidavit of the sheriff's officer shewing what he had done under the writ. Parke, B., there says: "The court ought not to allow execution to issue against a shareholder, unless they are satisfied that due diligence has been used to obtain satisfaction of the judgment by execution against the company. Now, what has been done for that purpose is a matter peculiarly within the plaintiff's knowledge; and therefore he is bound to shew to the court that he has used all reasonable exertions. Here, the principal objection is, that, although a writ of fieri facias issued, it does not appear what was done under the writ. It may be that the return of nulla bona was at the instance of the plaintiff himself. The affidavits are not sufficient to satisfy me that all has been done which might have been done, and, consequently, due diligence has not been used. With respect to the case of *Thompson* v. *The Universal Salvage Company*, 3 Exch. 310, it may be observed, that it was not objected that the affidavits were insufficient, or probably the rule would have been discharged on that ground." [Cresswell, J. *Nixon* v. *The Kilkenny and Great Southern and Western Railway Company*, 1 Hurlst & N. 47, is more like the present case. There, an application under this **[113]** act was founded upon affidavits which stated, that a fi. fa. issued against the company and was returned nulla bona, and that the company had not at the date of the judgment, or since, any lands, chattels, &c., in England, Ireland, or elsewhere, whereon the plaintiff could levy the amount of the judgment, or any part thereof: and it was held sufficient. Pollock, C. J., there distinguishes the case of *King* v. *The Parental Endowment Assurance Company*, saying,—"There, the affidavits stated that a fi. fa. issued, which was returned nulla bona, that the chief office of the company was closed, and that the deponent believed that any writ of execution against the property and effects of the company would be wholly unavailing. But there was no affidavit, as in this case, that the company had no property whatever, real or personal, on which execution could be levied."] The statute authorizes an execution against the shareholder only "if any execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution." The court ought to be satisfied that due diligence has been used before the sci. fa. is issued, seeing that the shareholder has no means of raising upon the record the question whether or not they have wisely exercised the discretion given them by the statute. [Cresswell, J. The deponent shews what means he had of becoming acquainted with the position and circumstances of the company, and he distinctly swears that he believes they have no property or effects, and that any execution against them would be ineffectual.] He does not make any independent statement of his belief to that effect, but merely states, that, from the inquiries he has made, he believes it. [Cresswell, J. He shews his means of knowledge.]

V. Williams was not called upon to support his rule.

[114] Per Curiam. We think, upon the authority of *Nixon* v. *The Kilkenny and Great Southern and Western Railway Company*, the affidavit is sufficient.

Rule absolute.

A similar rule had also been obtained against one John Widdecombe, upon a similar affidavit.

April 28th.—W. R. Cole now shewed cause, upon an affidavit of Mr. Widdecombe, stating, that, before the time of recovering the judgment, he, as director and shareholder of the said company, and for and on behalf of the company, had paid out of his own proper moneys for and on behalf of the company, and allowed the said company in account, a much larger sum than the amount of the 5l. per share alleged in the affidavit upon which the rule was moved not to have been paid up by him on his said shares, and that the company were then and still remained indebted to him in a sum far beyond the said 5l. per share alleged not to have been paid up by him, viz. in a sum of 193l. 1s. 3d., and that the company had no claim whatever on him in respect of the said 5l. per share on his said shares on any account whatever; and that, in the manner aforesaid, the whole amount of his said shares had been paid up by him, and that he had and still had a claim on the company beyond the amount of his said shares in the said company to the said amount of 193l. 1s. 3d., and which he had been and still was unable to obtain from the company.

The 36th section of the 8 & 9 Vict. c. 16, enacts, that, "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to **[115]** levy such execution, then such execution may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up: Provided always that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged: and upon such motion such court may order execution to issue accordingly." The question is, whether the court will, in the exercise of their discretion, allow execution to issue under the circumstances disclosed in Mr. Widdecombe's affidavit. [Cockburn, C. J. The judgment-creditor has a right to have execution against the shareholder to the extent of his shares not paid up. What answer is it for the shareholder to say "The company is indebted to me, as well as to you!" The one party has a judgment against the company; the other a mere right of set-off.] The creditor's right is subject to the discretion of the court. [Cockburn, C. J. I do not think this is a matter to be discussed upon affidavit. Crowder, J. Payment of a call is a clear and definite thing. That which you wish to introduce is open to a great deal of difficulty.] The averments in the scire facias, that the party is a shareholder, and as to the amount of his shares unpaid, are traversable: *Devereux* v. *The Kilkenny and Great Southern and Western Railway Company*, 20 Law Journ., Exch. 37, 5 Exch. 834.

V. Williams, contrà, was not called upon.

Cockburn, C. J. I am of opinion that this rule should be made absolute. The 36th section provides, that, where execution upon a judgment against a joint-stock company proves ineffectual, recourse may be had **[116]** by execution, with the leave of the court, against shareholders to the extent of their shares not paid up. I agree that the court is not a mere instrument to make the order: but I think it is clear that the legislature intended to give an effectual and substantial remedy against the shareholder to the extent of his shares not paid up; and, unless we see that manifest injustice will be done, we are bound to afford the creditor the remedy intended by them. It may be that the shareholder may have some defence upon the scire facias: but I see no ground upon which we can at this stage interpose between the creditor and the rights which the law has given him.

The rest of the court concurring.

Rule absolute.

BENNS *v.* MOSLEY AND COBBETT. May 4th, 1857.

[S. C. 3 Jur. N. S. 694; 5 W. R. 583. Followed, *Weldon* v. *Neal*, 1885, 15 Q. B. D. 471.]

The courts have no power to issue writs of habeas corpus to bring up prisoners for the purpose of moving for or shewing cause against rules,—there being no writ known to the law which is applicable to such a purpose.

This was an ejectment which was tried before Williams, J., at the first sitting at Westminster in this term, when a verdict was found for the plaintiff.

Mrs. Cobbett, the wife of one of the defendants, moved for a writ of habeas corpus to be directed to the keeper of the Queen's Prison, commanding him to bring up her husband into this court for the purpose of enabling him to move in person for a new trial. [Cockburn, C. J. I very much doubt whether we have any power to grant a habeas corpus for such a purpose.] It is in the discretion of the court (*a*), and has repeatedly been granted.

[117] COCKBURN, C. J. We have communicated with the judges of the courts of Queen's Bench and Exchequer, and we all concur in thinking, that, although a practice had at one time prevailed of granting such applications as the present, that practice was erroneous. Indeed, it is long since those two courts came to the resolution not to grant them. In *Ford* v. *Nassau*, 9 M. & W. 793, 1 Dowl. N. S. 631, where an application was made for a writ of habeas corpus to bring up a party in custody under attachments, to enable him to move to set them aside, Parke, B., said: "I am not aware of any precedent for such an application. In *The Attorney-General* v. *Hunt*, 9 Price, 147, this court refused to grant a habeas corpus to enable a defendant in an information who was confined in a county-goal, under sentence of another court, for libel, to attend in court at Westminster, and conduct his defence in person; and, in *Rex* v. *Parkyns*, 3 B. & Ald. 679, the court of King's Bench refused a similar application, where the object was to shew cause against a rule for a criminal information:" and he directed the counsel to look into the authorities, and apply again. On a subsequent day, the counsel having referred to a case of *The Attorney-General* v. *Cleave*, 2 Dowl. P. C. 668, where the court of Exchequer had granted a writ of habeas corpus to bring the defendant into court for the purpose of enabling him to defend an information filed against him for selling unstamped papers, the learned Baron said,—"The difficulty is, to see in what form the writ is to be. A writ of habeas corpus is issued for some specified purpose, either ad testificandum, or ad respondendum, as the case may be. There is no general form for a writ of habeas corpus: and, as there is no authority for doing this, we cannot grant the application." It is plain, therefore, that we have no power to do that which is asked.

Writ refused.

[118] IN THE MATTER OF THE ACKNOWLEDGMENT OF ESTHER, THE WIFE OF WILLIAM ANDERSON. May 1st, 1857.

Upon a motion for an order to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 W. 4, c. 74, s. 91, the court declined to receive an affidavit in which she was described as "wife or widow of W. A."

J. Addison moved for an order under the 3 & 4 W. 4, c. 74, to enable Esther Anderson by deed or surrender to convey certain premises to which she was separately entitled, without the concurrence of her husband.

The affidavit was sufficient in all respects, save that the deponent described herself as "the wife or widow of William Anderson, late of Leeds, in the county of York."

CRESSWELL, J. The description of the deponent will not do. If she is a widow, she does not need the assistance of the statute. We have already on more occasions than one decided that such a description will not do: see *In re Mary Noy*, 7 Scott, N. R. 434, and *Ex parte Lydia Sparrow*, 12 C. B. 334. The affidavit must be amended, and re-sworn.

An amended affidavit having been produced, the rule was granted.

Fiat.

(*a*) See *Clark* v. *Smith*, 3 C. B. 984, and *Ford* v. *Graham*, 10 C. B. 369.

[119] SWEET, *Appellant*, SEAGER, *Respondent*. May 4th, 1857.

[S. C. 3 Jur. N. S. 588; 5 W. R. 560. Distinguished, *Tidswell* v. *Whitworth*, 1867, L. R. 2 C. P. 326. Referred to, *Thompson* v. *Lapworth*, 1868, L. R. 3 C. P. 158; *Crosse* v. *Raw*, 1874, L. R. 9 Ex. 213; *Budd* v. *Marshall*, 1880, 5 C. P. D. 490. Applied, *Brett* v. *Rogers*, [1897] 1 Q. B. 528; *Farlow* v. *Stevenson*, [1900] 1 Ch. 132. See *Skinner* v. *Hunt*, [1904] 2 K. B. 455, 462.]

A. held premises under a building lease, with a covenant to pay, bear, and discharge "all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof." He granted an underlease (at a rack rent) to B., the latter covenanting "that the several covenants, conditions, and agreements contained in the original lease on the lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him:" -Held, that B. was liable for the expense of drainage works done upon the premises under the authority of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120.

This was an appeal against a decision of the judge of the county court of Kent holden at Greenwich, in an action of replevin in which the defendant (the respondent) avowed for 22l. 10s., a quarter's rent due to him from the plaintiff (the appellant) at Christmas, 1856. The following case was stated (and settled by the judge) for the opinion of this court:—

By an indenture of lease made the 27th of November, 1829, between Michael Raven, of the first part, Catherine Vaughan Austin, of the second part, and the defendant (William Seager), of the third part, it is witnessed, that, in consideration of the expense which the said W., Seager had been at in erecting the messuage and buildings thereinafter demised, and also of the rents and covenants thereinafter reserved and contained, the said M. Raven demised and leased, and the said C. V. Austin demised, leased, and confirmed, a piece of ground situate in the parish of Charlton, in the county of Kent, therein described, with the said messuage and buildings, unto the said W. Seager, his executors, administrators, and assigns, from the 29th of September then last for the term of 59½ years, wanting fifteen days, yielding and paying therefor the yearly rent of 20l., without any deduction whatsoever in respect of any taxes, rates, assessments, impositions, or any other matter or thing whatsoever then already or thereafter to be taxed, assessed, and imposed upon or in respect of the said premises, or any part thereof, by authority of parlia-**[120]** ment or otherwise howsoever: And the said indenture of lease contained a covenant by the said W. Seager that he, his executors, administrators, and assigns, would quarterly during the said term pay unto the said M. Raven, his executors, administrators, and assigns, the said quarterly rent of 20l. on the several days and times thereinbefore appointed for payment thereof, without any deduction, according to the reservation thereof therein contained, and would in like manner pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the said term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof, and would during the said term insure and keep insured the said messuage and buildings from loss or damage by fire, for the sum of 1000l., for a term not less than seven years.

By an indenture of underlease made on the 17th of February, 1846, between the defendant, W. Seager, of the one part, and the plaintiff, G. Sweet, of the other part, after reciting the above stated lease, the defendant demised the said piece of land, messuage, buildings, and premises comprised in the above stated lease, to the plaintiff, his executors, administrators, and assigns, from the 25th of December, 1845, for all the residue of the said term of 59½ years (wanting fifteen days), except the last day of the said term, at the rent of 85l. for the first year of the said term, and the yearly rent of 90l. for the second and subsequent years of the said term, payable quarterly, and a proportional part at the expiration of the term: and by the same indenture of underlease the plaintiff covenanted with the defendant that the rent thereby reserved should be paid

at the times aforesaid, and that the several covenants, conditions, and agree-[121]-ments contained in the above-recited indenture of lease on the lessee's part to be performed and observed (except the covenant to pay the rent thereby reserved, and the covenant to keep the said premises insured from fire) should during the continuance of that demise be performed and observed by the plaintiff, his executors, administrators, or assigns: And by the same indenture of lease it is provided that the plaintiff, his executors, administrators, or assigns, might make void that demise, and the term thereby granted, at the expiration of the first three, seven, fourteen, or twenty-one years thereof, by giving to the defendant, his executors, administrators, or assigns, six months' notice in writing to that effect, or at any time while the said messuage and premises, or any part thereof, should be untenantable by reason of damage from fire, having continued so untenantable for nine calendar months, by giving one week's notice in writing to that effect.

No such notice has been given.

By the Metropolitan Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 31, and sched. B., part 2, the parish of Charlton and other districts are united into a district called "The Plumpstead District," and placed under the management of a board of works for the purposes of the act.

By s. 73 of the said act, the district board of works is impowered to require the owner of any house, whether built before or after the commencement of the act, situate within one hundred feet of a sewer of sufficient size on a lower level, and found not to be drained by a sufficient drain communicating with some sewer, to make a drain, with proper branches, from the house to the sewer, with such other works as may appear requisite to the board or their officers; and, if the owner of such house or building neglect or refuse so to do, the district board of works is authorised to cause the same to be construct-[122]-ed and made, and to recover the expenses incurred thereby from such owner, in manner thereinafter provided.

By s. 217 of the act it is enacted that it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the act, from any person who then or at any time thereafter occupies such premises: and the owner shall allow every such occupier to deduct all sums of money which he so pays, or which are levied by distress, out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent.

By s. 219 of the said act it is enacted that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant.

By s. 250 it is enacted, that, in the construction of the act, the word "owner" shall (except for a purchase not material to this case) mean the person for the time being receiving the rack-rent of the land or premises in respect of which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent. The act contains other provisions which it might be material to refer to.

The house comprised in the stated lease and under-lease is within one hundred feet of a public sewer of sufficient size on a lower level, and, until the execution of the works hereinafter mentioned, was not sufficiently drained into any sewer.

Some time in the month of June, 1856, a good and [123] sufficient notice under the said act, by the surveyor to the said board of works, addressed to the plaintiff (the appellant) as owner and occupier of the said house, was left at the said house, requiring him to execute certain drainage works therein specified from the said house into the said sewer, being works authorised by the said act to be done, and giving him notice, that, if the works were not performed, the said board would cause them to be done, and recover the expenses according to the said statute.

Other notices under the said act, to the same effect, were left at the said house in the month of September, 1856. All the said notices were sent by the plaintiff to the defendant shortly after they were so left at the said house, and before the works hereinafter mentioned were commenced.

The drainage works required by the said notices to be constructed were not done

by the plaintiff or by the defendant, but were afterwards executed by a person employed by the said board of works, under the inspection of their surveyor, in the middle of October, 1856; and, on the 16th of December, 1856, the plaintiff was required by the said board to pay, and did pay to the said board the sum of 27l. 16s. 8d. being the amount of the expenses paid by the board for the said works.

On the 25th of December, 1856, the sum of 22l. 10s. became due from the plaintiff to the defendant, for a quarter's rent for the said house and premises, reserved by the said underlease. The plaintiff claimed to retain the said sum of 22l. 10s. in part satisfaction of the said sum of 27l. 16s. 8d. paid to the said board of works.

On the 22nd of January, 1857, the defendant distrained the goods of the plaintiff on the said demised premises for the said sum of 22l. 10s.; and on the same day this action of replevin was brought in the county-court by the plaintiff for such distress.

On the 26th of February, 1857, the cause was tried **[124]** before the judge of the county-court, and adjourned until the 12th of March, 1857, on which latter day the said judge gave judgment for the defendant, on the ground that the plaintiff, by the terms of his lease, was bound to bear and discharge the costs of executing the said drainage works, and was not entitled to deduct the amount from the rent reserved to the defendant.

The question for the opinion of the court was, whether the plaintiff was entitled to deduct the said sum of 27l. 16s. 8d. from the rent reserved by the said underlease to the defendant. If the court should be of opinion that the plaintiff was entitled to make the said deduction, then the judgment for the defendant was to be set aside, and judgment given for the plaintiff, with 40s. damages, or a new trial granted: otherwise, the said judgment for the defendant was to stand.

Milward, for the appellant (*a*). The defendant is the person who answers the description of "owner" given by the interpretation clause, s. 250, -the person receiving the rack-rent. [M. Chambers, Q. C., assented.] Then, as such owner, he is the person upon whom is by s. 73 cast the duty of making the drain communicating with the sewer. That section enacts, that, "if any house or building, whether built before or after the commencement of this act, situate within any such parish or dis-**[125]**-trict, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, and its several floors or stories, and also of its areas, water-closets, privies, and offices (if any), and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and fit and proper sinks, and fit and proper syphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and fit and proper water supply and water-supplying pipes, cisterns, and apparatus for scouring the same, and for causing the same to convey away the soil, and fit and proper sand traps, expanding inlets, and other apparatus for hindering the entry of improper substances therein, and all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads; and it shall be lawful for the said vestry or board to cause the said works to be inspected while in progress, and from time to time during their execution to order

(*a*) The points marked for argument on the part of the appellant, were,

"That he was entitled to deduct the expense of the drainage works in question from the rent due to the defendant; that the defendant was owner of the premises within the 217th and 250th sections of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120; and that the expense of the drainage works in question was not such a levy, rate, assessment, tax, charge, imposition, contribution, burthen, duty, or service, as the plaintiff by his covenant was bound to pay, bear, or discharge."

such reasonable alterations therein, ad-**[126]**-ditions thereto, and abandonment of part or parts thereof, as may to the vestry or board or their officers appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works; and, if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from the owner in the manner hereinafter provided." The mode of recovering the expenses is pointed out by s. 217, viz. by distress on the occupier, to be reimbursed out of the rent. In the absence of any special provision, the owner would be the person liable to pay. And, suppose the owner here had paid the money, he would have had no claim over against any other person. Then comes s. 219, which provides that "nothing in the act contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant." That probably was a provision that was hardly necessary. We must see what was the bargain between the parties It is clear that this is not a burthen which the act of parliament throws upon the ground-landlord. Primâ facie, therefore, it is imposed upon the defendant, as being the owner of the rack-rent. [Cresswell, J. This would be a charge which the defendant would have been bound to pay if the premises were not let. Has not the plaintiff **[127]** covenanted to do all (with the exception mentioned in the underlease) that the defendant had covenanted to do?] It is rather a covenant of indemnity, than a covenant to do all acts which the covenantee had undertaken to do. This is not a rate or an assessment, or a charge or parochial levy or service. [Cockburn, C. J. Is it not a duty? Crowder, J. Or a burthen?] It is not one of those periodical or occasional duties, assessments, or burthens which the covenant contemplated: it is a claim for a specific sum of money, wholly distinct from the sewer-rate. It is a payment in respect of an improvement to the premises. [Cresswell, J. But for the 217th section, the tenant could not deduct the money at all. Then, s. 219 declares that nothing in the act contained shall affect any contract by the occupier to pay and discharge all rates, dues, and sums of money payable in respect of the property. Has the plaintiff covenanted to pay all rates, dues, and sums of money payable in respect of the property?] But for s. 217, the occupier could not be called upon to pay in the first instance. Clauses of this sort are to be construed ejusdem generis. In *Southall* v. *Leadbetter*, 3 T. R. 458, a lessee for twenty-one years at a peppercorn rent for the first half year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and who covenanted to pay the land tax and all other taxes, rates, assessments, and impositions, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of the statute 14 G. 3, c. 78, s. 41, or the covenant; the charge in such case must be borne by the original landlord. Lord Kenyon there says: "The covenant to pay the land-tax and all other taxes, rates, assessments, and impositions, only extends to the land-tax and other taxes ejusdem generis: but this is not a tax." So, in *Beardmore* v. *Fox*, 8 T. R. 214, it was held that the lessor of a house at rack-rent **[128]** (there being no other person entitled to any kind of rent) was liable to contribute to the expenses of a party-wall under the 14 G. 3, c. 78, though the lessee had improved the house demised. In *Barrett* v. *The Duke of Bedford*, 8 T. R. 602, there were clear and unambiguous words casting the burthen upon the tenant. *Waller* v. *Andrews*, 3 M. & W. 312, and *Payne* v. *Burridge*, 12 M. & W. 727, which will probably be relied on by the defendant, are distinguishable, inasmuch as there the payments were made in respect of a charge affecting a whole district.

Montagu Chambers, Q. C. (with whom was J. Brown), contrà (*a*). The payment

(*a*) The points marked for argument on the part of the defendant, were,—

"That the plaintiff was not entitled to deduct the expense of the drainage works in question from the rent due to the defendant; that, by the covenants in the underlease to the plaintiff, he was bound to bear and pay the expense of the said drainage

in question was properly chargeable on the tenant, and not upon the landlord. It is impossible to conceive a covenant in terms more strong to shew that it was intended that the landlord should be relieved from every burthen or duty which might be imposed upon the premises or upon the land. The tenant covenants to pay not only all taxes which are usually called tenants' taxes, but also all those burthens that usually fall upon the landlord. The words are,—"And shall and will in like manner pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the said term shall [129] be taxed, assessed, or imposed upon or in respect of the said premises hereby demised." This clearly is a burthen imposed upon or in respect of the premises,—a duty that arises in respect of them, from which it clearly was intended that the landlord should be relieved. *Southall* v. *Leadbetter* and *Beardmore* v. *Fox* are altogether inapplicable. In the former, the contention was whether or not there was an improved rent acquired by the lessor; and it was held that there was not. Lord Kenyon said: "The improved rent mentioned in this act of parliament stands contradistinguished from some other rent; but here no other rent was reserved but that at the granting of the lease. But it is said that the lessee received from the assignee a sum in gross as the consideration for the purchase, which is equivalent to an improved rent. If, indeed, a large sum were paid to [for] the purchase of a lease, though no improved rent were reserved to the original lessee, I think he would be liable to pay this expense within the act of parliament. But that is not the present case: for, when Winter granted this lease, he reserved the best rent which could be procured for it at that time, since this rent exceeds the rent formerly reserved by 10*l.* per annum and the whole of the land-tax: and the case ought not to be varied by the circumstance of the estate's gradually increasing in a small degree." If the intention of the parties at the time of entering into the contract is to be looked at, can there be a doubt as to what these parties meant in 1846? *Waller* v. *Andrews*, 3 M. & W. 312, and *Payne* v. *Burridge*, 12 M. & W. 727, are precisely in point. In the former, by a memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should thereafter be charg-[130]-ed or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted): and it was held, that an extraordinary assessment made by commissioners of sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement. Parke, B., says: "The first question in this case was, whether a sewer's rate on the landlord, in respect of the permanent improvement of the land by a new sluice, falls within the terms of the agreement. We think it does; for, though the authority of Lord Holt raises a doubt whether this could be properly considered as a parliamentary tax, and therefore, if the words 'parliamentary taxes' only had been mentioned, it might have been questionable whether the sewer's rate was included, yet, when such very extensive words as those in the agreement are used, that is 'all outgoings, rates, and scots,' which last word is commonly applied to sewer's rates on marsh lands, we think that the sewer's rate is included. It is a 'scot,' and would be comprised in the terms 'all parliamentary scots, though not perhaps properly and technically so, as not being imposed directly by parliament, but by commissioners deriving their authorities under an act of parliament." So, in *Payne* v. *Burridge*, where, by a local act, the commissioners appointed thereby were authorised to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining, in default whereof they were to be recovered by distress: another clause impowered the tenant to deduct the costs so paid by him out of his rent: and it was held that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be, rated, levied, assessed, or imposed on the premises. [Cresswell, J. The way in which it was [131] sought to

works himself; and that the said expenses were a charge, duty, or imposition imposed by authority of parliament upon or in respect of the demised premises within the meaning of the lease of the 27th of November, 1829, and therefore within the covenant which the plaintiff took on himself by the underlease."

distinguish those cases was, by saying that this is not an apportionment or subdivision of a charge imposed upon a district, but a specific sum charged for the improvement of a single house.] It is not the less on that account a parliamentary or district tax. In *Hurst* v. *Hurst*, 4 Exch. 571, words like these were extended as well to a landlord's tax as to a tenant's. There, a lessee covenanted that he would pay "all taxes, charges, rates, tithes, or rent-charge in lieu of tithe, dues, and dues whatsoever, as then were or should at any time thereafter during that demise be taxed, charged, assessed, or imposed upon the said demised premises:" and it was held that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself. This is an improvement of which the tenant has all the benefit. The landlord has only a reversion of three days reserved to him.

Milward, in reply. This is not a payment of money in respect of an assessment or charge upon the demised premises: it is a mere substitution for the obligation to do certain specific work, which the act of parliament in the first instance imposes on the owner. The burthen of shewing that it comes within the covenant rests upon the defendant.

Cockburn, C. J. I am of opinion that the decision of the county-court judge was right, and that this appeal must be dismissed. The 73rd section of the Metropolis Local Management Act, 1855, enables the district board of works to order works of the description of that in question to be done by "the owner" of the premises, and provides, that, in case he shall neglect or refuse to do it, the district board may cause the same to **[132]** be done, and may recover the expenses thereby incurred from the owner, in manner thereinafter provided. But, as the premises are not always in the occupation of the owner, there is a provision in s. 217 enabling the district board to enforce payment from the occupier, who may indemnify himself by deducting all moneys so paid by him from the rent from time to time becoming due in respect of the premises. And by another section (s. 219) it is provided that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereby it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant. Primâ facie, therefore, this is a charge upon the owner, —the person entitled to the rack-rent, —but payable by the occupier. The lease under which Seager holds the premises contains an express covenant on the lessee's part to "pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the said term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof." That covenant is incorporated in the underlease granted in 1846 by Seager to Sweet, the latter covenanting, amongst other things, "that the several covenants, conditions, and agreements contained in the above-recited indenture of lease on the lessee's part to be performed and observed (except the covenant to pay the rent thereby reserved, and the covenant to keep the said premises insured from fire) should, during the continuance of that demise, be performed and observed by the lessee (Sweet), his executors, administrators, or assigns." The **[133]** question is, whether this charge comes within the very large and comprehensive words of the covenant. It clearly was the intention of the original landlord, and also of Seager, that the tenant should bear the landlord harmless against all charges of a general local character imposed upon or in respect of the premises. The words used are very large, and quite large enough, in my opinion, to include the duty or imposition in question. As to the supposed distinction between ordinary rates and occasional particular assessments for permanent improvements, it is to be observed that the same suggestion was made in *Payne* v. *Burridge*, 12 M. & W. 727, and the court of Exchequer held, that, although the charge was in respect of a permanent improvement to the premises, it fell within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to bear and pay all taxes, rates, duties, levies, assessments and payments whatsoever which were, or during the term might be, rated, levied, assessed, or imposed on the premises, —words even less comprehensive than those of the covenant in the present case.

Cresswell, J. I entirely agree with my Lord in thinking that the decision of

the judge of the county-court was right. Some taxes are properly called landlords' taxes. But I think it is impossible to read the covenant which is incorporated by reference into the lease under which the appellant holds the premises, without seeing that it was the intention of the parties that the lessor should receive a certain sum wholly independent of any taxes or assessments of any description or upon any account. It seems to me that the arguments urged on behalf of the appellant are completely answered by the case of *Payne* v. *Burridge*.

CROWDER, J. I am of the same opinion. The cove-**[134]** nant in question is in the most general and comprehensive terms, and clearly embraces this charge. The case of *Payne* v. *Burridge* is conclusive so far as regards the argument as to permanent improvements

WILLES, J. I also think, for the reasons assigned, that this appeal must be dismissed, and, I apprehend, dismissed with costs.

Appeal dismissed, with costs.

GILKISON AND ANOTHER *v.* MIDDLETON AND OTHERS. April 23rd, 1857.

[S. C. 26 L. J. C. P. 209. Dissented from, *Kirchner* v. *Venus*, 1859, 12 Moo. P. C. 361. Referred to, *Hayn* v. *Culliford*, 1878-79, 3 C. P. D. 415; 4 C. P. D. 182; *Wehner* v. *Dene Steam Shipping Company*, [1905] 2 K. B. 98.]

By a memorandum of charter, made at Liverpool, it was agreed that the ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandize for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7l. 10s. per ton of 50 cubic feet for tea delivered, for the round out and home; other goods, if shipped, to pay in customary proportion: in consideration whereof, the outward cargo to be carried freight-free: payment to become due and to be made as follows, 800l. on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivery of the cargo, by approved bills on London at two months' date, or cash: "the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charterparty; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charterparty." By another memorandum, indorsed on the above, Singapore was substituted for China: and it was agreed, that, on delivery of the cargo in Singapore, the freighters' agents there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be 3375l. in full; that, should the vessel proceed to China, the freighters should pay an additional freight of 30s. per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China; and an acceptance at three months for 900l., on the ship's sailing from Liverpool, was substituted for 800l. The ship was laden by the charterers chiefly as a general ship; but they shipped on their own account goods for which the master signed bills of lading making the goods deliverable at Singapore to M. & Co., or assigns, paying freight as per margin: in the margin, the freight (in the aggregate, 196l. 12s.) was declared to be "payable in Liverpool one month after sailing of vessel, lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900l., which became due on the 23rd of May, and was dishonoured: Held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment; but not for the 900l.

The following case was stated for the opinion of this court, without pleadings, by consent of the parties, and by judge's order.

[135] The plaintiffs are shipowners, and are the owners of the ship "James Scott," of Port Glasgow.

The defendants are merchants in Singapore, where they carry on business under the firm of Middleton & Co: and they have also a house in Liverpool, which trades under the firm of C. S. Middleton & Son.

On the 24th of December, 1855, the plaintiffs chartered the "James Scott" to the firm of Syers, Walker, & Syers, merchants, of Liverpool, for a voyage from Liverpool to Hong Kong or Shanghai, as ordered before sailing, and to return to Liverpool or London, at certain rates of freight therein mentioned.

The following is a copy of the charterparty:—

"Liverpool, 24th Dec. 1855.

"It is this day mutually agreed between Messrs. Newall, Burt, & Co., agents for owners of the good ship or vessel called the 'James Scott,' A1 12, and newly coppered, of, &c., of the burthen of 340 tons register measurement or thereabouts, whereof is master, now in Liverpool, and Messrs. Syers, Walker, & Syers, of Liverpool, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed load in Prince's or Salthouse Dock a full and complete cargo of lawful merchandize, not exceeding 400 tons in weight, and therewith proceed to Hong Kong or Shanghai, as ordered before sailing, or so near thereunto as she may safely get, and there deliver the same agreeably to bills of lading; after which, she shall load there, or, if required, proceed to one other safe port in China, and there load in the usual and customary manner from the agents of the said charterers a full and complete cargo of tea or other lawful merchandize,—the cargoes being brought and taken from alongside the vessel at charterers' risk and expense: ship is to have liberty to put on board 80 tons kentledge, copper-dross, or other equally dead weight, and to retain **[136]** it on board during the voyage, which the said merchants bind themselves to ship,—not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to Liverpool or London, as ordered on signing bills of lading abroad, or so near thereunto as she may safely get, and there deliver the same in the usual and customary manner to the said charterers or their assigns, they paying freight for the same at the rate of 7*l.* 10*s.* sterling per ton of 50 cubic feet for tea delivered, for the round out and home: a reduction of 5*s.* per ton to be made if ship be discharged and loaded at Hong Kong: other goods, if shipped, to pay in customary proportion: in consideration whereof, the outward cargo to be carried freight free: payment whereof to become due and to be made as follows,—800*l.* on sailing, by charterers' acceptance at three months' date: what money the master may require for the ordinary disbursements of the vessel at her port of discharge and loading abroad, free of interest, paying 2½ per cent. commission, subject to insurance, at the current rate of exchange; and the balance on the unloading and right delivery of the cargo by good and approved bills on London at two months date, or cash equal thereto. Thirty running days (Sundays excepted) are to be allowed the said merchant, if the ship is not sooner dispatched, for loading, in Liverpool, and forty-five like days for all purposes abroad, and ten days on demurrage over and above the said laying days and time herein stated at 10*l.* sterling per day, paying day by day as the same shall become due. The time occupied in changing ports not to count as laying days. Should it be necessary for the vessel to take in dunnage or ballast, the same to be provided by the owners. The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without preju-**[137]**dice to this charterparty; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charterparty. The act of God, the Queen's enemies, fire, strike of pitmen, and all other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever throughout this voyage being excepted. It is agreed that the charterers are to have the option of naming the lumpers and stevedores who are to take in and stow the outward cargo; and the ship is to pay the charterers for so doing one shilling per ton; but it is expressly agreed that the cargo shall be stowed under the direction of the master, and the owners of the vessel responsible for improper stowage.

"The vessel to be consigned to the charterers' agents abroad, free of commission.

"On the return of the ship to Liverpool, she shall be addressed to Newall, Burt, & Co., brokers, or to their agents at any other port of discharge. Penalty for non-performance of this agreement, the estimated amount of freight.

"For the Owners,
"Newall, Burt, & Co.
"Syers, Walker, & Syers."

It was afterwards agreed between the plaintiffs and Messrs. Syers, Walker, & Co., that the destination of the vessel should be changed to Singapore, and thence either home or by way of China: and the following indorsement was thereupon made upon the charterparty:—

"Liverpool, 7th Feb. 1856.

"It is this day mutually agreed that the following alterations shall be made in the within charter, viz. that freighters shall load the 'James Scott' for Singapore, in lieu of China.

"That, on delivery of cargo in Singapore, the freighters' agents there shall have the option of loading the [138] vessel for London or Liverpool, or for Hong Kong or Shanghai. In the event of the vessel returning from Singapore, the freight for the round to be 3375*l.* in full. The ballast to be discharged in Singapore, freighters agreeing to pay any loss or expense on said ballast.

"Should the vessel proceed to China, the freighters to pay an additional freight of 30*s.* per ton on homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China. The terms of payment to be altered as follows,—900*l.* instead of 800*l.* to be paid on sailing hence, by charterers' acceptance at three months date.

"Should the vessel load from Singapore to China, the sum of 750*l.* to be paid to the captain there, and in China say the amount of freight payable in Singapore by bills of lading to be received by the captain, and the balance on delivery of cargo in China, both at current rate of exchange.

"The freighters to be allowed seventy running days for loading here and discharging and loading in Singapore, if the vessel return direct, and ninety six running days for all purposes of loading and discharging here and abroad if she proceeds to China. The vessel to retain her ballast on board if she proceeds to China: and the homeward cargo thence to consist entirely of measurement.

"All other terms and conditions of the within charter to remain in force.

"Newall, Burt, & Co.
"Syers, Walker, & Syers."

The vessel was laden by Messrs. Syers, Walker, & Syers, chiefly as a general ship, but they shipped on board of her, on their own account,—325 barrels of ale and porter, 100 ditto pitch, 25 ditto tar, and 120 bales merchandize, which goods they consigned to the defend-[139]-ants' house at Singapore for sale on their (Syers, Walker, & Syers's) account.

The master of the vessel signed bills of lading for these goods as follows:—

"S.[1]/200. 200 barrels ale
SWS. 50 „ „
S.[200] 275. 75 „ porter
Meas[t] 2252[0] 1[in]
@ 30/- £84 9 1
5 % 4 4 6
£88 13 7

"Not accountable for leakage or breakage, except from improper stowage.

"Freight payable in Liverpool one month after sailing of vessel, lost or not lost.

"Weight and contents unknown.

"Shipped in good order and well conditioned, by Syers, Walker, & Syers, in and upon the good ship 'James Scott,' whereof is master for this present voyage Putt, and now riding at anchor in the port of Liverpool, and bound for Singapore,—

"Two hundred and fifty barrels bottled ale,

'Seventy-five barrels bottled porter, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of Singapore, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted, save risk of boats so far as ships are liable thereto, unto Messrs. Middleton & Co., or their assigns, paying freight for the said goods here as per margin: 5 per cent primage, and average accustomed.

"In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Dated in Liverpool, 18th February 1856.

"Frank Putt."

There were two other bills of lading of the same date, and in similar terms, one for 120 bales merchandize, and the other for 100 barrels coal pitch, and 25 barrels Stockholm tar. The freight mentioned in the margin of **[140]** the former is 65l., 14s. 10d., and in the margin of the latter, 42l. 3s. 7d.

These three bills of lading, with invoices of the goods shipped, were handed by Syers, Walker, & Syers, to C. S. Middleton & Son on the 20th of February, 1856, who thereupon in exchange for the same, pursuant to previous arrangement, accepted Syers, Walker, & Syers's draft for 218l., being 80 per cent. on the invoice amount of the goods so shipped, as an advance on the consignment.

This draft (which was dated the 20th of February, 1856, and was payable four months after date, and was duly paid at maturity,) was accepted by C. S. Middleton & Son on the 21st of February, 1856. The bills of lading were transmitted by C. S. Middleton & Son to the defendants, Middleton & Co.

The invoice amount upon which 80 per cent. was advanced by the defendants as above mentioned, included the freight mentioned in the bills of lading.

It is a very usual practice in Liverpool for freights reserved under bills of lading to Singapore, to be made payable in Liverpool one month after the ship's sailing.

The vessel sailed from Liverpool for Singapore on the 21st of February, 1856; and thereupon, in conformity with the terms of the charterparty, the plaintiffs drew a bill of exchange upon Syers, Walker, & Syers, for 900l. This bill (which was dated the 20th of February, 1856, and was made payable three months after date,) was accepted by Syers, Walker, & Syers on the 21st of February, 1856. It fell due on the 23rd of May, 1856, and was dishonoured: and it is still in the plaintiffs' hands wholly unpaid. Messrs. Syers, Walker, & Syers stopped payment early in April, 1856.

The vessel arrived out at Singapore on the 13th of June, 1856; and the master, having received advices from the plaintiffs of the stoppage of the charterers, and that he was to insist upon a lien upon their goods, refused to **[141]** deliver the goods so shipped by them as aforesaid to the defendants, who claimed them under the said bills of lading, unless they paid the amount of the said bill of exchange for 900l. for which the plaintiffs claimed a lien on the goods.

The defendants refused to acknowledge the lien, and claimed delivery of the goods under the bills of lading. The master of the vessel thereupon wrote to them a letter, of which the following is a copy:—

"Messrs. Middleton & Co. "Singapore, 17th June, 1856.

"Dear Sirs, With reference to the goods shipped by Messrs. Syers, Walker, & Syers, on board the 'James Scott,' marked and numbered as under noted, and on which I maintain that the owners of that vessel have a lien for the amount of freight due on a voyage from Liverpool to this port as per charter entered into with the said shippers, I regret that you should have refused to grant a letter submitting the dispute in reference to the said lien to the decision by law or otherwise as might appear most advantageous to our respective friends in England.

"Being anxious to avoid litigation here, I would now propose that you pay over the amount in dispute, say 900l., to any third party which we may mutually agree upon, to be by them held until it is decided by appeal to law in England whether the ship is justly and legally entitled to the said or any other amount. On your doing this the goods will be at once delivered up to you; otherwise, the only course left open to me is, to hold them until the claim is settled.

"An early reply to this will oblige your obedient servant,

"FRANK PUTT, Master of the barque 'James Scott.'"

The defendants for some time persisted in their refusal to acknowledge the lien in any way; but eventually they **[142]** agreed that the goods should be delivered without prejudice to the lien (if any did exist, which they denied); and they gave the master a letter, of which the following is a copy:—

"To Capt. Frank Putt, of the barque 'James Scott.'

"Singapore, 21st June, 1856.

"Sir,—In consideration of your delivering to us the following goods [setting forth the description, marks, and numbers,] shipped to us by Messrs. Syers, Walker, &

Syers, we hereby agree that your doing so shall not prejudice the lien which you allege the owners of the 'James Scott' have on such goods, but which we deny; and we agree that the question of lien on such goods shall be determined between the owners of the 'James Scott' and our house in Liverpool according as the law of England may direct: and our said house shall pay the amount, if any, for which the owners are legally entitled to a lien." (Signed) "MIDDLETONS & Co."

The master, on receiving this letter, delivered the goods to the defendants.

The charterers failed to load the ship home; and the plaintiffs in consequence sustained a further serious loss by the charterparty.

The question for the opinion of the court is, whether the plaintiffs had a lien on the before-mentioned goods, as against the defendants, for the said sum of 900l.; or, if they had no lien for the said sum of 900l., whether they had a lien for the freight mentioned in the several bills of lading, making together the sum of 196l 12s. If the plaintiffs had a lien for the 900l., judgment is to be entered for the plaintiffs for that sum, and interest from the 23rd of May, 1856, with costs. If they had a lien for the 196l. 12s. only, judgment is to be entered for them for that sum, without costs. But, if they are not entitled to a lien either for the 900l. or for the **[143]** 196l. 12s., then judgment is to be entered for the defendants, with costs.

Mellish (with whom was Knowles, Q. C.), for the plaintiffs (*a*). The question is, whether the plaintiffs had a lien on the goods,—first, as against Syers & Co. and the shippers, -secondly, whether, if they had, the defendants could be in a better position. The goods in respect of which the lien is claimed was outward cargo, shipped at Liverpool, and delivered at Singapore. No specific freight was payable on the outward voyage: the freight was to be measured by the home voyage, —7l. 10s. per ton if loaded from China; and, if from Singapore, a lump sum of 3375l. But, in any event, the voyage was to terminate at Liverpool or London: and, in either case, 900l. was to be paid on account of the freight, by bill at three months, on the sailing of the vessel. The first question is, whether, the bill being dishonoured, the owners would have a lien for the 900l. on the cargo at Singapore. By the express terms of the charterparty, the owners are to have "an absolute lien upon the cargo,"—not distinguishing between outward and homeward cargo,—"for the recovery of all freight, dead freight, demurrage, &c., **[144]** due to the ship." When the ship arrived at Singapore, the 900l. was due for freight, and was unpaid. Independently of that clause in the charterparty, the owners would have a lien: but that clause specifically provides for it; and the stipulation that the outward cargo was to be carried freight free makes no difference. Then, assuming that the plaintiffs would have a lien as against Syers & Co., do the defendants stand in any better position in this respect? The charterparty provides that the master shall sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to the charterparty. It never could have been intended, that, the goods being shipped by the charterers, the freight should be measured by the bills of lading. [Cresswell, J. As between the shippers and the ship-owners, no doubt the freight was to be measured by the charterparty.] The defendants are not the buyers of the goods, or in the ordinary sense the indorsees of the bills of lading. They are merely employed by the shippers to sell, having made certain advances on the goods. The question is, whether, under these circumstances, the effect of the bills of lading is, to limit the lien to the freight mentioned therein. The authorities are strong to shew, that, where goods are shipped by the charterer, the owner's lien attaches the moment the goods are shipped, and that the consignee stands in no better position in this respect

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

"That, according to the true construction of the charterparty set out in the special case, the plaintiffs were to have a lien on all goods loaded on board the ship by the charterers, including the outward cargo, for all freight which might have become payable under the charterparty at the time such goods were to be delivered; and that, the goods in question having been placed on board the ship by the charterers, the defendants, who claim under them, are subject to the same right of lien as the charterers; or, if the plaintiffs have no lien for the full freight payable under the charter, that the plaintiffs have a lien on the goods to the extent of the bill of lading freight."

than the charterer. Thus, in *Small* v. *Moates*, 9 Bingh. 574, 2 M. & Scott, 674, a lien on the lading of a ship having been expressly reserved to the owner by a charterparty, —it was held that goods which the charterer purchased and put on board, and then transferred with a stipulation to carry them to their destination for a certain amount of freight, were, even as against an indorsee of the bill of lading, subject not only to that freight, but to **[145]** the ship-owner's lien for a balance due to him under the charterparty, whether possession of the ship was by the charterparty completely out of the ship-owner, and vested in the charterer, or not. Tindal, C. J., says: "The rice and saltpetre were purchased by Wilkinson, the master of the ship, and shipped by him as dead freight on his own account, in January, 1828. From the moment these articles were loaded on board, the lien of the defendant attached upon them for the freight and other payments due to him under the express contract contained in the charterparty. If the master had sold the cargo of rice and saltpetre to a third person, but still retained it in his possession on board the ship, to be carried to London, it is difficult to state the principle upon which this lien, once vested in the ship-owner, should have become divested from him by such sale. Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charterparty reserved to himself a lien upon the goods laden on board the ship for his freight due under the charterparty, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold before delivery to a stranger: or, in other words, the extent of the ship-owner's lien remains unaltered, whether the bill of lading is indorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And, upon the same principle, it would seem to follow, that, if the lading of the ship belongs to the charterer, and such lading is subject to the ship-owner's lien for the freight reserved by the charterparty, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the ship-owner had before the sale." [Cresswell, J. Here, the ship-owners wilfully put it in the power of Syers & Co. to **[146]** raise money upon the faith of the contract appearing on the face of the bills of lading.] *Gledstanes* v. *Allen*, 12 C. B. 202, is also a strong authority in favour of the plaintiffs. By a charterparty it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers' factors, and proceed therewith to London, and there deliver the same on being paid freight "a lump sum of 2500l. in full of all charges." At the end of the charterparty was the following clause, —"The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charterparty, the charterers shipped at Penang goods of their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honor bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question: and it was held that the owners had a lien upon the goods for the entire lump freight. Jervis, C. J., says: "No ordinary shipper would have put goods on board upon such a charterparty as this. The charterers, therefore, say,—'Give the master authority to sign bills of lading at a specified rate of freight:' to which the owners assent, provided it is not to prejudice their rights under the charterparty. The master accordingly gives bills of lading. I do not say that the owners might not have been bound to deliver the goods to a bonâ fide holder for value of the bills of lading, upon payment of the freight therein mentioned. But here the plaintiffs do not stand in that position: and they must be taken to have been cognisant of the **[147]** limited authority of the master. Upon these short grounds, I am of opinion this case is to be determined by the authority of *Small* v. *Moates*, which is express upon that point, and proceeded upon principles which are precisely applicable to the present case." And Cresswell, J., says: "According to the case of *Small* v. *Moates*, —in which I entirely concur,—it is difficult to see how the lien which the owners clearly had at the time of the shipment could be discharged." No case has yet held, that, where the charterer puts goods on board, and the owner's lien has attached, his right can be at all prejudiced or affected by the stipulations contained in the bill of lading. [Cresswell, J. Compare *Small* v. *Moates* with *Faith* v. *The East India Com-*

pany, 4 B. & Ald. 630, and *Colvin* v. *Newberry*, 1 Clark & Fin. 283. Tindal, C. J. in the former case, seems to think that a person who might have known the contents of the charterparty is in the same position as one who does know them.] At all events, the owners have a lien for the amount of the bill of lading freight.

Manisty, contrà (*a*). The plaintiffs had no lien for either of the sums claimed. As to the bill of lading freight, the facts are these:—Syers, Walker, & Co., having by the terms of the charterparty a right to carry a cargo outward freight free, for their own purposes insert a nominal freight in the bills of lading (which never could be demanded, the ship-owners hav-**[148]**-ing no right to it), and obtain advances from the defendants on goods and freight. [Willes, J. All that appeared to you was, that Syers, Walker, & Co., had shipped the goods upon a contract to pay freight in Liverpool one month after the sailing of the vessel. Cresswell, J. Trusting that Syers, Walker, & Co. would perform that engagement, the defendants advanced money upon the shipment, increased by the value of the freight.] Nothing but the 900*l.* was to be paid by the shippers until the vessel's return. [Cresswell, J. The vessel was to go to Singapore and China and back to Liverpool or London, the freight to be measured at so much per ton on the home cargo, and 900*l.* of that freight to be paid by bill at three months from the sailing. Although, therefore, the amount to be ultimately paid for freight was not ascertainable until after the ship's return, a portion of it was due before. If the goods were the goods of the charterers, it would be difficult for them under the terms of this charterparty to contend that the owners would not have a lien upon them for the whole charter freight. It may be that that lien would be suspended during the currency of the bill, but it would revive on the bill's being dishonoured. How, then, can the defendants be in a better situation than the consignors? Crowder, J. "The owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charterparty." What cargo does that point to?] The home cargo. [Cockburn, C. J. Suppose none is shipped?] In that case, the owner is remitted to his remedy by action upon the charterparty. [Willes, J. The ship was put up as a general ship. The captain would have to collect freight at Singapore.] As agent for the charterers. The recent case of *Marquand* v. *Banner*, 6 Ellis & B. 232, has a very strong bearing upon the present. By a memorandum for charter, made **[149]** in Liverpool, between the plaintiff, as master, for the owners of the ship "Secret," and M. & Co., it was agreed that (excepting the cabin, state-rooms, and room for stowage of cables, &c., and crew,) the vessel should be immediately made ready, and take on board from the charterers (who were to have the full reach of the hold from bulkhead to bulkhead, including the half-deck,) a full cargo of merchandise and specie, the owners employing sufficient hands for the purpose, and should proceed to Buenos Ayres, and there deliver the cargo, in the usual and customary manner, agreeably to bills of lading, and so end the voyage: in consideration whereof, the affreighters to deliver the cargo alongside to be laden, and cause it to be received at the port of discharge in the usual and customary manner, and pay "for the use and hire of the said vessel, in respect of the said voyage," 775*l.* "lump sum, in full, charterers paying for landing the measurement part of the cargo, or 850*l.* in full, the ship-owners paying the lighterage, at charterers' option, to be decided before sailing from Liverpool:" payment to be made by the captain receiving "such freight as the charterers may have payable abroad as per bills of lading, not exceeding half, or by an order handed over to him by the charterers, at their option, at the current rate of exchange, which order is to be payable at the port of discharge; and the balance to be paid by the charterers' acceptance, payable in London, at three months' date from the day of sailing." The charterers to name the lumpers and stevedores for taking in cargo and stowing; the ship to pay the lumpers, the charterers the stevedores, both to be under the direction of the master, and owners to be responsible for improper stowage: such goods only as the charterers might direct to be received on board. "That the master

(*a*) The point marked for argument on the part of the defendants, was as follows, "That the plaintiffs had not, as against the defendants, any lien whatever upon the goods mentioned in the three bills of lading, either for the 900*l.* mentioned in the charterparty, or for the three sums of 88*l.* 13*s.* 7*d.*, 65*l.* 14*s.* 10*d.*, and 42*l.* 3*s.* 7*d.* (making together the sum of 196*l.* 12*s.*), mentioned in the said bills of lading respectively, or any of them."

shall, at the charterers' request, sign bills of lading in the usual and customary manner, and at any rate of **[150]** freight that may be filled up, and made payable in any manner the charterers may choose, without prejudice to this charter." The vessel to be consigned to the charterers' agents at her port of discharge. The charterers put up the "Secret" as a general ship: the plaintiff, as master, signed bills of lading at such freight and payable in such manner as they requested. They elected to pay the 850*l*. Part of the bills of lading made 244*l*. 5*s*. 2*d*. payable at Buenos Ayres; and this the plaintiff received at Buenos Ayres. The rest of the bills of lading made the freight payable "here" (Liverpool), as per margin: by the margin, it was to be paid one month after sailing, ship lost or not lost: it was not specified to whom the payment was to be made. The charterers paid a small part of the balance of the 850*l*. in cash, and, for the rest, gave their acceptance at three months, payable in London. Before the maturity of the bill, they suspended payment. The plaintiff then claimed from the shippers the portion of the bill of lading freight not yet paid: the charterers also claimed it. The plaintiff himself was one of the owners. Upon a case stated for the opinion of the court, with power to the court to draw inferences of fact,—it was held, that the plaintiff was not entitled to claim from the shippers the freights last mentioned, he having signed the bills of lading in the character only of agent for the charterers, and there being no contract between the ship-owners and the shippers. [Cresswell, J. I presume the court of Queen's Bench meant also to decide, that, if the goods had been damaged, the owners would not have been liable. They must have gone that length, though they do not say so.] Wightman, J., in giving the judgment of the court, says, —"By the terms of the charterparty, the ship is let for a particular voyage, and the charterers are to pay the ship-owners a lump freight for the whole voyage: and the master, at the request of the charterers, **[151]** is to make bills of lading at any rate, and payable in any manner, the charterers may choose, without prejudice to the charter. This, therefore, gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. In fact, the bills of lading are not signed in any manner compromising the rights of either party: for, all the freight now in question is to be paid in Liverpool, as per margin, and the margin specifies only that it is to be paid within a month of the ship's sailing, not specifying to whom it is to be paid, leaving thus open the question who is entitled to claim the freight, in other words, whose agent the master is. As far as the parties shipping the goods are concerned, there may be an unnamed principal, to whom they are to look. But, when it is once shewn that the master was in fact acting for the charterers, and this is made known to the shippers, it appears to me that the charterers are entitled to recover the freight under the general authority which the ship-owners have conferred upon them. Whatever might have been the result if the charter had not contained these terms, I think it clear that the charter here makes the charterers the parties entitled to the freight.' When the plaintiffs claim the lien for 900*l*. as owners, they must rely upon the charterparty as their title-deed; and then they are met by the stipulation, —"the outward cargo to be carried freight free." [Cresswell, J. May that not mean, that the owners shall not demand more than the 900*l*. for the outward cargo?] That would be defeating the very object of the parties. Besides, the 1st section of the 18 & 19 Vict. c. 111, affords a conclusive answer as to the 900*l*. Bills of lading now pass the contract to the consignee (*a*): and here the bill of lading states the freight **[152]** to be payable at Liverpool one month after the sailing of the vessel. The plaintiffs, therefore, are not entitled to a lien in respect of either sum.

Mellish, in reply. The plaintiffs claim a lien in respect of the unpaid bill for 900*l*. If the court should think them not entitled to that, they are clearly entitled to the bill of lading freight. The consignees are not the less liable for the particular freight, because the master has stipulated for the payment of freight at Liverpool at a time when the goods could not have reached their destination. The consignees clearly were not entitled to the goods without paying the freight specified in the bills of

(*a*) That section enacts that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."

lading. *Marquand* v. *Banner* was decided upon the authority of *Colvin* v. *Newberry*, 1 Clark & Fin. 283; neither of those cases can have any bearing upon the present.

COCKBURN, C. J. I am of opinion that the plaintiffs are entitled to the judgment of the court for the smaller sum, viz. 196*l*. 12*s*., the aggregate of the freight stipulated for by the three bills of lading. Looking at the terms of the original charterparty, and at the modification of those terms by the memorandum indorsed thereon, and applying so much of them as is applicable to the contingency which has arisen, the case stands thus:—The vessel was to take out a cargo from Liverpool to Singapore, and, in the event of her returning from Singapore to Liverpool or London, the charterers were to pay 3375*l*., for the round out and home, 900*l*. of it by a bill at three months from the sailing of the ship from Liver-**[153]**-pool on her outward voyage. Then comes this important provision, "The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charterparty; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charterparty." It has been contended on the part of the defendants, that this stipulation for a lien upon the cargo applies only to the homeward cargo. I see no reason for so limiting it. I think it embraces all cargo, whether out or home. Having by the charterparty stipulated that 900*l*. shall be paid in advance, by an acceptance at three months date, it appears that a bill was given, which was dishonoured before the arrival of the ship at Singapore. The cargo being expressly made liable for all freight due under the charterparty, it follows, that, on the arrival of the ship at Singapore, there was 900*l*. due for freight, for which the cargo was liable If matters had so remained, the owners clearly would have had a lien for that 900*l*. But they have by their master become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled. That being so, it seems to me that the utmost the plaintiffs can be entitled to recover as against the consignees is, the freight mentioned in the three bills of lading; and for that sum, and that sum only, they are entitled to the judgment of the court.

CRESSWELL, J. I am of the same opinion. It seems that the case of *Marquand* v. *Banner*, 6 Ellis & B. 232, **[154]** proceeded upon the authority of *Colvin* v. *Newberry*, 1 Clark & Fin. 283, in which the House of Lords affirmed the judgment of the Exchequer Chamber in *Newberry* v. *Colvin*, 7 Bingh. 190, 4 M. & P. 876, 1 C. & J. 192, 1 Tyrwh 55, which reversed the judgment of the court of King's Bench in *Colvin* v. *Newberry*, 8 B. & C. 167, 2 M. & R. 47. But, in that case, the charterers were owners of the ship pro tempore. The contracts were made with the captain as owner, and not as agent. Here, the captain was still the agent of the ship-owners; and, as they sanctioned the signing of bills of lading by him making the goods deliverable on payment of a given amount of freight, they cannot, as against the consignees, rely upon the charterparty as entitling them to a larger amount. I think the plaintiffs are clearly entitled to the freight reserved by the bills of lading. It appears by the charterparty that 900*l*. was due on account of freight three months after the ship sailed from Liverpool; and there is a stipulation that the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due under the charterparty,—that is, they are to have a lien upon the cargo for any freight due and from which it is not exonerated. The lien is upon each parcel of goods for the freight payable in respect of it. The bills of lading signed by the master shew upon the face of them that the freight had not been paid. The parties taking them, therefore, must have known that they took them subject to the risk of its not being paid, and knowing that the goods were subject to the ship-owners' lien. I therefore think the plaintiffs are entitled to recover to that extent.

CROWDER, J. I entertained some doubt at one time whether the reservation of the owners' lien for freight was not limited to freight on the homeward cargo. But, upon further consideration, I think the true conclusion **[155]** is that come to by my Lord and my Brother Cresswell, viz. that the owners are to have an absolute lien upon any cargo put on board for any freight earned by the ship. The first question that arises is, whether, as between the ship-owners and the charterers, the former

would be entitled to a lien for the 900l. agreed to be paid at three months from the ship's sailing from Liverpool. It seems to me that they would. It formed a portion of the freight for which by express agreement the lien was to attach. But I agree with the rest of the court in thinking that that amount cannot be recovered here, the owners having by their agent signed bills of lading making the goods deliverable on payment of the smaller amount, one of the terms of the bills of lading being, that such freight should be payable one month after the sailing of the vessel. The lien extends only to the amount of freight mentioned in the bills of lading.

WILLES, J. I am of the same opinion. The argument that the outward cargo is liable to the lien for the 900l. is strengthened by the demurrage clause. Demurrage might have become due and payable before the arrival of the vessel at Singapore. The contract is, that "the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charter-party." The words "upon the cargo" mean, upon the cargo from time to time put on board the vessel. I do not think it necessary to add anything more to what has already fallen from the court. With regard to the case of *Marquand* v. *Banner*, 6 Ellis & B. 232, I think it must rest upon the ground stated by my Brother Cresswell. I do not exactly see how, if sustainable at all, it can be upon any other ground.

Judgment for the plaintiffs for 196l. 12s. without costs.

[156] PHILLIPS AND ANOTHER *v.* CLARK. April 23rd, 1857.

[S. C. 26 L. J. C. P. 168; 3 Jur. N. S. 467; 5 W. R. 582. Referred to, *Ohrloff* v. *Briscall; The Helene*, 1866, L. R. 1 P. C. 238; *Czech* v. *General Steam Navigation Company*, 1867, L. R. 3 C. P. 17. Applied, *Grill* v. *General Iron Sand Colliery Company*, 1868, L. R. 3 C. P. 481. Referred to, *The Duero*, 1869, L. R. 2 Ad. & E. 396; *Gill* v. *Manchester, Sheffield, and Lincolnshire Railway*, 1873, L. R. 8 Q. B. 196; *Steel* v. *State Line Steamship Company*, 1877, 3 App. Cas. 87; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 1882-83, 9 Q. B. D. 124; 10 Q. B. D. 531. Explained, *Manchester, Sheffield, and Lincolnshire Railway* v. *Brown*, 1883, 8 App. Cas. 709. Referred to, *Steenman* v. *Angier Line*, [1891] 1 Q. B. 624; *The Glendarroch*, [1894] P. 237; *Price* v. *Union Lighterage Company*, [1903] 1 K. B. 753; [1904] 1 K. B. 415.]

A stipulation in a bill of lading, that the ship-owner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from gross negligence.

The declaration stated that the plaintiffs delivered to the defendant, and the defendant accepted and received from the plaintiffs, certain goods of the plaintiffs', to be carried in a certain ship of the defendant, to wit, from London to Calcutta, and thence back to London (certain perils and casualties only excepted), for certain freight and reward in that behalf payable by the plaintiffs to the defendant, and upon the terms that the defendant should use due and proper care in and about the stowage of the goods; and that, though the plaintiffs had done all things, and all things had happened, necessary to entitle them to have the goods so stowed, yet that the defendant did not nor would use due and proper care in and about the stowage of the said goods, but so carelessly and negligently stowed the same contrary to his said duty, that, by reason thereof, and not by reason of any of the said excepted perils or casualties, the said goods were greatly damaged and injured: And the plaintiff claimed 500l.

Fourth plea,—that the plaintiffs delivered the said goods to the defendant, and he accepted and received the same, to be carried as in the declaration mentioned, upon the express condition only that the defendant should not be accountable for leakage or breakage; and that the loss and damage complained of by the plaintiffs arose wholly from leakage and breakage, and not otherwise.

Second replication to the fourth plea,—that the condition in that plea mentioned consisted of certain words inserted by the defendant in the margin of the bill of lading under which the said goods were shipped on board **[157]** the said ship of the

defendant to be carried as in the declaration mentioned, which said bill of lading was in the words and figures following, that is to say:—

"Shipped in good order and well conditioned, by Phillips, King, & Co., in and upon the good ship called the 'Bengal,' whereof is master for this present voyage James Clark, and now riding at anchor in the East India Dock, and bound for Calcutta, and from thence back to London,

"E.I. / P.S. } 1 10...10 butts.
11/30...20 hhds.
E.I. / F.B.S. } 31/33...3 butts.
P.K. / E.I. } 1...1 butt (cased).

Thirteen butts, Twenty hogsheads, One cased butt, } of sherry wine,

being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of London (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats so far as ships are liable thereto, excepted,) unto order, or to his or their assigns. Freight for the said goods to be paid in London, at the rate of 5l. sterling per butt, with primage 5 per cent., for the aforesaid voyage from London to Calcutta and from thence back to London, ship lost or not lost; with primage and average accustomed. In witness whereof the [158] master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

"Weight and contents unknown. Not accountable for leakage or breakage.

"Dated in London, the 25th of October, 1854."

(Signed) "JAMES CLARK."

Indorsement: "It is agreed that the within-mentioned wines, or any portion thereof, may be landed at Calcutta under the consignees' order, should they desire to do so, freight being paid at the rate of 40s. sterling per butt, which is to cancel the agreement for delivery back to London on the quantity that may be landed."

(Signed) "GEORGE DUNCAN,
"PHILLIPS, KING, & CO."

Averment, that the loss and damage in that plea mentioned arose wholly from the gross negligence of the defendant and his servants in and about the stowage of the said goods, and not otherwise.

The defendant took issue on the plaintiff's second replication to the fourth plea, and also demurred thereto on the ground that "the memorandum in the bill of lading exempted him from liability for leakage and breakage, whether arising from negligence or not." Joinder.

J. Brown, in support of the demurrer (*a*). The question [159] in this case is, whether the defendant is protected by the terms of his contract from liability, under all circumstances, for damage arising from leakage and breakage, whether the special clause does not protect him even against the consequences of negligence, however gross. The words are as general as possibly can be conceived. The construction to be contended for on the other side would seek to add words similar to these,—"arising without the owner's default." That, it is submitted, would be adding most unjustifiably to the terms of the written contract. It will probably be said that an exception of that sort is to be implied from the nature of the undertaking, and that it is unreasonable that the defendant should thus protect himself from loss or damage

(*a*) The points marked for argument on the part of the defendant, were,—

"That the clause in the bill of lading exempts the defendant from liability for leakage and breakage, whether arising from negligence or not; that, to construe it as only applying to leakage or breakage occurring without the defendant's default, is altering the contract; and that no intention so to limit the defendant's protection can be gathered from either the words of the bill of lading or the nature of the contract."

arising from his own acts, or from those of his crew. But stipulations of that sort are not new: they are now almost universal in the case of contracts for conveyance by railway: see *Carr* v. *The Lancashire and Yorkshire Railway Company*, 7 Exch. 707. The construction contended for on the other side would in every case provoke litigation,—the very thing which the introduction of the clause was designed to prevent. [Cockburn, C. J. Is the owner to break and to allow others to break, without incurring any responsibility? Is there to be no limit? I think it can hardly be permitted to him to contend that he inserted the clause for the purpose of protecting himself against negligence. Suppose the master knew that the crew had tapped the casks on the voyage, are you prepared to say that the owner would not be responsible for negligence in that respect?] It is perfectly competent to every carrier, whether by land or by water, to protect himself against responsibility for negligence of any sort. [Cockburn, C. J. No doubt, if the person sending goods chooses to agree with the carrier that he shall not be responsible for negligence, however gross, he is at liberty to do so. But, can we in a court of justice **[160]** put so absurd a construction upon language that is susceptible of another and a more rational construction?] There is no such absurdity in the stipulation in question as to warrant the court in introducing the exception suggested. Nor can it be said, considering the small amount of the freight, as compared with the length of the voyage and the value of the goods, that the stipulation is unreasonable. [Crowder, J. Suppose the leakage arose from the wilful act of the master himself, would the owner still be irresponsible?] For the master's direct connivance in the abstraction of the wine, the owner might possibly be liable. [Willes, J., referred to *De Rothschild* v. *The Royal Mail Steam-Packet Company*, 7 Exch. 734.] The law upon this subject is well laid down in *Hinton* v. *Dibbin*, 2 Q. B. 646, 2 Gale & D. 36, where it was held, under the statute 11 G. 4 & 1 W. 4, c. 68, that, if a parcel containing any of the valuable goods enumerated in s. 1 be sent to a carrier for conveyance, without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge according to s. 2, the carrier is not liable for their loss, though it happen by the gross negligence of his servants. Lord Denman, in giving judgment in that case, elaborately reviews all the previous authorities as to the effect and meaning of "gross negligence" in contracts of this sort: and the decision has ever since been acted upon. The doctrine of the older cases as to common carriers,—see *Lyon* v. *Wells*, 5 East, 428, and that class of cases,—is very much shaken, if not altogether overturned, by the modern authorities: and, at all events, those cases are wholly inapplicable to contracts by bill of lading. This contract is to be construed just like any other. It is not enough to suggest that it would be reasonable to limit it in the way proposed: it must be shewn that there is an invincible necessity for implying that such a limitation or exception was contemplated by the parties **[161]** when they entered into the contract. [Willes, J. Suppose the vessel were taken by a Russian man of war under such circumstances as that by the exercise of ordinary care the captain might have escaped capture, would the exception of the Queen's enemies absolve him from the consequences of his negligence?] Possibly not. But here we have an express contract, which is clear and unambiguous.

Sumner, contrà, was not called upon (*a*).

Cockburn, C. J. This was an action for an injury sustained by goods delivered to the defendant, a carrier by water, to be carried from London to Calcutta and back, upon a contract containing an exception of certain perils and casualties; and the declaration charges a loss arising from improper stowage, and not by reason of any of the excepted perils and casualties. The defendant pleads that the goods were delivered to him to be carried upon the express condition only that the defendant should not be accountable for leakage or breakage, and that the damage complained of arose from those causes, and not otherwise. The plaintiff replies that the loss and damage arose wholly from the gross negligence of the defendant and his servants in and about the

(*a*) The points marked for argument on the part of the plaintiff, were,—"That the memorandum in the bill of lading did not protect the defendant from liability for losses owing to the negligence of the defendant and his servants; that it did not protect him from liability for losses occasioned by the gross negligence of the defendant and his servants; and that it only protected him from losses arising in the course of the voyage, and not from damage occasioned by bad stowage."

stowage of the goods. And the defendant demurs. The question arises upon these words in the margin of the bill of lading, — "Not accountable for leakage or breakage." **[162]** Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms; yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were intrusted to him. When it is borne in mind what is the ordinary duty of a carrier, it is plain what the parties intended here. So long ago as in the case of *Dale* v. *Hall*, 1 Wils. 201, it is laid down (by Lee, C. J.) that "everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies; and a promise to carry safely, is a promise to keep safely." Amongst the events which the carrier here would under ordinary circumstances be responsible for, are, leakage and breakage. He stipulates to be exempted from the liability which the law would otherwise cast upon him in these respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence. The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense: and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence. I therefore think the plaintiff is entitled to judgment.

[163] Cresswell, J. I am of the same opinion. Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly; and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before. That is the whole case.

Crowder, J. The simple question is, what did the parties intend by the contract they have entered into: and this we must gather from the words they have used. It could hardly have been contemplated by the plaintiff that the defendant should be utterly absolved from the obligation of taking any care of the goods. The construction put upon the contract by my Lord, is evidently the most just and reasonable, — as absolving the defendant from liability for leakage and breakage the result of mere accident, where no blame was imputable to the master, and for which but for the stipulation in question he would still have been liable. It clearly was not intended to relieve him from responsibility for leakage or breakage the result of his negligence and want of care. The construction contended for on the part of the defendant would be giving the contract a sense not necessarily involved in the words as they stand.

Willes, J. I also am of opinion that the plaintiff is entitled to judgment on this demurrer. The introduction of the words in the margin of the bill of lading is sufficiently accounted for by the fact that without them the defendant would have been bound to the strictest care, so as to deliver the goods at the end of the voyage in the same state and condition as they were in when he received them, without reference to negligence. It appears from the observations of Lord Wensleydale, in *Walker* v. *Jackson*, 10 M. & W. 161, 169, that, in the **[164]** absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them, — as is pointed out by some members of the court in *Wyld* v. *Pickford*, 8 M. & W. 443. The defendant gets rid of that liability in the present case by the introduction of the words "not accountable for leakage or breakage," but not of the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him. It is no more than putting the leakage and breakage on the same footing as the act of God or the Queen's enemies. Suppose a vessel were taken by the enemy in consequence of the master's neglect of precautions which he might easily have taken, could the owners claim an exemption on the ground of the capture? Clearly not; for, the exception necessarily implies that the capture shall not be occasioned by the act or default of the owners or the master. Lord Tenterden, in his

Treatise on Shipping, p. 386, treating of the exception as to robbery by pirates, and citing Emerigon, tom. i. p. 532, refers to *Morse* v. *Slue*, 1 Vent. 190, "in which the owners were held responsible for goods taken by robbery from the ship in the river Thames within the body of a county, Chief Justice Hale took notice of this doctrine, and said, 'by the civil Admiral law, the owners are not responsible for a robbery by pirates at sea.' This, however, is to be understood only in case the ship does not fall into the hands of pirates by any neglect or fault of the master." That is equally applicable to the additional exception here of leakage and breakage. The true meaning of this contract is,—"I will take all reasonable care of the goods, but will not be accountable for a loss arising from leakage or breakage such as usually happens without the exercise of extraordinary care." The owner engages only to abstain from negligence. The result, therefore, is, that as, upon this record, the damage is alleged to have occurred through [165] the negligence of the master causing the leakage and breakage, the defendant is responsible for it; and therefore there must be judgment for the plaintiff.

Judgment for the plaintiff.

BLOOMER *v.* DARKE. April 23rd, 1857.

A plea of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), is not good, unless it shews on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of all the creditors. And, semble, that the want of such averments in the plea is not supplied by the general allegation that "all matters and things were done and happened according to the said act to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same."

This was an action by drawer against acceptor on two bills of exchange dated respectively the 11th of December, 1854, and 1st of November, 1855, each at four months' date, the one for 112*l.* 10*s.*, the other for 107*l.* 10*s.*; with counts for goods sold and delivered, and for money due upon accounts stated.

Plea,—that, before and at the time of making the deed thereinafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment thereinafter mentioned, the defendant was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the Bankrupt Law Consolidation Act, 1849, and that, before and at the said time of his suspending payment as thereinafter mentioned, and making the said deed, he was indebted to the plaintiff and divers other persons in divers sums, and was and would be unable to pay the same in full: That, being such trader, and so indebted as aforesaid, he suspended payment: That thereupon, afterwards, and after the accruing of the causes of action in the declaration mentioned, and after the 11th of October, 1849, and more than three calendar months before the suit, a deed of arrangement was entered into [166] between the defendant and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amounted to 10*l.* and upwards, touching the defendant's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, each of the creditors of the defendant being in the computation of the amount of his debt accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from the defendant, appeared to be the balance due to him: That the said deed was an indenture expressed to be made by and between the defendant of the first part, C. Simpson, H. R. Morley, J. Charlesworth, and J. Kitson the younger, therein described as trustees for the purposes therein mentioned, of the second part, and the several other persons whose names or partnership firms were thereunto subscribed and set, and seals affixed, by themselves, their partners, attorneys, or agents thereunto duly authorised, being creditors of the defendant for the respective sums of money set or mentioned opposite to the names or partnership firms of such creditors in the schedule thereunder written, of the third part: That, by the said deed, the defendant assigned his estate and effects to the said trustees in manner and for the purposes therein mentioned: That,

by the said deed, in consideration of the said assignment therein contained, and of certain trusts, provisions, and agreements therein expressed, the several creditors of him the defendant, parties to the said deed, for themselves severally and respectively, and for their several and respective partners in trade, executors, and administrators, acts and deeds only, but not jointly, nor the one for the others or other of them, nor for the acts and deeds of the others or other of them, did and **[167]** each of them did thereby agree to accept and take the estate and effects thereby assigned in full satisfaction and discharge of their several and respective debts and demands, whether due to them respectively alone or jointly with any other person or persons, from or upon the said defendant, and did thereby remise, release, discharge, and for ever quit claim to the said defendant, his executors and administrators, and every of them, all action or actions, cause and causes of actions, suits, bills, bonds, notes, debts, accounts, reckonings, sum and sums of money, judgments, executions, controversies, costs, charges, claims, and demands whatsoever both at law or in equity, or otherwise howsoever, which against him the said defendant, his heirs, executors, or administrators, or any of them, they the said several creditors parties thereto, every or any of them respectively, then had or might have or claim for or in respect of any debt or debts, sum or sums of money, claim or demand whatsoever, at any time or times theretofore due or owing to them, every or any of them, or which they or any of them might or could claim, challenge, or demand of, from, or against the said defendant, so that the said defendant should be fully and effectually discharged, released, and exonerated therefrom, anything therein contained to the contrary notwithstanding, the said assignment and the covenants and agreements in the said deed contained on his part to be observed and performed, only excepted: That, more than three calendar months before the suit, the plaintiff had notice from the defendant of his suspension of payment, and of such deed of arrangement; and that all matters and things were done and happened according to the said act, to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same.

[168] Replication, —Joinder of issue: and, for a second replication, the plaintiff denied that all matters and things were done and happened according to the said act, to make the alleged deed, and the alleged release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same, as alleged, —in this, that it did not provide for the distribution of the whole of the defendant's estate amongst and for the benefit of all his creditors.

The plaintiff also demurred to the plea, on the grounds "that the alleged deed is not a deed of arrangement within the Bankrupt Law Consolidation Act, 1849; that it is not stated with certainty, or at all, that the alleged deed was executed by the defendant or by or on behalf of six sevenths in number and value of his creditors, as required by the statute; that it is not stated that the persons or firms who signed the alleged deed were creditors who would be entitled to prove against the defendant's estate in bankruptcy, or that they signed the said deed before the plaintiff had notice thereof, or when they signed the same: that it is not stated that the said alleged deed purported to assign all the estate and effects and property of the defendant which would have been available at the time of his suspension of payment in bankruptcy for his creditors, or what part of his estate and effects was thereby assigned, or upon what trusts such assignment purported to be, or whether those trusts were for the benefit of all or of a part only of his creditors; and that it appears by the plea that the alleged assignment was for the benefit of those creditors only who were parties to the said deed of arrangement."

The defendant joined issue on the second replication, and also demurred thereto, on the ground that, "if the deed is for the distribution of the estate among all the **[169]** creditors who execute, sign, or assent to it, it is within the act, and yet such a deed is not for distribution among all the creditors." Joinder in demurrer.

John Gray (with whom was M'Mahon), for the plaintiff (*a*). The question turns

(*a*) The points marked for argument on the part of the plaintiff, as to the demurrers, were in substance the same as the grounds of demurrer to the plea: and, as to plaintiff's second replication, —"that, if the alleged deed did not provide for the

upon the construction of the clauses in the 12 & 13 Vict. c. 106, which relate to arrangement by deed with creditors. The 224th section enacts "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same," &c. The 225th section provides "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall **[170]** within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid," &c., "and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." The 226th section enacts, "that, when the trustee or inspector under such deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that six sevenths in number and value of the creditors whose debts amount to 10l. and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing," which certificate is to be primâ facie evidence that such deed or memorandum has been so signed. The 227th section enacts "that every such certificate as last aforesaid shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same." And the 228th section enacts, "that the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed, in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed." The plea is clearly bad for not shewing upon **[171]** the face of it that the deed referred to is for the distribution of all the estate and effects of the debtor, and that it is an assignment for the benefit of all his creditors: to satisfy the statute, it is not enough that the assignment is, as it purports to be here, for the benefit of those creditors only who execute the deed. The provisions in question contemplate a deed which shall provide for the administration of the debtor's estate in the same manner as it would be administered under a fiat in bankruptcy. It is true that Parke, B., in delivering the opinion of the judges in the House of Lords in *Larpent* v. *Bibby*, 5 House of Lords Cases, 481, 497, intimates a doubt as to the latter point. "We have some doubt," he says "whether a deed is not void as making the estate distributable amongst, not all the creditors, but those only who execute the deed. We should have clearly thought so, except that such a deed is in practice common, and in all cases of a conveyance for the benefit of creditors it is for the distribution of the estate amongst the creditors parties to the deed. But, if we cannot take notice of that, as we probably ought not to do, the deed is void on this account also." But no decision was come to on the point: and, in the subsequent case of *March* v. *Warwick*, 1 Hurlst. & N. 158, where *Larpent* v. *Bibby* was cited, the court of Exchequer do not seem to have participated in the doubt: for, they held that a deed of arrangement under this statute, which exempted from the assignment the wearing apparel of the debtor and his family, was

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distribution of the whole of the defendant's estate amongst and for the benefit of all his creditors, it was not a deed of arrangement within the Bankrupt Law Consolidation Act, 1849, or a bar to the plaintiff's claim."

void: and they intimated a pretty strong opinion that such a deed ought in terms to provide for the distribution of the debtor's estate amongst all his creditors, and not those only who execute the deed. Upon authority, therefore, as well as upon the general reason of the thing, it is submitted that the deed set out in this plea is not such a deed as is contemplated by the statute, and therefore that the plea is bad.

[172] Hugh Hill, contrà (*a*). It was not necessary that the plea should set out in detail all the provisions of the deed: it is enough if the plea contains positive allegations bringing the deed within the words of the act. Now, the plea alleges that a deed of arrangement was entered into between the defendant and his creditors, and signed by or on behalf of six sevenths in number and value of the creditors whose debts amounted to 10*l.* and upwards. It then goes on to aver that the said deed was an indenture expressed to be made by and between **[173]** the defendant of the first part, certain persons named, and therein described as "trustees for the purposes therein mentioned," of the second part, and "the several other persons whose names or partnership firms are thereunto subscribed and set, and seals affixed, by themselves, their partners, attorneys, or agents thereunto duly authorised, being creditors of the said defendant for the respective sums of money set or mentioned opposite to the names or partnership firms of such creditors in the schedule thereof thereunder written," of the third part. The plea then goes on to allege that by the said deed the defendant assigned "his estate and effects" (meaning all his estate and effects) "to the said trustees in manner and for the purposes therein mentioned; that the creditors parties to the deed thereby agreed to accept and take the estate and effects thereby assigned in full satisfaction and discharge of their several and respective debts and demands, and thereby released and discharged the debtor. Then there is an allegation, that, more than three calendar months before the suit, the plaintiff had notice from the defendant of his suspension of payment, and of such deed of arrangement; and the plea concludes with a general averment "that all matters and things were done and happened according to the said act to make the said deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same." Now, this plea clearly would not be proved unless the defendant shewed a deed in all respects complying with the requisitions of the statute. [Cresswell, J. The general words "that all matters and things were done and happened," &c., cannot surely be read "all words were inserted in the deed necessary to make it a compliance with the act."] The 224th section says that a deed to the purport mentioned, and signed by the required number of creditors," shall **[174]** be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same,"—that is, when signed

(*a*) The points marked for argument on the part of the defendant, were as follows:—

"That it is sufficient to follow the words of the act in the description of the deed, and the averment of the other matters; and to allege that all matters and things were done and happened according to the act to make the deed and release as effectual and obligatory on the plaintiff as if he had signed it: that, at the trial of a traverse of the plea, the defendant could not have the verdict, unless he proved all that the act requires: that it was open to the plaintiff, if he considered that the deed was insufficient on the face of it, to set it out: that it tends to unnecessary prolixity in these cases to set the deeds out at full length in the pleas, and make every explanatory averment necessary to bring such deeds within the act: that the words in the plea 'he assigned his estate and effects,' mean the whole: that the words in the plea, 'notice of such deed,' mean, as they mean in the act, notice of the deed signed as required by the act, the word 'such' referring to every quality and incident previously mentioned: that it appears that the whole estate was assigned, and it is better to allow a general averment that all things were done according to the act, than to require that the mode prescribed by the deed for dealing with the estate should be explained in the plea: that, if the plaintiff was embarrassed by the generality of the averment, he could have applied to have the plea amended: and that, on the argument of the demurrer, it must be assumed that there is nothing embarrassing, as the plaintiff must either have made no application, or, having made one, he has failed in proving embarrassment."

by six sevenths, it shall enure for the benefit of all. [Cockburn, C. J. Assuming that the deed purports to be such a deed as the statute requires. Cresswell, J. The deed purporting to be an assignment for the benefit of those who execute it, would the trustees be justified in paying dividends to those who have not signed?] Yes: the deed is for the benefit of the general body. [Crowder, J. The deed clearly appears to be for the benefit only of "the parties hereto."] Upon the plea it does not appear to be so limited. [Willes, J. Suppose such a deed as this had been made before the statute, and a suit in Chancery against the trustees to enforce payment to a creditor who had not executed it,—would such creditor be entited to participate in the fund? Your contention is, that the words at the latter part of the 224th section operate to introduce a person who but for the statute would not be within the deed.] Creditors who have not executed the deed are by the terms of that section placed precisely in the same position as if they had executed. [Cockburn C. J. Even if it appeared to be the intention of the deed to exclude those creditors who did not execute?] If the deed contain words of exclusion, it is not a deed within the statute. [Cockburn, C. J. What is there upon the face of this deed, as stated in the plea, to shew it to be a deed within the statute?] The plea clearly would not be proved unless we shewed a deed in conformity with the act. [Cresswell, J. We do not know what the trusts of the deed are: and, unless it is such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors, it is not a deed within the statute.] The case of *Macnaught* v. *Russell*, 1 Hurlst. & N. 611, concurs with the view **[175]** which the court seem inclined to take. The defendant, therefore, will pray leave to amend, by setting out the deed more fully.

Gray, for the plaintiff, asked that it might be imposed as a condition that he should be furnished with a copy of the deed, or allowed to inspect it. This was assented to.

Leave to amend, on the usual terms (*a*).

TAYLOR AND ANOTHER *v.* STRAY. April 2nd, 1857.

[S. C. 26 L. J. C. P. 185, 287, 3 Jur. N. S. 964; 5 W. R. 761. Applied, *Whitehead* v. *Izod*, 1867, L. R. 2 C. P. 238; *Cropper* v. *Cook*, 1868, L. R. 3 C. P. 198. See *Coles* v. *Bristowe*, 1868, L. R. 6 Eq. 161; L. R. 4 Ch. 3.]

The plaintiffs, stock-brokers, and members of the London Stock Exchange, on the 28th of August, 1856, at the request of the defendant, bought for him twenty shares in a joint-stock bank called the Royal British Bank, to be paid for on the "settlement day," which was on the 15th of September, and duly forwarded to him the usual broker's contract-note. The bank stopped payment on the 3rd of September, and ultimately become bankrupt. On the 11th, the defendant repudiated the transaction, and gave the plaintiffs notice not to pay the price on his account. The plaintiffs having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent the defendant the certificates and transfers, and, upon his declining to accept them, sued him for money paid:—Held, that they were entitled to recover.

This was an action brought to recover the sum of 643l. 10s., being the price of twenty shares in the Royal British Bank, which had been bought by the plaintiffs, as the brokers of the defendant, and had been paid for by the plaintiffs under the circumstances hereinafter mentioned, and also 5l., being the plaintiffs' commission on the purchase of the shares. The declaration contained counts for money paid, work and labour, and for money due upon accounts stated. The defendant pleaded never indebted.

The cause was tried before Willes, J., at the sittings in London after Michaelmas Term, 1856, when the facts appeared to be as follows:—

The plaintiffs (Taylor & Aston) are members of the Stock Exchange, in London, and carry on the business of stock and share-brokers in partnership together. On the 28th of August, 1856, the defendant had a conver-**[176]**-sation with Aston respecting the price of shares in the Royal British Bank, and requested him to purchase on the

(*a*) The plea was not amended, and the plaintiff had judgment.

Stock Exchange for him twenty shares, at 32l. per share, for the account day on the 15th of September then next. On the same day, Aston bought for the defendant on the Stock Exchange twenty shares at the price named, of one Russell, a jobber or dealer in bank shares upon, and a member of, the Stock Exchange. Russell was not himself, nor was Wadeson, a broker and member of the Stock Exchange of whom Russell bought sixteen of the shares, at any time a registered owner of any shares in the Royal British Bank; but Russell did not buy to fulfil his contract, but had shares to the amount required in his possession, or a right to them, and a control over them, at the time of the sale. There were at this time only two jobbers who dwelt in these shares, and Russell was one of them. The Royal British Bank was then supposed to be solvent.

The purchase was made subject and according to the practice of the Stock Exchange. There was no written contract: but the plaintiffs and Russell each made a memorandum of the bargain.

It was proved to be the practice of the Stock Exchange before and at the time of the transaction in question,—first, that the seller is not bound to transfer, nor the buyer's broker to procure, shares from the person named in the note sent by the buyer's broker to his principal (in this case designated by the works "of Russell"),—secondly, that members of the Stock Exchange, in bargains for customers, make themselves liable for their performance,—thirdly, that, in case of non-performance by a member, the committee is referred to, and decides; and, if their order is disobeyed, the disobedient party is expelled,—fourthly, that, on the Stock Exchange, payment is made for shares, on handing the shares and a transfer; that the seller is paid by the pur-**[177]**-chasing broker on handing the shares and transfer, as was done in this case; and that that is so as to all kinds of shares.

The plaintiffs had previously to the 28th of August, 1856, purchased Ottoman Bank shares on the Stock Exchange for the defendant, for an account day, in the usual way, and to pay for which the defendant furnished the plaintiffs with the money previously to the settling-day.

On the 28th of August, the plaintiffs announced to the defendant that they had purchased the shares, by a letter as follows, "We have managed to purchase the twenty British Bank shares at 32l., agreeably to your directions, for the 15th of September. Contract herein." This letter contained an inclosure called by the plaintiffs in their letter the contract relating to the purchase, which was in the following terms:—

"2 Capel Court, London,
"No. 5835. "28th August, 1856.

"Bought for Frederick Stray, Esq., for 15th September (50l. paid), twenty Royal British Bank shares, of Russell.

"Consideration	£640	0	0
Stamp	3	10	0
Registration		2	6
Commission	5	0	0
	£648	12	6

"Taylor & Aston, Brokers."

The Royal British Bank stopped payment on the 3rd of September, 1856, at 11.30 A.M.

On the 8th of October, the time for paying or compounding the debt expired, whereby the bank committed an act of bankruptcy, which had relation to the 8th of September.

[178] Early on the morning of the 3rd of September, the defendant had a conversation with Aston respecting the shares in question: and Aston told the defendant that British Bank shares had been dealt in that morning at 20l. per share; and thereupon the defendant expressed a wish to sell the shares in question at that price. At this time the plaintiffs did not know, nor did it appear, whether the bank had then stopped. The plaintiff Aston then went on to the Stock Exchange, and tried to sell the said shares, but could not. The defendant waited whilst he did so, and was informed of the result of the attempt.

On the 8th of September, the defendant saw Aston who told him that the failure of the bank did not vitiate the contract of purchase; and the defendant said, that, at all events, he should not have the shares transferred to his own name, but should have them transferred into the name of a man of straw. Aston requested authority for that purpose in writing, and was also desirous of obtaining a recognition in writing of the purchase by the defendant; and Aston drew out a memorandum for the defendant to sign, which was in the following terms:—

"2 Capel Court, 8th September, 1856.

"Messrs. Taylor & Aston, stock and share-brokers.

"Gentlemen,—I request you will not pass my name for the twenty British Bank shares purchased on the 28th of August, as they are not intended to be transferred to me."

The defendant took this memorandum away with him to consider about it; and, having done so, refused to sign it: and before the 15th of September, he returned it unsigned to Mr. Aston.

On the 11th of September, 1856, the defendant, by his attorney, wrote and sent the plaintiffs the following letter:—

[179] "Gentlemen,—Having now had an opportunity of ascertaining with some precision the state of the Royal British Bank, not only at the time of the recent sale of their shares in the market, but for some time previously, and the circumstances under which the shares were sent into the market, and the many grounds of objection to the acceptance of such shares under existing circumstances, I give you notice that Mr. Stray will not take any shares in the said bank; and, further, that you do not pay any money on his account for or in respect of any alleged purchase by him of any such shares."

On the 11th and 13th of September, 1856, the plaintiffs wrote and sent to the defendant letters of which the following are copies:—

"2 Capel Court, 11th September, 1856.

"Stock Exchange.

"Royal British Bank.

"Resolved, that no circumstances have been submitted to the committee to induce them to interfere with the settlement of the Royal British Bank shares in the ordinary way.

"By order,

"G. Webb, secretary."

"Dear Sir,—Our committee have to-day come to the above decision as to the transactions in the Royal British Bank shares. We have, therefore, to request you to inclose us a cheque for 648*l.* 12*s.* 6*d.* by the 15th instant, being the cost of the twenty shares purchased on the 28th ult. for you and by your instructions, and for which we shall have to pass your name on that day.—Yours, &c. "Taylor & Aston.

"Frederick Stray, Esq."

"2 Capel Court, 13th September 1856.

"Dear Sir,—We have received some letters as to the purchase of the twenty Royal British shares at 32*l.* per [180] share on the 28th August for payment on the 15th September, to suit your convenience, and in accordance with the customs and rules of the Stock Exchange made by us as brokers by your instructions and for your account, of Mr. Russell, as per contract rendered you on that day: and, as we are informed, we must, as brokers, and in accordance with those rules, give your name, and pay the consideration undertaken for the shares, although of doubtful value, the same as we should have done, and handed them to you, had they been worth twice your purchase-money. We cannot, therefore, relieve ourselves of the contract entered into on your behalf and by your direction, and shall hold you liable for whatever we may be called upon to pay as the consequence of your orders to effect the purchase for you on the 28th ult.—Yours faithfully, "Taylor & Aston.

"F. Stray, Esq."

The charter of the Royal British Bank (which was put in) recites the deed of settlement of the bank on its formation under the 7 & 8 Vict. c. 113: the following clauses were read:—

"10. That it should be lawful for every proprietor, and for every person claiming in his or her right in any way howsoever, with consent of the court of directors, to sell and transfer, by deed duly stamped, in which the consideration should be truly stated, the shares to which he or they should be entitled, or any of them, to any person or persons, subject nevertheless to the conditions or restrictions therein contained; and that the same, when duly executed, should be delivered to the secretary or other proper officer of the company, and be kept by him; and he should enter a memorial thereof in a book to be kept at the head banking house aforesaid, to be called the 'Register of Transfers,' and should indorse [181] such entry on the deed of transfer; and that, for every such entry and indorsement, the company should be entitled to 2s. 6d.; and that such deed, so indorsed, should be sufficient evidence of the consent of the court of directors.

"11. That the person or persons proposing to make any transfer of shares, or the person or persons to whom the same was proposed to be made, should, seven days at the least before the making or executing any such transfer, deliver to the court of directors at the head banking-house aforesaid, a notice in writing specifying the number of shares proposed to be transferred, and the name or names, residence, or rank, profession, or trade, and, if representatives, their character or title as such, as well of the person or persons so proposing to transfer, as of the person or persons to whom such transfer was proposed to be made, and the price or consideration (if any) proposed to be given for the same.

"13. That the court of directors should prescribe the form of the transfer of the shares; and that every purchaser or transferee of shares should, in respect of the shares purchased by or transferred to him, and at his own expense, when required by the said court, execute this or any supplementary deed or deeds, and enter into any such covenant with the company to observe, fulfil, and perform all the clauses, conditions, and stipulations therein contained, as by the said court should be required.

"16. That, upon every sale or transfer of shares, or change of proprietorship therein, the then existing certificate should be given up to be cancelled, and should forthwith be cancelled accordingly, and that a new certificate should be given to the new proprietor, in respect of the shares transferred to or taken by him; and that, if any of the shares included in the certificates so given up should be retained by the old proprietor, a new certifi-[182]-cate in respect thereof should be issued to him without any other fee than that paid on the transfer; and that the production of any certificate should at all times be good primâ facie evidence of the title of the person holding the same as proprietor of the shares therein mentioned."

The practice of the bank as to transfers of shares therein was as follows:—They prescribed a form, and had it printed in blank. This form was generally filled up by the bank, and, if so filled up, there was nothing put upon the transfer to shew that it had been so filled up. The bank, however, sometimes gave out the blank printed forms of the transfers to the brokers, to be filled up by themselves; and the transfers in this case were in such forms.

It was not a matter of course that the consent of the directors should be given: but it was never refused.

The notice mentioned in the eleventh clause was not generally required by the bank: and they never refused to register a transfer in consequence of its omission.

Russell bought sixteen of the twenty shares of one Wadeson, a broker; and he sold them as broker of William Barnett. It was Wadeson's duty to deliver to Russell a transfer duly executed by Barnett of the said sixteen shares. Wadeson on the 15th of September applied to the bank to prepare a transfer of the said sixteen shares to the defendant. This application was refused by the bank.

There was no other evidence of any refusal by the directors to consent to a transfer of the shares in question; and no evidence of consent on their part to such transfer. Wadeson afterwards, on the same day, obtained a blank printed form, and filled it up himself, and got it executed by Mr. Barnett.

The bank refused a number of applications made to them after the 3rd of September to allow transfers. [183] They, however, allowed and registered two or three transfers after the 3rd of September.

The secretary of the bank stated that it was not a matter of course to register transfers on production at the bank of the papers duly executed; but that he was not aware of any refusal to do so.

On the 15th of September, the plaintiffs, according to the ordinary practice of the Stock Exchange, passed the defendant's name to Mr. Russell, as the buyer of twenty shares; and, in due course, according to the same practice, Mr. Russell tendered to the plaintiffs twenty shares in the said bank, and transfers thereof in the prescribed form, duly executed and stamped,—sixteen certificates being in the name of William Barnett, with a transfer from him, and four in the name of Rear Admiral Robert Aitcheson, with a transfer from him. On such tender, the plaintiffs were bound by the ordinary practice of the Stock Exchange to pay to Mr. Russell 640l. for the purchase money, and 3l. 10s. for the stamps impressed on the said transfers.

The plaintiffs, in order to try and save the defendant, though at the risk of being declared defaulters, at first refused to pay Mr. Russell for the shares: and he thereupon summoned them on the same day before a committee of the said Stock Exchange, who considered the circumstances of the case, and determined that the plaintiffs were bound to pay for the shares. Russell thereupon again tendered the certificates and the transfers, and the plaintiffs paid him 643l. 10s. for the same.

The plaintiffs' commission for making the purchase is 5s. per share, making 5l. for the twenty shares. The certificates of shares were genuine, and the transfers were in the ordinary form. There were sixteen certificates of shares in the name of William Barnett, all in the same form, but numbered respectively 1021 to 1036, **[184]** both inclusive. The following is a copy of one of the certificates:—

"The Royal British Bank.

"No. 1021. "London, the 27th day of March, 1855.

"This is to certify that William Barnett, National Debt Office, Old Jewry, gentleman, is the proprietor of one share of 100l. in the Royal British Bank, on which 50l. have been paid up. "Ed. Esdaile,

"R. Paddison, Secretary. "Pro Gen[l]. Manager."

The following is a copy of the transfer from the said William Barnett:—

"I, William Barnett, of the National Debt Office, Old Jewry, city, gentleman, in consideration of the sum of 512l. paid to me by Frederick Stray, of 40 Haymarket, tailor, do hereby transfer to the said Frederick Stray sixteen shares numbered 1021 to 1036, both inclusive, in the business of the corporation called the Royal British Bank, To hold unto the said Frederick Stray, his executors, administrators, successors, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof: And I, the said Frederick Stray, do hereby agree to take the said sixteen shares subject to the same conditions. As witness our hands and seals this 18th day of September, in the year of our Lord, 1856.

"William Barnett (seal).
" (seal).

"Signed, sealed, and delivered by the above-named William Barnett, in the presence of
"William Wadeson,
of 76 Old Broad Street, stock-broker.

"Signed, sealed, and delivered by the above-named in the presence of "

[185] The other transfer was of four shares, and was in the same form, excepting that the transferror was Rear Admiral Robert Aitcheson, of Shrubs Hill, Lyndhurst, Hampshire; and the consideration was stated to be 128l.; and the date was the 16th of September, 1856.

There were also four certificates of shares in the same form as the above, but in the name of the said Rear Admiral Robert Aitcheson.

The said William Barnett and Rear Admiral Robert Aitcheson were respectively registered shareholders of the above-mentioned shares.

On the 19th of September, 1856, the plaintiffs wrote to the defendant a letter of which the following is a copy :—

"2 Capel Court, 19th September, 1856.

"Dear Sir,—We yesterday had stamped transfers and certificates of the twenty Royal British Bank shares purchased for you on the 28th of August of Mr. Russell, presented to us for payment by him, and have been under the necessity of paying, according to the laws of our Stock Exchange, on your account, the purchase-money, 640l., with stamps 643l. 10s., and with our commission 5l., making together 648l. 10s., which we request you to pay the bearer, who will hand you the shares, or to forward us the same immediately, otherwise we shall require interest to be paid thereon from this date. "TAYLOR & ASTON.

"To Frederick Stray, Esq."

This letter was delivered to the defendant on the same day, by a clerk of the plaintiffs, who took with him the shares and transfers.

At the close of the plaintiffs' case, the following objections were urged on the part of the defendant,—first, that the directors of the Royal British Bank had refused to consent to the transfer tendered to the defendant before **[186]** the plaintiffs paid their money; and that it was the plaintiffs' duty to procure such transfer,—secondly, that the transfers were not in the name of Russell, but in the names of other parties; and that Russell had not at the time of the contract, or at any subsequent time, any shares in the bank.

The learned judge declined to nonsuit the plaintiff, but reserved the points; and a verdict was found for the plaintiffs, the counsel for the defendant not addressing the jury, nor requiring any point to be left to them, but relying upon the above objections.

Knowles, Q. C., in Michaelmas Term last, in pursuance of the leave reserved to him, obtained a rule nisi to enter a verdict for the defendant, on the grounds urged by him at the trial. He referred to *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, and *Wilkinson* v. *Lloyd*, 7 Q. B. 27.

Atherton, Q. C., and Aston, shewed cause. The defendant by this rule seeks to have the verdict entered for him upon two grounds,—first, that the directors had refused to consent to the transfers tendered to the defendant before the plaintiffs paid the money, and that it was the duty of the plaintiffs to procure such transfers,—secondly, that the transfers were not in the name of Russell, but of other parties, and that Russell had not at the time of the contract, or at any subsequent time, any shares in the bank.

1. The first point does not properly arise; for, the defendant having refused to accept any shares, the time never arrived at which the directors could accept or reject the transferree. Before the directors could be called upon for their consent, a formal transfer must be executed by the transferror, and assented to by the transferree. Assuming, however, that that point does **[187]** arise, the question is upon what terms the plaintiffs and defendant dealt,—whether or not it was part of the bargain that the consent of the directors should be obtained. The evidence clearly established that sales of shares on the Stock-Exchange were not subject to the approval of the directors; but that all that the broker is bound to do is, to obtain a transfer of the required number of shares at the price and within the time stipulated. It also appears that the buying broker is by the rules of the Stock Exchange bound, on pain of expulsion, to pay the price to the selling broker on the settlement day. *Wilkinson* v. *Lloyd*, 7 Q. B. 27, therefore, has no bearing upon the present case. [Willes, J. The mere fact that the buying broker is liable to be expelled for non-compliance with the regulations of the Stock Exchange, might not be sufficient for a court of justice: but here the plaintiffs were under a liability to Russell. The 10th and 11th clauses of the deed of settlement shew that the consent of the directors is mere matter of form, and cannot be withheld.

2. Then, as to the second point, the question is, whether, having made the contract of the 28th of August, 1856, with Russell, and having communicated that to the defendant, the plaintiffs were bound to obtain a transfer of the stipulated number of shares from Russell, or whether the contract was not satisfied by their obtaining through Russell a transfer from some third party. The evidence was, that it is the

invariable practice of the Stock Exchange not to take the transfer from the broker, but to accept as a performance of the contract any shares that can be obtained within the time. [Willes, J. That is perfectly well known.] The practice is recognised in *Sutton* v. *Tatham*, 10 Ad. & E. 27, 2 P. & D. 308, where Lord Denman, C. J., and Littledale, J., lay it down that a person who employs a broker **[188]** on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules. *Pollock* v. *Stables*, 12 Q. B. 765, 5 Railw. Cas. 352, is an authority to the same effect. *Hibblewhite* v. *M'Morine*, 5 M. & W. 462, disposes of the objection. It was there held, that a contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract. The plaintiffs, having performed their contract in buying the securities they were instructed to buy, are clearly entitled to recover the money paid by them in pursuance of it, and do not impliedly covenant for title: *Lamert* v. *Heath*, 15 M. & W. 486; *Bosanquet* v. *Shortridge*, 4 Exch. 699; *Westropp* v. *Solomon*, 8 C. B. 345.

Knowles, Q. C., Maude, and Gibbons, in support of the rule. The contract was for the purchase from Russell of shares in the Royal British Bank. Unless Russell tendered to the plaintiffs a valid transfer, they were under no obligation to accept the shares or to pay the money, and consequently could have no right to call upon the defendant. Now, the 23rd section of the 7 & 8 Vict. c. 113, which authorizes the transfer of shares, requires that such transfer shall be made "subject to the provisions of the deed of settlement;" and the 10th clause of the deed of settlement expressly requires it to be done "with the consent of the court of directors." Without such consent, therefore, a transfer would be inoperative: the pretended transferror would still re-**[189]**-main a shareholder: *Bosanquet* v. *Shortridge*, 4 Exch. 699,—the decision of the court of Exchequer in which, so far as this question is concerned, not being at all affected by the judgment of the House of Lords in *Bargate* v. *Shortridge*, 5 House of Lords Cases, 297. The principle upon which alone this action is maintainable, is thus stated by Tindal, C. J., in *Bowlby* v. *Bell*, 3 C. B. 284, 293,—"In order to maintain this action for money paid to the use of the defendant, at his request, it was necessary that the plaintiff should prove either an actual request on the part of the defendant, or that the money was paid in discharge of some liability which the plaintiff had taken upon himself by the defendant's authority." *Wilkinson* v. *Lloyd*, 7 Q. B. 27, is very much in point. There, the plaintiff agreed to purchase of the defendant shares in a mining company established under a deed of settlement, and sent a form of transfer to the defendant for his execution. The deed required, that, on transfer of shares, the intended proprietor should be approved of by the directors. The defendant executed and returned the transfer, and sent also a certificate (according to the provisions of the deed) verifying the defendant's title to the shares. The plaintiff, on receiving the transfer, paid for the shares; but, before such payment, the directors passed a resolution (unknown to the plaintiff till after the payment) stating that the defendant had commenced an action against the company, and that no transfer of shares standing in his name should be allowed while such action was pending. The directors never objected to the plaintiff as a proprietor; and the defendant denied their power to stay a transfer on the ground above stated. While the transfer was suspended, the shares fell in the market, and the plaintiff brought assumpsit for money had and received, to recover back the purchase-money: and it was held that the action lay: for **[190]** that the defendant, as vendor, was bound to obtain the assent of the directors, and to do all that was necessary to vest the shares in the plaintiff. That case shews that the plaintiffs may recover back the money they have paid to Russell. The case of *Sleigh* v. *Sleigh*, 5 Exch. 514, is also very analogous. It was there held that the drawer of an accommodation bill cannot sue the acceptor for money paid to his use to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. Therefore, where the plaintiff drew and indorsed for the accommodation of the defendant, the acceptor, a bill of exchange, which, when due, was dishonoured, and the plaintiff, without having received notice of dishonour, and without any request from the plaintiff, paid a part of the bill to

the holder,—it was held that he could not recover the amount from the defendant in an action for money paid to his use,—there being no implied undertaking to indemnify against a payment which the drawer voluntarily made, with full knowledge that he was not bound to pay. [Crowder, J. Here, the plaintiffs enter into a contract at the request of the defendant: you are, in effect, seeking to imply an agency different from the ordinary course of the business which the parties are engaged in.] There was no evidence of a course of business applicable to a case like this,—where a tender of shares was made after the failure of the bank. Besides, the course of business on the Stock Exchange is not binding on the court: *Child* v. *Morley*, 8 T. R. 610. The consent of the directors to the transfer was clearly necessary: *Parnther* v. *Gaitskell* 13 East, 432: and it was the seller's duty to procure it. This is like the case of a covenant in a lease, not to assign without the consent of the lessor; in which case it is the vendor's duty to procure such consent: *Lloyd* v. **[191]** *Crisp*, 5 Taunt. 249: *Mason* v. *Corder*, 7 Taunt. 9. As to the resolution of the Stock Exchange committee, of the 11th of September, 1856, that clearly had no binding force upon persons not members of that body: *Westropp* v. *Solomon*, 8 C. B. 345. [Crowder, J. All that that resolution amounts to is, that the committee declined to interfere in the matter.] This contract was in writing,—it was a contract for twenty shares bought of Russell. [Cresswell, J. They are not stated to be Russell's shares. Willes, J. Besides, the note sent to the defendant was not the contract.] It must be conceded that it cannot be put higher than a statement of the contract sent by the plaintiffs to the defendant.

Cresswell, J.(*a*). I am of opinion that the rule for a new trial for this case must be discharged. This is an action for money paid by the plaintiffs to the use of the defendant; and the question is whether the plaintiffs had any authority, express or implied, to pay the money on his behalf. It appears that the plaintiffs were employed to purchase for the defendant on the Stock Exchange shares in a chartered joint-stock bank, and that, according to the usage of the Stock Exchange, he bought the required number of shares of another broker there: and it was proved, that, by the rules of that establishment, it is incumbent on the buying broker to pay the amount of the purchase money on the day specified to the selling broker upon the transfers being tendered to him, and that the plaintiffs did pay the money accordingly. It was further proved that the plaintiffs had on former occasions been employed by the defendant to buy shares for him in that market. He must, therefore, be taken to have given them authority when he employed them to deal according to the course and practice of the **[192]** market. Having at the defendant's request purchased the shares for a future day, the plaintiffs did all that was requisite to entitle them by the usage of the Stock Exchange to complete the transaction; and therefore they had an implied authority from the defendant to pay the money for him on that day. I do not think it necessary to deal with the resolution of the committee of the Stock Exchange, because, if we find the plaintiffs buying shares according to the course of business of the market to which the defendant sends them, and advancing their money in pursuance of that course of business, although the transaction ultimately fails otherwise than through any default on their part, they clearly are entitled to recover from their principal the money so paid. If the principal fails to obtain the consideration for which the money was paid, he must resort to the party from whom the purchase was made, and not to his own brokers. Suppose, instead of impliedly authorising his brokers to pay the money for him, the defendant had drawn a cheque for the amount, could he afterwards have brought an action against his brokers because the transaction turned out a failure? I think that is very like this case. It is said that the deed of settlement requires notice of an intended transfer to be given to the directors. But that notice may be given by either party, and it is not of necessity part of the transaction. The directors may waive it. But, before there can be a perfect transfer, there must be a deed executed by both parties, the seller professing to convey the shares upon certain terms and conditions to the buyer, and the latter under his hand and seal accepting the shares subject to those conditions: and, when the directors by their officer accept the transfer and enter a memorial thereof on the register, the transferree is bound to observe all the conditions to which the shares are subject. Now, the seller could not get the transfer accepted by the directors

(*a*) Cockburn, C. J., was absent, on account of indisposition.

until the **[193]** purchaser had given the name to be filed in. That the defendant in this case refused to do. He therefore failed to do that which it was necessary and incumbent on him to do to enable Russell to do anything more than he did. The only question upon which I have entertained any serious doubt is, whether Russell could be said on the 15th of September to have tendered the things he contracted to sell, the bank having stopped payment. He had contracted to sell and deliver shares in an existing bank; and the shares he delivered were shares in a bank which had suspended payment. Upon consideration, however, I think that objection cannot prevail. The Royal British Bank is a chartered bank; and, though it had at this time stopped payment, there was nothing to prevent its going on again. I think, for the purpose now in question, the bank must now be assumed to be still existing, and that the shares tendered, though greatly reduced in value, were the things contracted for. It seems to me, therefore, that there has been no failure on the part of the plaintiffs to do that which they were employed to do; and that, having paid the money in pursuance of a liability which they had incurred through the defendant's instructions, they are entitled to recover it back. Another point was made, as to the names of the transferrors, founded upon the supposed authority of *Hibblewhite* v. *M'Morine*. But the foundation for that objection fails, inasmuch as the contract was not for the transfer of shares standing in Russell's name. I therefore think the rule must be discharged.

CROWDER, J. I also am of opinion that this rule should be discharged. The question is whether the plaintiffs are entitled to recover the sum paid by them as the purchase-money of the shares and their commission. It appears that the defendant employed the plaintiffs to go upon the Stock Exchange and buy for **[194]** him twenty shares in a joint-stock bank. It must be taken, therefore, that he authorised them to deal according to the usual course of brokers in that market. Being so authorised, it seems the plaintiffs entered into a contract to purchase the required number of shares of one Russell, also a member of the Stock Exchange. On the day on which by the ordinary course of business on the Stock Exchange the transfer deed was to be delivered, such deed was tendered by Russell to the plaintiffs, and they, according to the usage, paid him the agreed price. The conduct of the plaintiffs was in strict accordance with the authority given to them by the defendant, provided the thing tendered was that contracted for: and hence arises the only question about which there could be any doubt, viz. whether, the bank having stopped payment before the shares were tendered, the payment was made in respect of that which the plaintiffs were authorised by the defendant to purchase for him. It appears to me that it was. It was contended, that the bank having stopped payment on the 3rd of September, the shares tendered on the 15th were not what the defendant had authorised the plaintiffs to purchase for him, viz. shares in an existing bank. But non constat that the bank might not have gone on again. Assume that the shares are now utterly valueless, they were not so then: and, if they were, it matters not; they were that which the plaintiffs were instructed to buy. As to the consent of the directors to the transfer of shares, it was no part of the plaintiffs' duty to obtain that. Besides, the time for obtaining such consent never arrived, the defendant having declined to take the shares or to give a name. The objection that the contract could only be performed by a transfer of shares from Russell, was not very much pressed. There was no contract between the defendant and Russell: the only contract was that which appeared in the respective brokers' **[195]** books: and the memorandum sent to the defendant did not represent a contract for the purchase of shares belonging to Russell, but for the purchase of twenty shares from Russell, which would be performed by the delivery of any shares.

WILLES, J. I am of the same opinion. The practice of the Stock Exchange appears to be this,—that the broker who buys shares should pay the price to the selling broker upon a transfer being tendered to him with the shares on the settling day. It further appears not to be the duty of the broker to get the transfer registered. All he has to do is, to accept the transfer and pay the money. If it should afterwards turn out that the transfer cannot, in consequence of the directors not having given their consent, or for any other reason, without any default on the part of the buyer, be completed by registration, it may be that an action would accrue to the buyer to recover back his money, but not from the brokers who paid it in accordance with the terms of the contract, the practice of the Stock Exchange, like that of any other

market, being imported into and forming part of the bargain. This differs from the ordinary case of a sale, inasmuch as the seller gets the money before the arrival of the period when the thing sold is effectually conveyed to the purchaser. But that does not follow from the application of any different rule of law to this case from that which governs others, but from the peculiar nature of the brokers' engagements upon the Stock Exchange. It might as well be said, that, if the two principals had themselves met, and had agreed that the shares should be paid for on the day preceding that upon which the transfer was to be handed over, that circumstance would require the application to this case of a different rule of law from that which applies to contracts of sale generally. The rule applicable to this case is the rule which pervades the whole law of principal and agent, **[196]** viz. that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him It appears, that, for some reason which at first I did not understand, but of which I now perfectly well see the drift, the directors had refused to consent to a transfer of the shares in question to the defendant. If there had been an absolute refusal on the part of the directors to recognise a transfer, and that had been known to the plaintiffs at the time they paid the money, whatever the reason for that refusal might have been, the subsequent payment might have been a payment by the plaintiffs in their own wrong. But, when the evidence is looked at, it appears that all the refusal of the directors amounted to was, a refusal to prepare a transfer. It seems, that, after the 3rd of September, the day on which the bank stopped payment, the directors, except in one or two instances, did not allow any new name to be placed upon the register. No doubt, the directors found the shareholders anxious to evade responsibility, and they naturally would refuse to receive transfers to men of straw. When the payment in this case was made, nothing appeared to shew that the transfer was necessarily void by reason of the directors having exercised their discretion in refusing to consent to the transfer being made to the defendant. Therefore the plaintiffs, who had at the implied request of the defendant made themselves responsible for the payment of the money at a stage preceding that on which the consent of the directors could be asked for, having acted rightly at the time, are entitled to call upon the defendant to reimburse them. I by no means say, that Mr. Stray could make out a case against the seller of the shares, on its appearing that the money was paid before the time when the completion of the transaction was to take place. To entitle him to maintain such an action, he must have been prepared to shew a readiness to do every thing necessary on his part for the purpose **[197]** of arriving at the completion. I am at a loss to conceive how the conclusion could be arrived at that he was ready to accept the transfer, seeing the state of the concern at the time. I express no opinion upon it, but I merely throw out these hints to shew that it is by no means clear that the defendant could recover back the money even from the seller of the shares. For these reasons, it appears to me, that, upon the first and principal ground the rule ought not to be made absolute. As to the suggestion that the defendant was entitled to have a transfer of twenty shares in the name of Russell,—it appears that that is contrary to the practice of the Stock Exchange. And, when the note of the contract is looked at, the objection is disposed of; for, that does not describe the shares agreed to be sold as shares belonging to Russell.

Rule discharged.

June 18th.—Against this decision the defendant appealed, pursuant to the 35th section of the Common Law Procedure Act, 1854.

The question for the opinion of the court of error was, whether the judgment of the court of Common Pleas in discharging the rule was or was not correct. If it was, the judgment for the plaintiffs was to stand, with interest, according to the statute. If the judgment was incorrect, the court of error was to give such judgment as ought to have been given by the court of Common Pleas.

The case was argued in the Exchequer Chamber on the 18th of June, before Lord Campbell, Lord Chief Baron Pollock, Coleridge, J., Erle, J., Crompton, J., and Bramwell, B., when the court, without hearing the counsel for the respondents, affirmed the judgment of the court below, with costs.

Judgment affirmed.

[198] In the Matter of Eliza, the Wife of John Haigh. April 17th, 1857.

[S. C. 26 L. J. C. P. 209; 3 Jur. N. S. 371; 5 W. R. 531. See *Foulke* v. *Draycott*, 1885, 29 Ch. D. 1000.]

The husband being a minor, the court granted a rule under the 3 & 4 W. 4, c. 74, to enable the wife to execute a conveyance of her separate property without his concurrence.

Kaye moved for an order under the 3 & 4 W. 4, c. 74, to enable Eliza, the wife of John Haigh, by deed or surrender to convey or dispose of certain freehold property at Thrapston, in the county of Northampton, which had been bequeathed to her for her separate use by the will of one Anne Hogg.

The motion was founded upon the affidavits of the husband and of the wife, from which it appeared that the former was under the age of twenty-one, and that they were desirous of raising a sum of 250l. by mortgage of the property in question, but, by reason of the infancy of the husband, the wife was unable to execute a valid conveyance for securing the same. The learned counsel referred to the 77th and 91st sections of the act.

Cockburn, C. J. The case falls within the words of the 91st section,—"if a husband shall, in consequence of being lunatic, idiot, or of unsound mind, or shall from any other cause be incapable of executing a deed:" therefore, if a purchaser or a mortgagee is willing to accept the title, valeat quantum, he may do so. Being an infant, the husband cannot execute a valid deed.

The rest of the court concurring,

The rule was granted,—"it appearing to the court by affidavit that the said John Haigh is incapable of executing a deed, by reason of his being an infant under the age of twenty-one."

[199] Tindall *v.* Hibberd. April 23rd, 1857.

A certificate granted by a commissioner in bankruptcy to a petitioning trader, under s. 221 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, operates a discharge as to the debts of all persons who were creditors at the date of the petition, and who had notice of the several sittings of the court under it, and is not affected by the refusal of one creditor to receive the composition agreed on by the three fifths.

This was an action for money payable by the defendant to the plaintiff for work and services done and rendered by the plaintiff for the defendant at his request, and for commission and reward due and payable from the defendant to the plaintiff in respect thereof, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them: and the plaintiff claimed 55l. 14s.

Plea, that, after the accruing of the debt and claim in the declaration mentioned, the defendant, being a trader within the Bankrupt Law Consolidation Act, 1849, was also indebted to divers other persons in divers other sums of money, and was unable to meet his engagements with them, and he thereupon, being so indebted, and so unable to meet his said engagements, after the passing of the said act of parliament, duly made an arrangement with his creditors under the superintendence and control of the court of bankruptcy, in pursuance of the said act, and filed such petition, and did all such matters and things as are required by the said act in that behalf; that such sittings were appointed and held as required by the said act in that behalf, and such orders made, and such notices given, and all such matters and things done, as required by the said act in that behalf; that three fifths in number and value of the creditors of the defendant who had proved their debts to the amount of 10l. and upwards did at the second sitting agree to the proposal made by the defendant at the first sitting, such sittings being duly held in pursuance **[200]** of the said act; that such proposal was then reduced into writing and signed by the said creditors; that afterwards the said court of bankruptcy did, after hearing such parties as are in and by the said act mentioned in that behalf, approve and confirm the same, and caused it

to be filed and entered of record in pursuance of the said act; that, afterwards, and before the commencement of this action, the said court did, in pursuance of the said act of parliament, grant to the defendant such certificate as in the said act of parliament in that behalf mentioned, setting forth therein the petition of the defendant, the agreement of the creditors, and that the same had been fully carried into effect; that all things had been done and happened to make the said certificate valid and effectual to discharge the defendant from his debts owing at the time of filing his said petition; and that, by virtue of the said certificate, and by force of the said statute, the defendant became and was before the commencement of the action discharged from the said debt and claim in the declaration mentioned.

Replication,—that the said proposal in the plea mentioned, and which was agreed to at the said second sitting therein mentioned, was made on the 22nd of December, 1855, and was, that the defendant should pay the costs and expenses of the said arrangement, and also on or before the 5th of April then next should pay to his creditors the sum of 5s. in the pound on the amount of their respective debts; that the defendant did not pay to him the plaintiff the said sum of 5s. in the pound on the amount of his the plaintiff's said debt; that the said resolution and agreement had not been carried into effect; and that the plaintiff, so being such creditor of the defendant, had not been satisfied according to the tenor of the said proposal and agreement.

[201] Rejoinder,—that the defendant did on or before the said 5th of April in the replication mentioned, being next after the making of the said proposal, tender and offer to pay to the plaintiff the said sum of 5s. in the pound on his, the plaintiff's, said debt, which the plaintiff then refused to take or receive; that such tender and offer were duly made by the defendant in performance of the said proposal and resolution and agreement as far as the plaintiff's said debt was concerned, as he the plaintiff well knew at the time when such tender and offer were made to him; and the defendant said that the said proposal and resolution and agreement was in all other respects fully performed by him, and that he had always been ready and willing to pay to the plaintiff the said amount of 5s. in the pound on his the plaintiff's debt since the said refusal by the plaintiff of the same.

The plaintiff joined issue on the rejoinder; and for a second surrejoinder thereto the plaintiff said, that, after the alleged tender, and before action, the plaintiff demanded of and requested the defendant to pay to him the said sum of 5s. in the pound on the plaintiff's said debt, and the defendant then wholly refused, and from thence hitherto had wholly refused, to pay the same or any part thereof. He also demurred to the rejoinder, the grounds of demurrer alleged in the margin being,—"1. That it (the rejoinder) is a departure from the plea, which must be understood as alleging that the resolution and agreement was carried into effect, and the rejoinder sets up an excuse for not doing so.—2. That the composition should have been brought into court either on the plea or rejoinder.—3. That it should have been shewn that it was paid into the bankruptcy court for the plaintiff."

The defendant took issue upon the second surrejoinder, and joined in demurrer: and, for a second rebutter **[202]** to the plaintiff's second surrejoinder, he said that the demand in the said second surrejoinder mentioned was made after and not before the granting by the said court of bankruptcy of the certificate in the second plea mentioned, and after and not before the defendant was by force of the said certificate discharged as in that plea mentioned from the debt in the declaration mentioned. He also demurred to the second surrejoinder, the ground of demurrer stated in the margin being,—"that the demand and refusal cannot revive a debt which has been discharged; and that, to give it any effect, it ought to have appeared that it took place before the debt was discharged by the certificate.

The plaintiff joined in demurrer, and also demurred to the defendant's second rebutter, the ground of demurrer alleged being,—"that it is immaterial whether the demand was before or after the certificate, as the plaintiff's refusal of the tender and the certificate did not discharge the defendant from payment of the composition." Joinder.

Hugh Hill, in support of the demurrer (*a*). The **[203]** questions presented for the

(*a*) The points marked for argument on the part of the plaintiff were as follows:—"1. That it was a condition precedent to the certificate mentioned in the plea operating to discharge the defendant from the debt sued for, that the plaintiff should

consideration of the court in this case, turn upon the construction of the clauses in the Bankrupt Act, 12 & 13 Vict. c. 106, which relate to arrangements between debtors and their creditors under the superintendence and control of the court. The 211th section enacts, "that any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the court of bankruptcy, and of submitting himself to the jurisdiction of the court, in manner hereinafter mentioned, may present a petition to the court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court, on such petition, shall have power to grant such protection, and may renew the same from time to time, as it shall think fit, and, if the petitioner be in prison or in custody for debt, may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the court here-**[204]**-inafter mentioned." Then follows an enumeration of the cases in which the debtor's release shall not be ordered. The 212th section gives the form of the petition and affidavit. The 213th section enacts, "that, forthwith after the granting of any order for protection, the court shall appoint a private sitting to be held at such time and place as it may name, and shall at the same time appoint an official assignee to act in the matter of such petition, and, upon sufficient cause shewn, may, if it shall think fit, direct that the estate and effects of the petitioner, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the court; and all stocks, moneys, and other effects of the petitioner shall be transferred, delivered, and paid by the official assignee into the Bank of England to the credit of the accountant in bankruptcy, to be subject to the like rule and regulation for the keeping the account of the said moneys and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as in bankruptcy; and the court shall have power to examine on oath such petitioner, or any witness produced by him, or any creditor or person claiming to be a creditor of such petitioner, and to adjourn such private sitting, or any subsequent private sitting, from time to time as it shall think fit; and notice of such private sitting shall be given in writing to every creditor not less than fourteen days before the same is held, such notice to be sent by post, addressed to every creditor at his last known place of business or residence." The 214th section enacts that such petitioning trader shall, ten days before the day appointed for the private sitting of the court, file in court a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate, &c., and shall therein set forth such proposal **[205]** as he is able to make for the future payment or the compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account." The 215th section enacts, "that, at the private sitting of the court appointed in manner hereinbefore mentioned, or at any adjournment thereof, the creditors shall prove their debts (such proofs to be in

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have been satisfied according to the tenor of the resolution, and that he was not satisfied merely by the money being tendered to him: 2. That, to render such tender an available excuse for not satisfying the plaintiff, the defendant should have been always ready to pay the money, and should have brought it into court; and the plaintiff did not lose his right to the sum tendered, by refusing to receive it: 3. That the plaintiff is entitled to recover the composition, he not having been paid it: 4. That the certificate affords no evidence that the plaintiff has been satisfied, and does not estop him from claiming the composition: 5. That the rejoinder departs from the plea, since the plea must be understood as alleging that the plaintiff was satisfied according to the resolution, and the rejoinder sets up an excuse for not having satisfied him: 6. That the excuse is not sufficient, as it does not shew that the defendant has always since been ready to pay the composition, or that he brings it into court: 7. That the plea alleges that the whole debt is barred, and the rejoinder only that 15s. in the pound is barred, since, notwithstanding the tender, the plaintiff is entitled to sue for the composition as part of his original claim: 8. That the second surrejoinder is good, as the demand, whether before or after the certificate, put the defendant in default, and entitled the plaintiff to sue for the composition, if not for his whole debt: 9. That the second rebutter is bad, because it was immaterial whether or not the demand was made before or after the certificate."

all respects as proofs in bankruptcy), and the petitioning trader shall attend, and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, three fifths in number and value of the creditors who have proved debts to the value of 10*l.* shall assent to the proposal of such petitioner, or to any modification thereof, the court shall appoint another private sitting for the confirmation of such proposal or modified proposal, and such second sitting shall be held not earlier than fourteen days from the first sitting, and notice thereof in writing shall be personally served on every creditor who was not present by himself or his appointed agent at such first sitting seven clear days at least before the day appointed for such second sitting: provided always, that the court, if it shall think fit, may make order in any special case that service of such notice at the last known place of abode or business of any creditor shall be deemed good service." The 216th section enacts, "that, at such second sitting, or at any adjournment thereof, the creditors may also prove their debts, and, if three fifths in number and value of those who have proved debts to the amount of 10*l.* shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned) shall thenceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the **[206]** date of his petition, and who had notice of the said several sittings of the court; and the court, if it shall think the same reasonable and proper to be executed, after hearing such creditors, by themselves, their counsel or attorneys, as may desire to be heard either for or against such resolution or agreement, shall approve and confirm the same, and cause it to be filed and entered of record, and shall grant to the petitioner a certificate of the filing and entering of record of such approval and confirmation, and shall from time to time indorse on such certificate a protection from arrest; and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices aforesaid; and any officer arresting such petitioner at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankruptcy in the like case, &c. The 218th section provides for the vesting of the estate and effects of the petitioning trader from and after the date of the approval and confirmation of such resolution or agreement. And the 221st section enacts, "that, so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof, the court shall give to such petitioner a certificate under the hand of the commissioner, in the form contained in the schedule A. c. to this act annexed, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy," except in cases of fraud, &c.

The question is, whether it is not a condition precedent **[207]** to the validity of the certificate, that "the resolution or agreement shall have been carried into effect, and the creditors satisfied." This matter came under the consideration of the court of Exchequer in *Allcard* v. *Wesson*, 7 Exch. 753, where it was held that a plea of a certificate granted by a commissioner in bankruptcy to a petitioning trader, under s. 221, is bad, unless it avers "that the resolution or agreement has been carried into effect, and the creditors of the trader have been satisfied." Pollock, C. B., in giving judgment, says: "We are all of opinion that the plea is bad. One objection was, that the plea did not state that the resolution or agreement was carried into effect, and that the creditors were satisfied. Now, the 221st section of the 12 & 13 Vict. c. 106, enacts that the court shall give the petitioner a certificate 'so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof.' I am, therefore, clearly of opinion that the plea ought to have contained an averment that the resolution or agreement had been carried into effect, and that the creditors had been satisfied according to the tenor thereof. It was also urged that the plea was bad inasmuch as it did not allege that notice of the first sitting was given to the plaintiff. On that point, it is unnecessary to express an opinion, as the plea is bad on the ground already mentioned: but I must observe, that, in the clauses with respect to arrangements by

deed, there is an express provision that the arrangement shall not be obligatory on creditors until after notice." The case afterwards came before the court of error, who affirmed the judgment of the court below, without, however, expressing any opinion upon the point now under consideration,—their judgment being confined to the point of notice. Here, the plea contains no direct allegation that the agreement or reso-**[208]**-lution had been carried into effect and the creditors satisfied; but there is a general allegation that all things had been done and happened to make the certificate valid and effectual to discharge the defendant from his debts owing at the time of filing his said petition. That is met by the replication, which traverses that the agreement, —which was, to pay 5s. in the pound,—had been carried into effect and the plaintiff satisfied. The rejoinder alleges a tender and refusal of the composition, and that the defendant was always ready and willing to pay. Then comes a surrejoinder, that, after the alleged tender, and before action, the plaintiff demanded, and the defendant refused to pay the 5s. in the pound; to which there is a rebutter, that the demand was made after the grant of the certificate. That raises the question whether a mere tender, without more, amounts to satisfaction, so as to give the court of bankruptcy jurisdiction to grant the certificate. The statute says, in s. 221, that, "so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied, according to the tenor thereof," the certificate shall be granted. It does not say that the certificate may be granted if the trader has performed the agreement cy pres, or to the satisfaction of the court. [Cockburn, C. J. Is the arrangement to be defeated because one creditor obstinately refuses to receive the composition?] The question is whether the condition has been performed. [Cresswell, J. All that was obligatory on the petitioning trader was, to pay the composition agreed on. Had he not performed that when the certificate was granted?] No. The creditor must be satisfied. [Crowder, J. In the ordinary way, by payment, or by tender, which is equivalent.] A mere tender clearly would be no satisfaction: the debtor must at least be always ready and willing to pay. Nothing short of actual payment of a **[209]** composition will discharge the debt: *Cooper* v. *Phillips*, 1 C. M. & R. 649. [Cockburn, C. J. That is because, in the ordinary case of a composition, nobody is empowered to step in and say that the debt is satisfied. But here, the legislature has said that the debt is gone so soon as the certificate is given.] Only provided the certificate is given in accordance with the provisions of the act. [Willes, J. In the case of a tender of amends for a thing done under colour or in pursuance of an act of parliament, the defendant may plead the tender without bringing the money into court.] That is not the case of a debt, but damages. [Willes, J. The party would be a creditor in either case,—in the one for liquidated, in the other for unliquidated damages.] The words of the act here are express: the debt must be satisfied by actual payment of the composition, or, at all events, the debtor must be ready at all times to pay it.

Cleasby, contrà, was not called upon (*a*).

COCKBURN, C. J. The 221st section of the 12 & 13 Vict. c. 106, in substance, enacts, that, so soon as the resolution or agreement mentioned in the preceding sections of this branch of the statute shall have been carried into effect, and the

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(*a*) The points marked for agreement on the part of the defendant, were,—

"1. That, at the time of the granting of the certificate, the defendant had done all he could do in order to carry the agreement into effect, so that, so far as he was concerned, he had carried it into effect:

"2. That it is not necessary, in order to entitle the debtor to the certificate, that every creditor should accept the composition; otherwise, any one creditor might deprive the debtor of the benefit of the act of parliament:

"3. That, the certificate legally given, the debt was as completely barred as if the plaintiff had accepted the composition; and that the only remedy for the plaintiff afterwards was upon the agreement of composition:

"4. That the demand of the composition, being made after the certificate, was too late to prevent the certificate from being effectual: if made before, it would have negatived the performance of the agreement on the part of the defendant:

"5. That, the debt being discharged, the defendant could not properly pay money into court: and the validity of the defence could not be affected by the payment of the composition into the court of bankruptcy."

creditors of the said petitioning trader shall have been satisfied according to the tenor [210] thereof, the court of bankruptcy shall give to such petitioner a certificate under the hand and seal of the commissioner, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and that such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy,—that is, shall enure as an absolute discharge of the debtor from all debts due to "persons who were creditors at the date of his petition, and who had notice of the several sittings of the court:" s. 216. If a man, not being one of the three fifths in number and value of the creditors attending and signing the agreement, by obstinately refusing to accept the composition, should have it in his power to render the certificate of no effect, the whole proceeding under the statute would be ridiculous. We cannot put a construction upon the statute which would lead to consequences so absurd. I am clearly of opinion that the certificate in this case was rightly given, and that it operates a complete discharge of the debtor from the debt.

CRESSWELL, J. I also think this debt was extinguished by the certificate. If it were not so, the conse-[211]-quence would be, that one obstinate creditor would, by refusing to receive the composition, have it in his power to obstruct the operation of these very beneficial provisions of the statute.

The rest of the court concurring,

Judgment for the defendant.

SHEEHY *v.* THE PROFESSIONAL LIFE-ASSURANCE COMPANY. 1857.

[Affirmed in Exchequer Chamber, 3 C. B. N. S. 597.]

A writ of summons issued out of the court of Queen's Bench in Ireland, after the passing of the 13 & 14 Vict. c. 18, against an incorporated joint-stock company duly registered in London, and also carrying on business by one R. an agent in Dublin, was, by leave of the court, pursuant to the practice of the court under the 43 G. 3, c. 53, s. 8, and 13 & 14 Vict. c. 18, s. 9,—served by delivering a copy (with a copy of the order) personally to the Dublin agent, R., and by sending similar copies through the general post office directed to the manager, secretary, and actuary at the company's office in London. An appearance was afterwards entered for the company by the plaintiff, and judgment signed:—Held, that the judgment so obtained was capable of being enforced by action in the superior courts of England.—In such an action, a plea merely alleging the absence of personal service of any writ or process, is bad.—Whether the 9th section of the 13 & 14 Vict. c. 18, per se gave the Irish court power to order substituted service in such a case,—quære? But, at all events, there is nothing in that act to take away the jurisdiction which they previously had under the 43 G. 3, c. 53.—An action will not lie upon an interlocutory and collateral order for costs: the mode of enforcing them is by attachment in the court by which the order is made.

This was an action upon a judgment obtained in the court of Queen's Bench in Ireland.

The first count of the declaration stated, that, on the 16th of February, 1852, the plaintiff, in the court of Queen's Bench in Ireland, recovered against the defendants the sum of 768*l.* adjudged to be due from them to the plaintiff, and also 27*l.* 13*s.* 11*d.* for damages for the detention thereof, also for his costs and charges in his suit in that behalf expended, whereof the defendants were convicted, as by the record and proceedings thereof remaining in the said court appeared, the same being unreversed and unsatisfied and in full force: whereby the plaintiff claimed the sum of 795*l.* 13*s.* 11*d.*

[212] The second count stated, that, on the 21st of February, 1852, the court of Queen's Bench in Ireland, by a certain order and decree then by them duly made, did further award and adjudge unto the plaintiff, in a certain proceeding then taken by the defendants before the said court, and in the said suit, upon the said judgment, the sum of 12*l.* 6*s.* 1*d.*, to be paid by the defendants to the plaintiff for his costs and charges by him in such suit in that behalf further expended, as by the said order and decree more fully appeared, and which remained unreversed and unsatisfied and in full

force, and of which the defendants had due notice; and whereby the plaintiff claimed the sum of 12l. 6s. 1d.

The declaration also contained a count for interest.

The defendants pleaded,—first, to the whole declaration, never indebted.

Secondly, to the first count, that the defendants were not at any time served with any summons or process issuing out of the said court of Queen's Bench in Ireland, at the suit of the plaintiff in the action upon which the said judgment in that count mentioned was obtained, and that the plaintiff irregularly, behind the back of the defendants, caused an appearance to be entered for the defendants in the said action, and thereby obtained the said judgment thereon, when the defendants were not within the jurisdiction of the said court, and had not been served with any summons or other process to appear to the said action in which the said judgment was so obtained as aforesaid.

The plaintiff joined issue on the first plea, and replied to the second, that the said action in which the said judgment and decree were respectively obtained, was commenced in the said court, the said court being one of the superior courts of common law in Ireland, after the making and coming into force of a certain act of parliament, &c. (13 & 14 Vict. c. 18), intituled An act for the **[213]** regulation of process and practice in the superior courts of common law in Ireland, and that the said action was duly commenced by writ of summons, and in every respect according to the said statute; and that, after the issuing of the said writ, and whilst it was in force, it was duly made to appear by affidavit to the satisfaction of the said court wherein the said judgment was obtained, that the defendants had not been personally served with the writ of summons issued in the said action, but that the defendants then resided out of the jurisdiction of the court, and could be properly served through or upon a certain agent or representative of the defendants within such jurisdiction; and thereupon the said court, to wit, on the 16th of January, 1852, did order that the writ of summons in the said action should be served by delivering the same, together with a true copy of the said order, unto, and by leaving the same with, one James Wilson Ramsay, therein described as agent in Dublin of the said defendants, and also by delivering true copies of the said order and said writ in a letter and through the general post office, directed to the London agent of the defendants; and that the plaintiff thereupon in all things complied with the said order, and effected service of the said writ as thereby directed, and afterwards, on the day and year aforesaid, upon due proof of such substituted service as aforesaid by affidavit, the plaintiff, in pursuance of such order, in default of appearance by such defendants in due time, entered an appearance for the said defendants under and by virtue of the said statute, and proceeded thereon in the said action as if the defendants had entered their appearance: that afterwards, on the 4th of February, 1852, the plaintiff filed his declaration in such action, and thereupon afterwards, on the day and year in the declaration mentioned in that behalf, in default of plea, the said judgment was obtained as therein alleged; that **[214]** afterwards an application was made on behalf of the defendants, by attorney and counsel, in the said court, and the said court was then on behalf of the defendants moved to set aside the said appearance and declaration filed in the said action, and all subsequent proceedings thereon; and that, on hearing the said motion, and counsel on behalf of the plaintiff and defendants, it was ordered by the said court that the said motion should be and the same then was refused.

Rejoinder to the replication to the second plea,—that the defendants are, and were at the time of the commencement of the said action in the said court in Ireland, a corporation aggregate within the true intent and meaning of the said statute in the replication mentioned, and that they had not before or at the time of the commencement of the said action any clerk, treasurer, or secretary within the jurisdiction of the said court, nor any known or responsible officer or agent, or any agent, representative, or manager of their real or personal estate within the jurisdiction of the said court, and that they the said defendants could not have been, and were not, properly served with the said writ of summons through or upon any agent or representative of the defendants within the jurisdiction of the said court; and that the plaintiff caused and procured the said order to be made for service of the said writ of summons on the said James Wilson Ramsay, by falsely representing to the said court that the said James Wilson Ramsay was the agent of the defendants within the meaning of the said statute, whereas in truth and in fact he was not such agent.

Surrejoinder,—that the said company, the defendants, had at the time of the commencement of the said action in the said court of Queen's Bench in Ireland, an agent within the jurisdiction of the said court, and that he the plaintiff did not cause or procure the said order [215] of the said court of Queen's Bench in Ireland in the replication and rejoinder mentioned, to be made, by falsely representing that the said James Wilson Ramsay was the agent of the defendants within the meaning of the said statute, because he the plaintiff said, that, at the time of suing out and serving of the said writ of summons in the said action as in the replication mentioned, the said James Wilson Ramsay was an agent of the defendants within the jurisdiction of the said court, that is to say, in the city of Dublin: that the affidavit by which it was made to appear to the satisfaction of the said court that the defendants could be properly served with the said writ through or upon an agent of the defendants within the jurisdiction of the said court, was an affidavit of one Bernard Egan, duly made and sworn in the said court in the said action, and duly filed in the said court on the 15th of January, 1852, in which the said writ was set forth and recited, and it was sworn and represented to the court that he the said Bernard Egan had on the day and year aforesaid served the Professional Life-Assurance Company (meaning the defendants, being such incorporated company as in the rejoinder mentioned,) with the original writ of summons in the said action, by delivering unto and leaving with the said James Wilson Ramsay, the agent for the said company in the city of Dublin, in person, at his office, No. 103 Abbey Street, in the said city of Dublin, a true copy of the said original writ, and that he the said Bernard Egan had desired him to send the said copy so served to the office of the said company in London, and that he the said Bernard Egan at the same time shewed him the said James Wilson Ramsay the said original writ of summons, and told him the true intent, nature, and meaning thereof: that, the said affidavit, being so sworn, and filed in the said court, was afterwards, on the 16th of January, 1852, read to the said court by [216] counsel on behalf of the plaintiff in the said action, and that afterwards, on the said day and year, the said court, on hearing such affidavit read, did make such order as in the replication in that behalf alleged, and which said order was in the terms following, that is to say,—"On motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, it is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin agent, and also by inclosing similar copies in a letter through the general post office directed to the London agent, be deemed good service of the said writ upon the said company: that the said James Wilson Ramsay in the said order mentioned was and is the said James Wilson Ramsay in the said replication and rejoinder respectively referred to, and thereinbefore and in the said affidavit also referred to: and that the plaintiff no otherwise caused and procured the said order to be made than as aforesaid, and that he made or caused to be made no false representation to the said court, as in the rejoinder alleged, nor, save as aforesaid, any representation whatever in that behalf; and that the contents of the said affidavit in that behalf were in fact true.

The defendants joined issue on the surrejoinder, and demurred thereto; and the paintiff joined in demurrer.

The demurrer was argued in Trinity Term, 1853, when judgment was given for the plaintiff, on the ground that the second plea was bad: see 13 C. B. 787.

At the trial of the issues of fact, a special verdict was found, which was in substance as follows:—

As to the first issue joined on the first count of the declaration, it was found, that, before and at the time of the suing out of the writ of summons in the said action, and until the recovery of the said judgment in [217] the court of Queen's Bench in Ireland in the said count mentioned, the defendants were a joint stock company duly registered in London according to the statute, as "The Professional Life Assurance Company," and carried on business as such life-assurance company in London, one Edward Baylis then being the manager, secretary, and actuary of the said company in London; and that the said company also carried on such business in Dublin by one James Wilson Ramsay, their agent in that behalf, the said James Wilson Ramsay being employed by the defendants to obtain insurances for the said company, and having been appointed by and acting under a letter addressed to him by the said Edward Baylis on behalf of

the said company, which letter was written on the 12th of February, 1850, and was in the words and figures following:—

"Professional Life-Assurance Company.

"Offices, 76 Cheapside, London,
"12th February, 1850.

"Sir,—I have the pleasure to inform you, that, upon the recommendation of your father, conjointly with the numerous testimonials of your highly respectable friends in evidence of your qualifications and eligibility, you have been appointed agent for Dublin, in connection with James Wilson Ramsay, Esq.

"The advantages and support offered by this corporation to the exertions of an agent, are of a very encouraging character. The institution possesses popular features exclusively peculiar to itself; and the directors allow a commission more than usually liberal; added to which, the operations of an agent are deemed co-extensive with his influence, that is to say, he is not confined by place or space as to agency, but is entitled to the full benefit of commission arising from every description of business introduced by him to the office, in whatever town or [218] county parties having transactions with the company through him may be resident.

"The commission allowed is, 10 per cent. on the amount of the first year's premiums, 7½ per cent. on the amount of the second year's premiums, 5 per cent. on the amount of all future renewal premiums, or 20 per cent. in one payment in lieu of the above; also 2 per cent. on the amount of the purchase-money of immediate annuities; and 1s. per share for every share disposed of.

"I am desired by the directors to remind you, that, in undertakings of this kind, which are considered by capitalists the best of investments, it is the usual practice to absorb the whole of the shares in a London proprietary, leaving none for the creation and advantage of a provincial influence. The contrary is the course pursued by this company, which, as you will perceive by a perusal of a printed list of shareholders, has already obtained a sufficient guarantee for all the purposes and contingencies of a properly managed life-assurance company.

"The directors are, therefore, desirous, and resolved, through the medium, and with the support, of their numerous agents and medical referees, to extend their proprietary among every class, through every town and city in the United Kingdom, by an allotment of a few shares to each individual whom they may have it in their power and be disposed to recommend; while it will at the same time occur to you that that agency cannot fail to be most prosperous which contains the greatest number of shareholders.

"The deposit is 10s. per share, without the probability of a further call being made or required; and the liability of the shareholders is by the deed of settlement limited to their several amount of shares, while the advantages and privileges to the original proprietors, as [219] stated in full in the prospectus, are of a truly comprehensive and beneficial character.

"In reference to the shares, you will be pleased to notice the following particulars:—1. The entire capital of the company is 250,000l., arising from 40,000 shares of 6l. 5s. each, the greater part of which have been actually sold and signed for,—2. The original deposit is 10s. per share; the remaining 5l. 15s. will be made up by the additions accruing from profits and bonuses,—3. By the deed of settlement, no proprietor is liable beyond the amount of his shares,—4. The holder of five shares, up to fifty, is entitled to one vote, and to an additional vote for every additional fifty shares held by him,—5. Interest is paid at the rate of 5 per cent. per annum on all paid up capital; such interest increasing year by year as the shares increase in value by the appropriation of profits; so that very considerable interest will be realized, until the amount of profits shall be sufficient to pay off the shares in full; after which, the corporation will be declared and constituted a mutual life assurance society,—Lastly. In addition to these advantages, there is one novel and most excellent feature, worthy of special attention, viz. that one tenth of the entire profits of the company is set aside as an annuity fund.

"You will receive herewith powers of attorney to be filled up by parties taking shares, and authorising any friend in town, or myself, to sign the deed of settlement on their behalf.

"You will also please to remember the shares constituting the proprietary and securing their influence, or in order to obtain life policies, annuities, endowments, and other business from which the profits are to be derived, and which you will therefore make it your constant endeavour to obtain.

"Anticipating the best results from your valuable co-operation in behalf of the institution, and soliciting your [220] earnest perusal and due appreciation of the above important details.—I am, &c. "EDWARD BAYLIS,

"Resident manager and actuary."

It was further found, that, after the coming into operation of the 13 & 14 Vict. c. 18, intituled "An act for the regulation of process and practice in the superior courts of Common Law in Ireland," and while the defendants so carried on business as aforesaid in Dublin by the said James Wilson Ramsay hereinbefore first mentioned, as such agent in their behalf as aforesaid, on the 15th of January, 1852, the plaintiff sued out the writ of summons in the said action in the said court of Queen's Bench, in Ireland, against the defendants, which writ was in the words and figures following, that is to say (setting it out): and that on the 15th of January, 1852, one Bernard Egan served a copy of the said writ of summons on the said James Wilson Ramsay, by delivering to him such copy in Dublin aforesaid, explaining to him the nature and effect thereof; and which is the service of the said writ mentioned in the affidavit of Bernard Egan hereinafter next mentioned: That no notice of the issuing of the said writ was ever given in the *Dublin Gazette*, and no notice thereof was ever given in one or any of the local newspapers of the county, city, or district in which the defendants resided, or the officer or agent to be served resided: That, on the said 15th of January, 1852, the said Bernard Egan duly made and swore in the said action in the said court of Queen's Bench, in Ireland, an affidavit in the words and figures following, that is to say—"In the court of Queen's Bench. William Sheehy, plaintiff, the Professional Life-Assurance Company, defendants: Whereas there issued forth of Her Majesty's superior courts of common law at Dublin, and under the common seal thereof, Her Majesty's writ of summons in this cause, bearing teste the [221] 15th day of January, 1852, whereby the said defendants were ordered, that, within eight days after the service of the said writ on them, exclusive of the day of such service, they should cause an appearance to be entered for them in Her Majesty's court of Queen's Bench at Dublin, in an action of debt at the suit of the said plaintiff; and notice was also thereby given, that, in default of their so doing, an appearance might be entered by the said plaintiff, and that the said plaintiff might proceed thereon to judgment and execution, as by the said writ of summons hereunto annexed, reference being thereunto had, will appear. Issued by John Synan, No. 5 Upper Gloucester Street, in the city of Dublin, attorney for the said plaintiff. Now, Bernard Egan, of Little Strand Street, in the city of Dublin, law messenger, aged thirty years and upwards, maketh oath, and saith, that, on this Thursday, the 15th day of January, he this deponent served the Professional Life-Assurance Company of London with the original writ of summons above in part recited, by delivering unto and leaving with James Wilson Ramsay, who is agent for the said Professional Assurance Company, in Dublin, in person, at his office, No. 103 Abbey Street, in the city of Dublin, a true copy of said original writ of summons hereinbefore in part recited, and desired him to give said copy so served to the said company's officer in London, and at the same time shewed him the said original writ of summons, and told him the true intent, nature, and meaning thereof. Bernard Egan. Sworn before me, at my office on the Inns Quay, Dublin, this 15th day of January, 1852; and I know the deponent. Thomas Byron. John Synan, plaintiff's attorney."

It was further found, that, on the 16th of January, 1852, the said court of Queen's Bench in Ireland, having heard the said affidavit read, did thereupon make in the said action a certain order, in the words and figures following, that is to say, —*William Sheehy* v. *The Pro*-[222]*fessional Assurance Company of London.* Friday, 16th January, 1852. On the motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, it is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin agent, and also by inclosing similar copies in a letter through the general post office, directed to the London agent, be deemed good service of the said writ

upon the said company. By the court. Christopher N. Duff. John Synan, attorney."

It was further proved, that, on the 19th day of January, 1852, the said Bernard Egan delivered to and left with the said James Wilson Ramsay, at his office in Dublin, a paper purporting to be a copy of the said writ of summons, and which was the service of the said writ of summons in the affidavit of Bernard Egan hereinafter next mentioned, which paper was in the words and figures following (setting it out,—the defendants being mis-described, as in the order), and also a copy of the said order of the said court; and also on the same day forwarded true copies of the said writ of summons and order respectively through the general post office, Dublin, inclosed in a letter addressed to the said Edward Baylis, then being manager, secretary, and actuary of the said company as aforesaid, at the company's office in London.

It was further found, that, on the 29th January, 1852, the said Barnard Egan duly made and swore in the said action in the said court of Queen's Bench in Ireland, an affidavit, in the words and figures following, that is to say,—"Queen's Bench. William Sheehy, plaintiff, the Professional Assurance Company, defendants: Whereas, there issued forth of her Majesty's superior courts of common law in Ireland, and under the seal thereof, Her Majesty's writ of summons in this **[223]** cause, bearing date the 15th day of January, 1852, whereby the defendants were commanded, that, within eight days after the service of such writ, they should cause an appearance to be entered for them in Her Majesty's court of Queen's Bench at Dublin, in an action of debt, or, in default thereof, the said plaintiff might enter an appearance, and proceed thereon to judgment and execution, as by the said writ, now of record in the said court, will appear. *William Sheehy* v. *The Professional Assurance Company of London.* Friday, 16th January, 1852. On motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, It is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin agent, and also by inclosing similar copies in a letter through the general post office directed to the London agent, be deemed good service of the said writ upon the said company. By the court. Christr. N. Duff. John Synan, attorney, Queen's Bench. Now, Bernard Egan, of Little Strand Street, in the city of Dublin, law messenger, aged thirty years and upwards, maketh oath and saith, that, on the 19th day of January instant, deponent served said Professional Assurance Company with said recited writ of summons and order, by delivering unto and leaving with James Wilson Ramsay, the Dublin agent of the said company, in his office Abbey Street, in the city of Dublin, true copies of said writ of summons and order respectively, and on the same day, and before six o'clock in the evening, deponent forwarded true copies of said writ of summons and order respectively, through the general post office, Dublin, inclosed in a letter directed to E. Baylis, the London agent of the said company, at the company's offices, 76 Cheapside, London, and deponent paid the postage thereon, **[224]** Barnard Egan. Sworn before me at my office on the Queen's Quay, Dublin, this 29th day of January, 1852; and I know the deponent. Thomas Byron. John Synan, attorney."

It was further found, that, on the said 29th of January, 1852, the time limited by the process having elapsed, and no appearance having been entered by the said defendants in the said action in the said court of Queen's Bench in Ireland, and according to the course and practice of the said court in that behalf, the said court of Queen's Bench in Ireland, on reading of the said affidavit, and a certificate of the proper officer of the said court in this behalf that (as the fact was) no appearance had been entered by the said defendants in the said action in the said court of Queen's Bench in Ireland, according to the course and practice of the said court, then duly made an order in the said action in the words and figures following, that is to say,—*Sheehy* v. *The Professional Life-Assurance Company.* Thursday, 29th January, 1852. On motion of Mr. Synan, plaintiff's counsel, and on reading the affidavit of service of process, and certificate of no appearance, It was ordered that the plaintiff be at liberty to enter an appearance for the defendants pursuant to the statute. By the court. Christr. N. Duff."

It was further found, that, on the 4th of February, 1852, the plaintiff duly, and according to the course and practice of the said court, filed a declaration in the said action in the said court of Queen's Bench in Ireland, and thereupon gave due notice

therewith, that, if the defendants did not plead thereto within and according to the time limited by the course and practice of the said court in that behalf, the plaintiff would sign judgment therein; and that, on the 16th of February, 1852, the plaintiff, in pursuance of the last-mentioned order, signed judgment in the said action in the said court, which said judgment was and is the judgment in the first count [225] mentioned, and which judgment is in the words following, that is to say,—"Pleas before the Lady the Queen, at the Queen's courts, of Hilary Term, in the 15th year in the reign of our sovereign Lady, Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth. Witness, Francis Blackburne, Esq. A. Bushe. William Sheehy, of Broad-street, in the city of Limerick, grocer, plaintiff, the Professional Life-Assurance Company, of London, offices, 76 Cheapside, London, defendants. County of the city of Limerick, to wit. William Sheehy, the plaintiff, by John Synan, his attorney, issued his writ of summons directed to the Professional Life-Assurance Company, of London, offices, 76 Cheapside, London, the defendants, and which was served on the said defendants pursuant to an order of this honourable court bearing date the 16th of January, 1852, by delivering a true copy of the said writ of summons, together with a true copy of the said recited order, unto, and by leaving the same with, James W. Ramsay, the Dublin agent of the said defendants, and also by delivering true copies of said recited writ of summons, and also of said recited order, in a letter in and through the general post office, directed to the London agent of said defendants; and an appearance was entered for the said defendants, pursuant to the statute, by the plaintiff's attorney; and the said plaintiff, on the 4th of February, 1852, filed his declaration in debt against the said defendants, for the recovery of the amount of a policy of assurance effected on the life of Michael Meade, therein mentioned, and on foot of which there is now due the sum of 768l., as appears by the affidavit of Michael Maroney, this day filed in the proper office; and, the defendants not having pleaded, the plaintiff prays judgment: It is therefore considered by the court of our Lady the Queen here, that the said plaintiff do recover against the said defendants [226] his debt aforesaid, as also the sum 27l. 13s. 11d. sterling for his damages which he sustained, as well by reason of the detention of said debt, as for his expenses and costs by him laid out about his suit in this behalf, to the said plaintiff by the court of our said Lady the Queen now here with his assent adjudged: and the said defendants in mercy, and so forth. Mercy. Judgment entered the 16th of February, 1852."

It was further found, that, afterwards, on the 21st of February, 1852, the defendants by their counsel and attornies, applied to a judge of the said court of Queen's Bench in Ireland, to discharge the appearance so entered by the plaintiff in the said action in the said court, and the declaration filed thereon; and the said judge, after hearing counsel for the parties in the said action, made an order in the words and figures following, that is to say,—Queen's Bench Chambers, 21st February, 1852. *William Sheehy* v. *The Professional Assurance Company of London.* On motion of Mr. M'Donagh of counsel for defendants, who moves that the parliamentary appearance, and declaration filed thereon, and all subsequent proceedings in this cause, be set aside, on the grounds that no sufficient or any notice of the issuing of the writ in this cause has been given in the *Dublin Gazette*, and in any one of the local newspapers of the county, city, or district in which the agent of the said defendants resides, and no such publication appears by the affidavit of service upon which the parliamentary appearance in this cause was entered, neither is there any affidavit whatever on the files of the court of such publication, and because such publication was a condition precedent on the ground that the parliamentary appearance was a nullity, or, if not so, was irregular; and, on hearing the notice of motion and documents therein mentioned read, and also on hearing Mr. J. D. Fitzgerald and Mr. Synan, of counsel for plaintiff, and Mr. Malley, of counsel for [227] defendant,—By the Right Honourable the Lord Chief Justice of the Common Pleas, It was ordered that defendants' motion be, and the same was thereby refused, with costs, Christr. N. Duff, clerk of the rules, Queen's Bench, Dublin."

The special verdict then proceeded,—"But whether or not, upon the whole matters aforesaid, by the jurors aforesaid in form aforesaid found, the defendants were indebted as alleged by the said first count, the jurors are altogether ignorant, and therefore they pray the advice of the court of our said Lady the Queen of the Bench at Westminster; and if, upon the whole matter aforesaid, it shall seem to the said court that the

defendants were indebted as alleged by the said count, then the jurors aforesaid, on their oath aforesaid, say that the defendants were indebted as alleged in the said count: but, if, upon the whole matter aforesaid, it shall seem to the court that the defendants were not indebted as alleged in the said count, then the jurors aforesaid, upon their oath aforesaid, say that the defendants were not indebted as alleged in the said count."

As to the issue joined on the second count, the special verdict found, that, on the 21st of February, 1852, the order of the said court of Queen's Bench in Ireland in the said second count mentioned was made in the terms following, that is to say,—(setting it out, ut ante, p. 226); and that afterwards, to wit, on the day and year aforesaid, the costs of the said motion, pursuant to the said order, were duly taxed to the sum of 12l. 6s. 1d. "But, whether or not," &c., &c. (as before, mutatis mutandis).

As to the issue joined on the third count, the special verdict found that the defendants were not indebted as alleged.

As to the issue joined on the surrejoinder to the rejoinder to the replication to the second plea to the first count, the special verdict found, that, after the coming [228] into operation of the 13 & 14 Vict. c. 18, intituled, &c., at the time of the suing out of the writ of summons in the said action in the said count mentioned in the court of Queen's Bench in Ireland, the defendants, and thence until the recovery of the said judgment in the said first count mentioned, carried on business in London as such life-assurance company, the said Edward Baylis then being the manager, secretary, and actuary of the said company in London as aforesaid, and also carried on business in Dublin as such life-assurance company, by the said James Wilson Ramsay, their agent in Dublin in that behalf, the said James Wilson Ramsay being employed by the defendants to obtain insurances for the said company, and having been appointed by and acting under the said letter hereinbefore mentioned to have been written to him on the 12th of February, 1850: and the defendants so carried on business until the recovery of the judgment in the said count mentioned: That, on the 15th of January, 1852, the plaintiff sued out of the said court of Queen's Bench in Ireland the writ of summons in the said action in the said count mentioned, against the said defendants, which writ was in the words and figures following, that is to say (setting it out): That, on the said 15th of January, 1852, one Bernard Egan, in the said surrejoinder mentioned, served a copy of the said writ on the said James Wilson Ramsay, in Dublin aforesaid, by delivering to him such copy, and shewed him the said writ, and told him the intent, nature, and purport thereof: That, on the said 15th of January, 1852, the said Bernard Egan duly made and swore in the said court of Queen's Bench in Ireland, an affidavit in the said action in the said count mentioned, which affidavit was duly filed in the said court, and was and is in the words and figures following, that is to say (setting it out): That, on the 16th of January, 1852, the said court of Queen's Bench in Ireland, having heard the said affi-[229]-davit read to them, did thereupon duly make an order in the said action, which order was and is in the words and figures following, that is to say (setting it out): But that, whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said surrejoinder is in substance true, the jurors aforesaid are altogether ignorant; therefore they pray the advice of the court of our lady the Queen of the Bench at Westminster aforesaid; and if, upon the whole matter aforesaid, it shall seem to the court that the said surrejoinder is in substance true, then the jurors aforesaid, on their oath aforesaid, say that the said surrejoinder is in substance true: but if, on the whole matter aforesaid, it shall seem to the said court that the said surrejoinder is not true in manner and form as alleged, then the said jurors, on their oath aforesaid, say that the said surrejoinder is not true in substance as alleged.

Shee, Serjt. (with whom was Huddlestone), for the plaintiff (*a*). The first question

(*a*) The points marked for argument on the part of the plaintiff, were,—

"1. Judgment valid at common law by reason of service of process on the defendants at their office by post, which was only irregular at common law.

"2. Judgment valid by statute, because of service on 'an agent' of the defendants in Dublin; whether he was so within the strict meaning of the statute, was to be, and has been, decided by the courts in Ireland, on affidavits on both sides.

"3. And, at the utmost, there was only an irregularity, which cannot vitiate the judgment."

is, whether the writ of summons in the action in which the judgment mentioned in the first count was obtained in the Irish court, was well served, by leaving a copy with Ramsay, the company's Dublin agent, and sending another copy by post addressed to Baylis, the manager, secretary, and **[230]** actuary in London: and this question turns mainly upon the construction which is to be put upon the 9th section of the 13 & 14 Vict. c. 18, an act for the regulation of process and practice in the superior courts of common law in Ireland. Before the passing of that act, the practice of the Irish courts in this respect was regulated by the 43 G. 3, c. 53, the 8th section of which provides, "that, whenever it appears to the court out of which the process issues, that all due diligence has been used to have the process of the court personally served, yet that, under the special circumstances of the case, appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to procure personal service, that then and in such case it shall and may be lawful for the court out of which the process issues to substitute such other kind of service as to them shall seem fit." Under that statute, the practice had been, to allow service upon an agent, in the case of companies carrying on their principal business out of the jurisdiction, but having an office or an agent within the jurisdiction. In *Sadler* v. *Smithwick*, 1 Crawf. & Dix, 397, Pennefather, B., upon an application for substituted service of a capias ad respondendum on an individual who had recently gone to America for the purpose of avoiding his creditors, said: "The jurisdiction of this court (the court of Exchequer) extends only to persons living in Ireland. Where persons reside within the jurisdiction, we are enabled to substitute service when they conceal themselves or keep out of the way to avoid being served. In the case of insurance companies having offices in this country, we have allowed service to be substituted, considering the office where the insurances were effected to be the residence of the defendants, and they to be within the jurisdiction. The court of Common Pleas thought that this court had **[231]** gone too far in the cases of actions brought against insurance companies having offices here: but, with great deference for their opinion, I think we were right. But we cannot go any further." The subject came again under discussion in two subsequent cases,—*Maloney* v. *Tullock*, 1 Jones (Irish Exch.) 114, and *Phelan* v. *Johnson*, 7 Irish Law Rep. 527. In *Maloney* v. *Tullock*, upon a motion to make absolute a conditional order to substitute service of a capias ad respondendum upon the agent with whom an insurance had been negotiated, and upon the law agent of the company, both of whom were resident in Ireland, the same learned judge said: "If this was res integra, I should not decide it, sitting alone: but this court, after full consideration of all the cases, came to a very clear opinion that such an application as the present ought to be granted, and that the holding open an office in this country by an insurance company, where in point of fact the contract is made, though the instrument may be fully completed in London, is an undertaking on the part of the company that their office is to be considered their residence, not only for the purpose of receiving the premiums, but also of enforcing the contract. On these grounds, the court substituted the service, considering that the company had adopted this country, not only as the place for entering into the contract, but also for the purposes of trial. We remain of that opinion; and therefore I have no hesitation in following the practice of the court, and substituting the service in the present instance." In *Phelan* v. *Johnson*, the subject is very fully gone into by Chief Baron Brady, who says: "The acts relating to the service of mesne process in England are, the 12 G. 1, c. 29, and the 5 G. 2, c. 27. No powers are given by those statutes to substitute the service of process; in other respects they are analogous to the 43 G. 3, c. 53, but the first of them contains very remarkable words. **[232]** It provides, that, in all cases where the cause of action shall not amount to the sum of 10*l.* or upwards, and the plaintiff shall proceed by way of process against the person, he shall not arrest the defendant, but shall serve him personally, within the jurisdiction of the court, with a copy of the process. So that, in that act, there is no power to substitute service; and it is expressly required that the service be made within the jurisdiction. That being the condition of the law in England, the 43 G. 3, c. 53, is now to be considered. It is analogous to the 12 G. 1, and the 5 G. 2, so far as those acts prohibit arrest for sums under a specified amount, and in the mode of enforcing appearances. The 3rd section of the 43 G. 3, c. 53, is that which corresponds with the 2nd section of the 12 G. 1, c. 29; but it omits those remarkable words, 'within the jurisdiction of the court.' And that appears to have

been done studiously. It is an omission deserving of great observation, and calculated to raise serious questions as to what were the purposes of the legislature in passing the 43 G. 3. Consequent on that omission, there is in the 43 G. 3, a special provision which exists in none of the English acts, viz. the 8th section, which authorises the court to substitute service of the process. I apprehend, that, for the last forty years, —I may say, from the passing of that act,—there has been a current of decision, in this court (Exchequer) at least, which I conceive has put this construction upon this act of parliament, that it warrants the substitution of service upon a party not bodily present in this country. In cases of actions upon policies of insurance, service of process has been from time to time substituted upon persons acting as agents of the insurance company and making this contract for them: and that course of practice, hitherto undisturbed by any authority or legal proceeding, has continued; establishing the existence of a power in the court to act in substituting **[233]** service of process upon persons not bodily present within the jurisdiction. So that it occurs to me, that, taking the course and practice of this court as one so long established, it really comes to no more than a question of discretion how far the court will exercise the power given to it by the act; and I think it has not unwisely considered that it had this power, having regard to the omission of those remarkable words in the 43 G. 3, and the introduction of the clause authorising the substitution of service into it." Such was the state of the law when the statute 13 & 14 Vict. c. 18, passed. The 1st section of that act enacts that the process for commencement of personal actions shall be according to a given form, and be called a writ of summons. Section 2 enacts that such writ shall be served personally within the jurisdiction of the court. Section 7 enacts, that, in default of appearance by the defendant on personal service, the plaintiff may enter an appearance for him. The 8th section enacts "that every such writ of summons issued against a corporation aggregate may be served personally upon the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a barony, half-barony, or other like district, may be served personally on the acting high constable thereof, or any one of the acting high constables thereof; and every such writ issued against the inhabitants of any county or any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a barony or other like district, may be served personally on some peace-officer or other known and responsible officer thereof; and every such writ issued against any other incorporated body having a known and responsible officer or agent, may be served personally on such agent; and, if any such defendants shall not appear according to the exigency of such writ **[234]** in due time after such service thereof as herein authorised, in such case, upon affidavit made as hereinbefore provided of such personal service of such writ, and of the publication of the notice hereinafter provided, it shall and may be lawful for the plaintiff to enter an appearance for such defendants, and to proceed thereon as if such defendants had entered their appearance, any law or usage to the contrary notwithstanding: provided always, that, in all such cases, a sufficient notice of the issuing of the writ shall be given in the *Dublin Gazette*, and in one of the local newspapers of the county, city, or district in which the defendant or defendants, or the officer or agent to be served, shall reside; the days for appearance to run in such cases from the day of the publication of such notice in *Gazette* or newspaper, whichever shall be the latest." And the 9th section enacts, "that, in case it shall be made appear by affidavit to the satisfaction of the court in which the appearance to the process should be made, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorise such substitution of service, through the post-office, or in such manner, and with such extension of time for service and appearance, as to them or him shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance **[235]** by such defendant in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had entered his, her, or

their appearance, any usage or law to the contrary notwithstanding." The 8th section clearly contemplates a mode of service in which the authority or intervention of the court is not required. The special verdict finds that such service was effected; but no notice was given in the *Gazette* or newspaper. Recourse must, therefore, be had to the 9th section, under the provisions of which the order of the court of Queen's Bench in Ireland was made. The question is, whether the service of the writ of summons under that order was not a good service; and the first point will be whether the word "defendant" in the early part of that section includes an incorporated company, as it clearly does in s. 8. Now, the interpretation clause, s. 51, provides that the words "party and person" shall extend to and include any corporation or other public body; and that any words importing the singular number or the masculine gender only, shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction. [Crowder, J. The 9th section would seem to be a substitution of such service as could be made personally.] In the former report of this case, 13 C. B. 800, Maule, J., says: "Personal service may comprehend a service which the 8th section of the 43 G. 3, c. 53, calls substituted service, viz. a service on the agent or officer of the corporation." [Cockburn, C. J. The 9th section certainly is very curiously worded. If it is to be limited to the case of a party living out of the jurisdiction, why make it a condition to the substituted service by the post that there should be an **[236]** agent who can properly be served within the jurisdiction? What authority has the court of Queen's Bench in Ireland to direct a service upon an agent in London?] Such authority is probably conferred by the 8th section of the 43 G. 3, c. 53, the words of which are very large, and which is not repealed. [Cresswell, J. When the case was before the court on the former occasion, my Brother Maule suggested that this amounted to mere irregularity at the most. The special verdict does not find whether the defendants knew of the issuing of the writ of summons or not.] It is found that they moved to set aside the appearance entered under it. [Cresswell, J. It may have come to their knowledge after the judgment was signed. There are numerous cases to shew that a foreign judgment will not be enforced in our courts, where the party has not been served with process,—proceeding upon the notion that it is contrary to natural justice that a man should be condemned without having had an opportunity of being heard.] It is difficult to conceive that there could be anything contrary to natural justice in a judgment founded upon a service such as that shewn to have been made upon Ramsay. If there were any irregularity in the course pursued in the Irish court, that is not a matter which this court can inquire into.

Then, as to the second count, which seeks to recover the costs awarded to the plaintiff on the dismissal of the motion to set aside the proceedings in the court of Queen's Bench,—it will be said that no action lies for those costs, the order being interlocutory. It is true, that, in general, an action will not lie in our courts to enforce a decree or order of a foreign court which is not in its nature final: *Patrick* v. *Sheddon*, 2 Ellis & B. 14: neither will an action lie upon an interlocutory order of one of our own courts, because there is a more appropriate mode of enforcing it, viz. by attachment, or by **[237]** execution. But, in *Russell* v. *Smyth*, 9 M. & W. 810, it was held that an action of assumpsit or debt might be maintained against a defendant resident in this country, for costs awarded against him, after appearance, by a decree of the court of session in Scotland in a suit for a divorce. Lord Abinger there says: "The action may be sustained on the ground of morality and justice. The maxim of the English law is, to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice. Foreign judgments are enforced in these courts, because the parties liable are bound in duty to satisfy them. The principles relating to this subject are well laid down by Lord Mansfield in his judgment in *Robinson* v. *Bland*, 2 Burr. 1077. Mr. Watson urges that no action for costs has ever been brought on a foreign judgment. I cannot quite assent to that; but, supposing it were so, I must own I should be disposed to set an example of such an action. Suppose litigation arises in France relating to real property, and costs are given against a party who comes to this country: if the English law gives no remedy, the debt would be lost. In such a case, I should be disposed to say that an action for those costs may be maintained in this country."

Bovill, Q. C. (with whom was Byles, Serjt.), contrà (*a*). **[238]** The 43 G. 3, c. 53, has no bearing upon this case. The 13 & 14 Vict. c. 18, relates to a new sort of process, and an entirely new mode of procedure: and, where it was intended to save the provisions of former acts, it is done by express enactment as in s. 4. The former statute is therefore virtually repealed, and is altogether inapplicable. All the provisions of the recent act contemplate personal service of the process, —as in s. 2, which provides that the writ "may be served personally in any place in which the defendant or defendants may be found, within the jurisdiction of the court," and s. 7, which enables the plaintiff to enter an appearance for the defendant in default of appearance on personal service. Then comes section 8, which provides, amongst other things, for the service of process upon incorporated bodies "having a known and responsible officer or agent," by personal service on such officer or agent, and notice in the *Dublin Gazette* and in a local newspaper. The 9th section applies to cases where the defendant cannot be personally served under s. 7, but may be properly served through or upon some agent or representative within the jurisdiction. It has no application at all to section 8: if it had applied to section 8, it would have altogether repealed it. The 8th section precisely applies to this case, assuming Ramsay to have been the agent of the company, which is sufficiently found by the special verdict. There is an incorporated company, and there is an agent residing within the jurisdiction through whom the service can be properly effected, and he has been personally served. The statute (s. 8) requires notice in the *Dublin Gazette* and in a local newspaper. This the special verdict finds has not been given. The 9th section contemplates a case where there can be personal service on the defendant, and not to a case where somebody else is to be served for him: it contemplates the case of a natural person, who may be served, and **[239]** who may reside. [Crowder, J. Suppose there had been no agent in Dublin?] Still, it is submitted, the section would not apply: if there be no agent within the jurisdiction, there can be no reason why a foreign corporation should be sued there. This subject is very elaborately discussed in Story's Conflict of Laws. In § 539, that learned jurist thus lays down the general rule:—"Considered in an inter-national point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory: for, otherwise, there can be no sovereignty exerted, upon the known maxim, Extra territorium jus dicenti impune non paretur: Dig. lib. 2, tit. 1, l. 20. Boullenois (1 Boullenois, Pr. Gen. 1, 2, pp. 2, 3) puts this rule among his general principles. The laws of a sovereign rightfully extend over persons who are domiciled within his territory, and over their property which is there situate. Vattel (b. 2, ch. 8, § 84) lays down the true doctrine in clear terms. 'The sovereignty (says he), united to domain, establishes the jurisdiction of the nation in its territories or the country which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country.' On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals:" *Picquet* v. *Swan*, 5 Mason (American), 35, 42; *Russell* v. *Smith*, 9 M. & W. 810. Further, in § 556, he says: "Having stated these general principles in relation to jurisdiction (the result of which is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains), we are **[240]** next led to the consideration of the question in what manner suits arising from foreign causes are to be instituted and proceedings to be had till the final judgment. Are they to be according to the law of the place where the parties or either of them live? Or, are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately, here there is

(*a*) The points of law intended to be argued by the defendants are, "that the surrejoinder neither traverses nor confesses and avoids the rejoinder; that, the defendants being a corporation aggregate, the writ of summons could not properly have been served on an agent until the 8th section of the statute requiring the service to be on the mayor or other head officer, town-clerk, clerk, treasurer, or secretary; or at least it should have been alleged that the agent was a known and responsible agent of the defendants, or an agent of their real and personal estate, or an agent within the true intent and meaning of the statute."

scarcely any ground left open for controversy either at the common law, or in the opinions of foreign jurists, or in the actual practice of nations. It is universally admitted and established that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians uniformly express it, according to the lex fori" (*a*)[1]. Again, in § 557, the learned commentator says: "The reasons for this doctrine are so obvious that they scarcely require any illustration. The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such forms and such a course of proceeding as best comport with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs in any nation, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, either customary or positive, of one nation, for rights which it recognised, or for duties which it enforced, or for wrongs which it redressed, might be **[241]** wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice. A nation acknowledging the existence of peculiar rights and privileges, either personal or real, such as seignorial rights, or trusts in the realty, would naturally introduce correspondent remedies. While other nations, in which such rights and privileges and trusts did not exist, might well dispense with the formalities which they might require. The jurisprudence of one nation may be very refined and artificial, with a multitude of intricate and perplexed proceedings: that of another may be rude, uninformed, and harsh, consisting of an undigested mass of usages. It would be absolutely impracticable to apply the process and modes of proceeding of the one nation to the other. Besides, there would be an utter confusion in all judicial proceedings, by attempting to engraft upon the remedies of one country those of all other countries whose subjects should be parties or be interested therein. No tribunal on earth, however learned, could hope by any degree of diligence to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto. A whole life might be passed in obtaining little more than a few unconnected elements; and litigation would thus become unnecessarily complicated, if not absolutely interminable. All that any nation can, therefore, be justly required to do is, to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects; and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own municipal code for natives and residents." [Cockburn, C. J. Suppose a writ issued here against a person resident in Ireland, and service was effected upon an agent,—would a judgment obtained thereon be valid?] Clearly not. [Cresswell, J. The usual ground for de-**[242]**-clining to give effect to a foreign judgment obtained against a party in his absence is, that it is contrary to natural justice. What is there contrary to natural justice in saying that a party shall be bound by the judgment, where he has had notice of the proceeding, and might have appeared? Cockburn, C. J. What say you to the 19th section of the Common Law Procedure Act, 1852 (*a*)[2]?] The judgment might fix the party and his property within the jurisdiction; but out of the country it would be unavailing. Story emphatically says (§ 539), "No sovereignty

(*a*)[1] Citing 1 Burge Comm. 24, *Ferguson* v. *Fyffe*, 8 Clark & F. 121, *General Steam-Navigation Company* v. *Guillou*, 11 M. & W. 877.

(*a*)[2] "In any action against a person residing out of the jurisdiction of the said courts (the three superior courts), and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction [s. 18], save that, in lieu of the form of writ of summons in the schedule A. to this act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule A. marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and, by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." [Cresswell, J. The question is, what effect a foreign court will give to a judgment so obtained.] In *Jefferys* v. *Boosey*, 4 House of Lords Cases, 815, 926, Parke, B., says: "It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and, when legislating for the benefit of persons, must primâ facie be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect." And Lord St. Leonards says,—p. 980: "It is quite clear as an abstract proposition, that an act of parliament of this country having within its view a municipal operation, having, as in this particular case, a territorial operation, and being therefore limited to the kingdom, cannot be considered to provide for foreigners, except as both sta-**[243]**-tute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because, being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects." That is the general principle which will be found to prevade all the cases on the subject. Thus, in *The Dundalk Railway Company* v. *Tapster*, 1 Q. B. 667, 1 Gale & D. 657, a public local act, 1 Vict. c. xcvi., for making a railway in Ireland, provided that, if any proprietor of shares should refuse to pay a call, it should be lawful for the company to sue for it in any of the Queen's courts of record in Dublin, and gave a general form of declaration: and it was held, that, the debt and the remedy being created by the statute, the company were bound to pursue the remedy pointed out by it, and could not bring an action for a call, and declare in the general form, in an English court. [Cockburn, C. J. The court of Queen's Bench in Ireland clearly had jurisdiction over the subject-matter, inasmuch as the company carried on business by means of an agent in Dublin. Your argument is, that there is an irregularity, or an illegality, in the process by which the defendants **[244]** were brought before the court. Is not that procedure?] It is submitted that the Irish court had no jurisdiction over an English corporation. [Cresswell, J. The cases cited shew that the Irish courts have long assumed to have jurisdiction under such circumstances.] It may be to the extent of any property the corporation may have in Ireland: otherwise they clearly could have no jurisdiction except such as is conferred by the 13 & 14 Vict. c. 18. [Cockburn, C. J. That statute does not affect to confer jurisdiction. It only provides for substitution of service of process. It applies to the procedure only. Suppose an incorporated company carrying on business in London and in Dublin, contract a debt in Dublin, where they are represented only by an agent, —would they not clearly be within the jurisdiction of the Irish courts, though, but for some statutory provision, beyond the immediate reach of the process of the court? The object of the act was, to substitute some other service than that which the law ordinarily provides. How can we deal with the question whether the service of the process has been in accordance with the course and practice of the Irish court?] It is submitted that the Irish court has no jurisdiction over non-resident strangers, except that which is given them by the statute. In the case of corporate bodies, the jurisdiction clearly is given by the 8th section. The 9th section applies to natural persons only, and not to corporations: and no aid can be derived from the interpretation clause. Besides, there is no finding that the copy of the writ of summons, and of the order of the court, were sent to the London agent: the person to whom they were sent might or might not be the agent of the company. [Cresswell, J. The special verdict may be amended in that respect, if necessary.] Then, the order was, for service of a copy of the writ of summons. That which was sent was not a "copy"; the word "Life" being omitted in the description of the **[245]** company; and in this respect, the affidavit and the order follow the supposed copy of the writ. Now, inasmuch as a corporate body exists only in name, the name is of the essence of the corporation. And this is a defect which cannot be remedied by amendment

As to the second count,—*Patrick* v. *Shedden*, 2 Ellis & B. 14, is an authority to shew that an action will not lie upon an order for interlocutory costs. In *Russell* v. *Smyth*, 9 M. & W. 810, the decree was final: it was in effect a judgment. But the mere order of another court for the payment of costs, is not a good ground of action:

Fry v. *Malcolm*, 4 Taunt. 705. So, in *Hookpayton* v. *Bussell*, 10 Exch. 24, it was held that no action will lie upon an undertaking contained in a judge's order though the order be made by consent, and the undertaking be founded upon a good consideration. Pollock, C. B., there says: "The proper remedy for disobedience of the order is, by attachment. We ought to guard against attempts to create new causes of action, and new modes of multiplying costs." And Martin, B., observes, that, "if the argument on behalf of the plaintiff is correct, an action would lie for the disobedience of every judge's order in which a party undertakes to do some act." In *Emerson* v. *Lashley*, 2 H. Bla. 248, it was held that no action will lie in a superior court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. Eyre, C. J., in giving judgment, there says, —"If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the court would think again and again before they would give it any encouragement. In general, there is another remedy (however that remedy may fail in an inferior court, whose jurisdiction is local); and the consequence of our determining that an action would **[246]** lie for such costs as these, would be, that, instead of applications to the court for their superior interference, numberless actions would be brought, of which we have enough already. And, upon general principles of law, it seems pretty clear that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a court, that they create debts and duties upon which actions of debt are founded. General policy and convenience require that faith should be given to those judgments, and that duties should arise: but, as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the court that enforces these kind of orders; and the power of the court will always be regulated by the discretion of the court in causes which come before them." That reasoning exactly applies to this case. In *Carpenter* v. *Thornton*, 3 B. & Ald. 52, where a bill had been filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase money, and costs,—it was held, that no action at law was maintainable to recover such interest and costs. And Holroyd, J., said: "There is no instance of an action brought on a rule of court for payment of money. The mode of enforcing such an order is, by attachment for contempt in not obeying an order of the court. Now, although that does not absolutely shew that such an action is not maintainable; yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable." So, in *Dent* v. *Basham*, 9 Exch. 469, it was held that no action lies for disobedience of a **[247]** judge's order made under the 6 & 7 Vict. c. 73, s. 37, for the delivery of a bill of costs,—and upon the same ground, viz. that attachment is the appropriate remedy. Alderson, B., there says: "The only way in which these orders can be enforced is that which is expressly given, viz. by attachment. I quite agree with what was said by two of the learned judges in *Emerson* v. *Lashley*, that this is a form of proceeding to which no encouragement ought to be given; and that it is better to submit to a particular inconvenience than to introduce a general mischief. For, if it were held that an action would lie in the present case, inasmuch as scarcely an order is ever obeyed within a reasonable time, an action would be brought in almost every case." The order itself creates no debt: nor does it become a debt by reason of the fact of the party being, or subsequently going, out of the jurisdiction.

Shee, Serjt., in reply. The 9th section of the 13 & 14 Vict. c. 18, enacts, that, in case it shall be made appear by affidavit to the satisfaction of the court, that any defendant has not been personally served with any writ, and has not appeared to the action, and that due and proper means were used to serve such writ,—or that such defendant resides out of the jurisdiction of the court and can be properly served through or upon an agent within such jurisdiction,—or has removed to avoid service, —or on any other good and sufficient grounds,—it shall be lawful for such court or judge to authorise such substitution of service, through the post office, or in such manner, and with such extension of time for service and appearance, as to them shall

seem fit. [Cockburn, C. J. What "other ground" do you suggest for the substitution of service, than that the defendants are out of the jurisdiction?] All the cases relied on by the other side are cases in which there was no difficulty in enforc-**[248]**-ing the order during the whole course of the proceedings. [Crowder, J. Do you insist that you can support an action upon the judgment, supposing the 13 & 14 Vict. c. 18, s. 9, not to apply?] The order for substituted service was well made, independently of that section. A judgment, though obtained against an absent party, is not contrary to natural justice, if there has been an opportunity afforded him to appear. In *Reynolds* v. *Fenton*, 3 C. B. 187, in assumpsit on a judgment or decree of the Tribunal of Commerce at Brussels, the defendant pleaded, that he was not at any time served with any process issuing out of that court, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained, nor had he at any time notice of any such process, nor did he appear in the said court to answer the plaintiffs: and the plea was held bad, inasmuch as it did not shew that the proceedings against the defendant in the Belgian court were so conducted as to deprive the defendant of the opportunity of defending himself therein. Upon the case of *Ferguson* v. *Mahon*, 11 Ad. & E. 179, 3 P. & D. 143, being cited, Maule, J., there says: "I take the distinction between that case and the present to be this: the court there could take judicial notice that the law of Ireland is the same as the law of this country with regard to the commencement of the suit by process: but, how do we know that there may not be a good commencement of a suit in Belgium by verbal summons?"

Cur. adv. vult.

CRESSWELL, J., delivered the judgment of the court:—

This was an action on a judgment obtained in the court of Queen's Bench in Ireland.

In the first count the plaintiff declared, that, in the court of Queen's Bench in Ireland, he recovered against the defendants 768l., adjudged to be due from them to **[249]** the plaintiff, and 27l. 13s. 11d. for damages for the detention thereof, and costs. In the second count, that the court of Queen's Bench in Ireland, by a certain order and decree did further award and adjudge unto the plaintiff, in a certain proceeding then taken by the defendants before the said court in the said suit upon the said judgment, the sum of 12l. 6s. 1d., to be paid by the defendants to the plaintiff for costs by him in such suit in that behalf further expended. The third count was for interest.

The defendants pleaded,—first, never indebted, upon which issue was joined,—secondly, that they were not at any time served with any summons or process issuing out of the said court of Queen's Bench in Ireland, and that the plaintiff irregularly and behind the back of the defendants caused an appearance to be entered for them in the said action, and thereby obtained the judgment therein when the defendants were not within the jurisdiction of the said court, and had not been served with any summons or process to appear in the said action.

The plaintiff replied, that the action was commenced after the passing of the statute 13 Vict. c. 18, by writ of summons; that it was made to appear to the court by affidavit that the defendants had not been personally served, but that they resided out of the jurisdiction of the court, and could be properly served through or upon a certain agent or representative of the defendants within the jurisdiction; whereupon an order was made that it should be served by delivering a copy of the writ and of that order to the said agent, and by sending copies of the writ and order through the general post to the secretary and manager in London; and that the plaintiff complied with such order.

The defendants rejoined, that the plaintiff obtained the order by falsely representing to the court that J. W. **[250]** Ramsay was the agent of the defendants within the meaning of the statute.

The plaintiff surrejoined, setting out the affidavit on which the motion was founded, and averring that it was true.

The defendants traversed the surrejoinder, and demurred.

This demurrer was argued in Trinity Term, 1853, when judgment was given in favour of the plaintiff, on the ground that the second plea was bad: see 13 C. B. 787. The judgment of Maule, J., proceeded on the ground that it was consistent with all the allegations of the plea, that the defendants appeared to the writ; but, without

resorting to that reason, it appears to have been considered that the plea was bad, because it did not shew that the defendants had not knowledge of the issuing of the writ of summons, and that this court could not take notice of a mere irregularity in the proceedings of the court of Queen's Bench in Ireland.

The issues joined on the first plea, and the traverse of the surrejoinder, afterwards came on to be tried, and a special verdict was found, the material parts of which were as follows:—[His Lordship read the passages marked with brackets, and stated the questions reserved by the special verdict for the opinion of the court.]

It appears, then, that the defendants were a joint-stock company duly registered in London, and carried on business in London, one E. Baylis being the manager, secretary, and actuary of the company in London; and that they also carried on business in Dublin by James Wilson Ramsay, their agent in that behalf; that a writ of summons was issued out of the court of Queen's Bench against the company, and personally served on J. W. Ramsay, but not advertised in the *Gazette* or any newspaper; that afterwards an order was made by the [251] court of Queen's Bench, that service of the writ of summons on the defendants, by delivering a copy to J. W. Ramsay, with a copy of that order, and by sending similar copies through the general post office, directed to the London agent, should be deemed good service of the writ; that the copies were accordingly served personally on J. W. Ramsay, and sent through the general post office directed to Edward Baylis, the manager, secretary, and actuary, at the company's office in London; that the company did not enter an appearance; that the court, on application to them, gave the plaintiff leave to enter an appearance for them, which was done, and other proceedings to judgment taken, according to the practice of the court; and that afterwards an application was made by the defendants to the court of Queen's Bench in Ireland to set aside the appearance entered for the defendants, and all subsequent proceedings, which was dismissed with costs, which were taxed at 12*l.* 6*s.* 1*d.*

On the argument of this special verdict, it was contended for the plaintiff, that, by the 43 G. 3, c. 53, s. 8, the court of Queen's Bench in Ireland had authority to order that service of process as effected in this case should be deemed good service. The words are,—"Provided always, and be it further enacted, that, whenever it appears to the court out of which the process issues, that all due diligence has been used to have the process of the court personally served, yet that under the special circumstances of the case appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to procure personal service, that then and in such case it shall and may be lawful for the court out of which the process issues, to substitute such other kind of service as to them shall seem fit." Some authorities from the Irish reports were cited. [252] In *Maloney* v. *Tullock*, 1 Jones's (Irish) Exch. Rep. 114, and *Phelan* v. *Johnson*, 7 Irish Law Rep. 527, it was held, that, under this section, the court might authorise service by serving the agent in Ireland of an insurance company carrying on business in London. And it was insisted that the 13 Vict. c. 18, "for the regulation of process and practice in the superior courts of common law in Ireland," did not take away or narrow the jurisdiction of the Irish courts in this respect, and that, if it had the effect of abolishing the old, and establishing a new practice, still the order made in this case was warranted by the 9th section of the latter act. It was further said, that, if there were anything irregular in the course pursued in Ireland, that was not a matter that could be inquired into in this court.

On the other hand, it was contended that the question depended entirely on the true construction of the 13 & 14 Vict. c. 18; that the 9th section did not warrant the making of the order for substituted service; and that, consequently, the defendants were never brought into court, and the whole of the proceedings there were null and void.

We are of opinion that our judgment must be in favour of the plaintiff.

This court has already decided in this case that, the plea merely alleging the absence of personal service of any writ or process, was bad; and, as far as that point is concerned, we adhere to our former decision. But the special verdict goes further, and shews in what manner the process was served, viz. personally upon an alleged agent, and through the post-office on the manager, secretary, and actuary in London, in pursuance of an order of the court. Now, after the 43 G. 3, c. 53, was passed, it appears from the cases cited that the superior courts in Ireland were in the habit of

making orders that service in Ireland on the agent of an incorporated company **[253]** should be deemed sufficient: and, if no subsequent act had been passed affecting the question, the order allowing such service in this case would have been in conformity with many of their decisions. There is nothing in it contrary to natural justice: it would afford the party sued an opportunity of coming to defend: and we could not under such circumstances have treated a judgment obtained according to the established practice of the court as a nullity. But it was contended that the 43 G. 3, c. 53, s. 8, was in effect repealed by the 13 & 14 Vict. c. 18. The 7th section of that act provides, that, in all cases of personal service, where the defendant does not appear in due time the plaintiff may enter an appearance for such defendant, and proceed as if the defendant had entered an appearance. The 8th section enacts that writs issued against certain specified corporate or quasi corporate bodies might be served personally on certain persons designated,—"And every such writ issued against any other incorporated body (which would include the defendants) having a known or responsible officer or agent, may be served personally on such officer or agent;" and, if any such defendants shall not appear, it shall be lawful for the plaintiff to enter an appearance for them, &c., as provided in s. 7: Provided always, that, in all such cases, a sufficient notice of the issuing of the writ shall be given in the *Dublin Gazette* and certain newspapers. This section, then, places plaintiff's suing corporate bodies, who personally served the persons designated, and gave the notice prescribed, in the same position as to further proceedings as in cases where the defendants were natural persons; and there was no occasion to apply to the court on the subject. The service on the agent was to have the effect of personal service on the party sued. Had notice been given in the *Gazette* and newspapers, as required by this section, the appearance entered would have been valid, without obtaining any **[254]** leave of the court: and we are inclined to think that entering an appearance without such notice would have been irregular only, and not void, and that such irregularity could not be used as an answer to an action on the judgment: but it is not necessary to decide this point. At all events, the clause does not in terms interfere with the practice previously existing in the Irish courts, of allowing, upon application duly made, a substituted service in cases which they considered within the 43 G. 3, c. 53; nor do we think it was intended to have that effect.

But the 9th section gives the courts power to direct substituted service. It enacts, "that, in case it shall be made to appear by affidavit to the satisfaction of the court in which the appearance to the process should be made or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorise such substitution of service through the post-office, or in such manner, and with such extension of time for service and appearance, as to them or him shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance by such defendant, in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had entered his, her, or their appearance, any usage or law to the contrary notwithstanding."

It was argued for the defendants, that this section, re-**[255]**-quiring an affidavit that the defendant had not been personally served, must have been intended to apply only where there was a defendant whom it was possible to serve personally, which could not be said of an incorporated company: but that is not by any means clear, for, the preceding section treated personal service on certain officers or agents of corporations as personal service on the defendants, for the purpose of allowing an appearance to be entered for them; and every thing required to give the court or a judge authority to allow substitution of service may exist in the case of a corporation, —an affidavit may be made that the defendants have not been personally served with the writ, that due and proper means were used to serve it (that is, as directed by s. 8), and that the defendants reside out of the jurisdiction, and can be properly served through an agent. And this section may have a very useful operation, notwithstanding

the power given by the 8th section to serve personally "a known and responsible officer and agent;" for, there may be an agent through whom the court may think the writ may be properly served, although he may not answer the description given in the 8th section. And the language of the section in this respect is similar to that of the 43 G. 3, c. 53, s. 8; for, that authorised orders for substituted service only where all due means had been adopted for having the process served personally, and yet it was held to extend to incorporated companies.

If it had been necessary to the maintenance of this action to say that the 9th section gave the court power to order substituted service in this case, there would probably have been some difference of opinion on the bench. But, if, as contended in argument, it does not apply to corporate bodies, we are all of opinion that there is nothing in the act taking away the jurisdiction before existing; and the service allowed in this case was **[256]** in conformity with the practice formerly existing in the court of Queen's Bench in Ireland. Quâcunque viâ, therefore, we must give effect to the judgment of the court below, and give our judgment for the plaintiff as to the issue joined on the first count, which in effect decides in favour of the plaintiff the question raised on the traverse of the surrejoinder.

A minor question was raised on the issue as to the second count, viz. the power to sue for the costs awarded to the plaintiff when the motion to set aside the proceedings in the court of Queen's Bench in Ireland was dismissed. As to that sum, we are of opinion that it falls within the general rule applicable to interlocutory and collateral proceedings. The liability to costs depends solely on the order of the court; and that order can only be enforced by attachment. It is not like a decree of judgment, upon which an action may be maintained, as in *Russell* v. *Smyth*, 9 M. & W. 810, and *Henderson* v. *Henderson*, 6 Q. B. 288. As to that sum, therefore, we give judgment for the defendants.

Judgment accordingly (*a*).

By the 43 G. 3, c. 53, s. 8, the "special circumstances" which give the court jurisdiction to order substituted service, are required to be made to appear to them "by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served." In this case, the affidavit was not such a one as the statute requires; but appears by the special verdict to have been made by an ordinary process-server. In *Maloney* v. *Tullock*, 1 Jones's Irish Exch. Rep. 114, and *Phelan* v. *Johnson*, 7 Irish Common Law Rep. 527, the reports do not state by whom the affidavits were made: but, in *Sadlier* v. *Smithwick*, 1 Crawford & Dix. 397, *Kidd* v. *Riddle*, 1 Irish Law Rep. 85, and *Lynskey* v. *The Asylum Life Assurance Company*, 9 Irish Law Rep. 299, the affidavits were by the plaintiffs themselves, and in *M'Cullagh* v. *The Yorkshire Assurance Company*, 1 Crawford & Dix, 264, by the plaintiff's attorney.

[257] SIMPSON AND OTHERS, Executors of William Warre Simpson, Deceased, *v.* THE ACCIDENTAL DEATH INSURANCE COMPANY. 1857.

[S. C. 26 L. J. C. P. 289; 3 Jur. N. S. 1079. See *Stuart* v. *Freeman*, [1903] 1 K. B. 55.]

A. on the 22nd of January, 1851, effected with the defendants an insurance against death or injury from accident, the premium on which was payable on the 22nd of January in each year. By one of the conditions indorsed on the policy (the 1st), it was provided that the premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," and that, "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition (the 2nd), it was provided, that, "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void, and the assured should forfeit all claim thereunder." And it was further provided (by the 4th condition), that, "in every case when a new

(*a*) A writ of error is now (M. T. 1857) pending. [See 3 C. B. N. S. 597.]

premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept such premium," &c.—A. duly paid the premiums under this policy down to the year 1855. On the 27th of January, 1856, an accident happened to him, which caused his death on the 1st of February following. On the 4th of February, the company had notice of the death, and a correspondence took place between their secretary and the attorney for A.'s executors respecting the cause of the death and their claim on the policy, neither party at first knowing that the premium which became due on the 22nd of January, 1856, was unpaid. On the 8th of February, the secretary for the first time became acquainted with the fact of the non-payment of the premium, but did not communicate it to the executors or their attorney until the 13th (the day after the expiration of the twenty-one days allowed by the 1st condition for payment of the premium), when he informed the latter by letter that the directors had considered and rejected the claim:—Held,—first, that there was nothing in the conditions to enable the executors of A. to pay the premium after his death, and that, if they had tendered it within the twenty-one days, the company would not have been bound to accept it:—Secondly, that the policy was, by reason of the non-payment of the premium within the terms of the policy and conditions, absolutely void; and that the company were not estopped from denying the payment:—Thirdly, that neither the plaintiffs nor the assured (had he been living) would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days,—the 4th condition giving the directors the option of refusing to continue it or not, at their pleasure.

This was an action brought by the plaintiffs, as executors of William Warre Simpson, deceased, to recover the amount of a policy effected on the life of the testator with the Accidental Death Insurance Company.

The declaration stated, that, theretofore and before this suit, and in the life-time of the said William Warre Simpson, the defendants made and entered into a certain policy or contract of insurance with the said William Warre **[258]** Simpson, whereby,—after reciting that the said William Warre Simpson, thereinafter and hereinafter called the "said insured," had delivered into the office of the defendants a declaration in writing bearing date the 22nd of January, 1851, and signed by him, and had agreed that such declaration should be the basis and condition of the contract for the insurance by the said policy intended to be made, and that the said insured had paid to the defendants the sum of 12*l.* as the premium for the said insurance for one year ending the 22nd of January, 1852,—it was witnessed and declared, that, if the said insured should receive or suffer bodily injury from any accident or violence on or before the 22nd of January, 1852, and subsequently thereto, during the continuance of the said policy, provided he the said insured on or before, or within twenty-one days after, the 22nd of January which would be in the year 1852, and on or before or within twenty-one days after the 22nd of January in every succeeding year so long as the acting directors for the time being of the said company should accept the same, pay or cause to be paid to the defendants the annual premium of 12*l.*, then, subject as therein and hereinafter, or in the indorsement thereon and hereinafter is mentioned or referred to, the subscribed capital and other funds and property of the said company should, according to the provisions of the deed of settlement of the said company, and subject as aforesaid, be liable to make or pay to the said insured, his executors, administrators, or assigns, at such time or times as after mentioned, the following payments or compensation, that is to say, in case such accident or violence should cause the death of the said insured within three calendar months after the occurrence of such accident or violence, the full sum of 2000*l.*, such sum to be payable to the personal representatives of the said insured within one calendar month after proof satisfactory to the directors **[259]** should have been furnished of the death of the said insured in manner entitling them to receive the said sum under or by virtue of the said policy; and, in case such accident or violence should not cause the death of the said insured, [then as therein mentioned and provided](*a*): **[260]** and it was in and

(*a*) Upon the amendment of the record, as ultimately agreed to at the trial, the words within brackets were omitted, and the following were here inserted,—"immediately, but should cause any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits,

by the said policy provided that the same was effected upon the express condition, that, if any statement or allegation contained in the aforesaid declaration should be untrue, or if any claim for payment of money to be thereafter brought by virtue of the said policy, or in any statement made in support of such claim, or in the information given to the said company in respect thereof, any false or fraudulent representation should be contained, or if the insurance thereby made, or any renewal thereof, should have been or should be obtained through any misrepresentation, concealment, or untrue averment whatsoever, then the said policy, and any renewal thereof, should be void, and all monies paid or to be paid in respect thereof should be forfeited to the defendants (*a*): provided also (*b*), that no claim should be payable to the said company under the said policy in respect of death or injury by accident or violence, unless such death or injury should be occasioned by some external and material cause operating upon the person of the said insured, and unless, in the case of death as aforesaid, such death should take place from such accident and violence within three calendar months from the time of the occurrence of such accident or violence (*c*): **[261]** provided also that notice in writing of any claim to be made against the said company, on account of any accident or violence, should be given to the said company within one calendar month after the occurrence thereof, if the said accident or violence should have occurred in Great Britain or Ireland, or, if elsewhere, then within three calendar months after

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a compensation in money at the rate of 20*l.* per week during the continuance of such disability, and also, where no medical attendance was provided by the said company as thereinafter and hereinafter mentioned, such further sum, not exceeding 40*l.* in the whole, as would compensate for any medical expenses which should be actually incurred by the said insured in consequence of such injury as aforesaid; such weekly compensation and further sum as last aforesaid to commence to be paid and be payable within fourteen days after proof satisfactory to the directors should have been furnished that the same were justly due or payable respectively under or by virtue of the said policy: And it was in and by the said policy provided, that, in the event of any non-fatal injury occurring to the said insured, it should be lawful for the directors of the said company, if they should think fit, at their own costs, to furnish medicines and medical attendance for the said insured, and, where the same should be so furnished, no moneys should be payable to the said insured by the said company as such compensation for medical expenses as aforesaid: Provided also, and it was by the said policy declared, that, in case the said insured should suffer any such non-fatal injury as aforesaid, and should be taken into any public hospital or infirmary, and attended without any charge to himself or to the said company for or on account of medicines or medical attendance, then and in such case it should be lawful for the said company, if they should think fit, to pay one half of the said sum of 40*l.* to such hospital or infirmary, and the other half only to the said insured."

(*a*) "Said company."

(*b*) "And it was by the said policy expressly agreed and declared."

(*c*) "And unless in the case of non-fatal injury, such disability as aforesaid should begin to be experienced within the space of one calendar month after the happening of such accident or violence: Provided also, that the said company should not be liable, during the continuance of the said policy, in the course of any consecutive twelve calendar months, reckoning from the 22nd day of January in one year to the 22nd day of January in the year following, to pay more in the whole than the sum of 1000*l.* for any accident or number of accidents which might happen to the said insured, not occasioning death, such last mentioned sum to include all such weekly payments and such medical expenses as aforesaid, or more than the said sum of 2000*l.* in the whole on any account whatsoever; and that any payment which should be made to the said insured in compensation for or on account of any injury received by him, should be deducted from the said sum of 2000*l.*, in case such injury should subsequently cause the death of the said insured, and the sum of 2000*l.* should eventually be claimed under or by virtue of the said policy: Provided always, that notice of any non-fatal accident or violence, happening to the said insured, on which a claim was intended to be made, if the same should occur in Great Britain or Ireland, should be given to the said company immediately, or, at latest, within ten days from the time of the happening thereof."

such occurrence (*a*)[1]: provided **[262]** also, that the said policy, and the insurance thereby made, should be subject to the several regulations and conditions printed on the back thereof, so far as they might respectively be applicable, in the same manner as if such regulations and conditions were there repeated and incorporated in the said policy with reference to the said insured,—[which said regulations and conditions, so far as the same were or are applicable to the said insured, and the claims of the plaintiffs, were and are as follows (*a*)[2],] that is to say,—

"1. The premium on this policy is to be paid within twenty-one days from the day on which the same shall first accrue or become due; and, provided the same be from time to time paid within such space of twenty-one days, this policy shall not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by this policy shall according to the terms thereof become payable:

"2. If the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be **[263]** absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same:

"3. The subscribed capital and other funds and property of the company which for the time being shall remain unapplied and undisposed of, and not applicable to prior claims and demands in pursuance of the trusts, powers, and authorities of the deed of settlement, shall alone be liable to make good and satisfy all claims and demands upon the said company in respect of this policy; and no director signing a policy, nor any other director, proprietor, or member of the company, his heirs, executors, or administrators, shall be in anywise individually subject or liable to any such claim or demand, or to any process or execution in respect thereof, but shall be and remain liable to pay to the said company so much of the share or shares held by him, her, or them in the said capital as shall not have been paid up; and that no other person shall on any account whatsoever be in anywise subject or liable to any claim or demand in respect of any policy of insurance to be issued or granted by the company (*b*):

[264] "5. No claim shall be payable by the said company in respect of any accident which shall occur out of the limits of Europe, unless in each case permission from the directors for the insured to pass such limit shall have been previously obtained, and such additional premium paid as shall be required by the directors on account of an extra risk:

"6. The company shall not be liable on a claim made in respect of any accident which shall occur to the insured in consequence of his being, or while he shall be, engaged or employed in actual service in any military or naval capacity, or whilst he shall be employed in any mine or quarry, or in the manufacture of gunpowder, or in the service of any railway company, police force, or constabulary force, or, in case of his being or becoming a sea-faring man, in respect of any accident which shall occur to him whilst upon the sea in the course of his occupation, unless in each case such

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(*a*)[1] Provided always, that, in the event of the said insured going beyond the limits of Europe, or in any other event or contingency which should appear to the directors of the said company to justify such an extension, it should be lawful for the said insured to make a special agreement with them for extending the aforesaid periods of ten days and one calendar month or three calendar months, as the case might be respectively, to such other period or periods as to the said directors might seem reasonable."

(*a*)[2] Instead of the words within brackets, "And the plaintiffs aver that the said regulations and conditions were and are in the words and figures following."

(*b*) "4. In every case where a new premium shall become payable, the directors shall be at liberty to terminate the risk by refusing to accept such premium; and shall also be at liberty, previously to accepting any new premiums, to require such further information as they may think fit regarding the insured. And no payment of any such new premium shall suffice to keep on foot or renew a policy, unless the person or persons paying such premium shall take a receipt for the same in writing under the hand of any two of the directors, or of some person or persons duly authorised by the directors to give such a receipt."

additional premium shall previously have been paid as shall be required by the directors on account of an extra risk:

"7. The company shall not be liable on a claim made in respect of death or injury arising from any surgical operation the necessity for which shall not be occasioned by some such accident or violence as within mentioned, or from duelling or prize-fighting, nor on a claim made in respect of death by suicide, whether influenced by insanity or otherwise, or by the hands of justice, or in respect of any injury inflicted intentionally on the insured by himself or with his consent, or of death or injury which may happen to him while acting in breach of the law, or which may be occasioned by the wanton and voluntary exposure of himself to obvious and unnecessary risk or injury:

"8. In case of difference of opinion as to the amount of compensation payable in any case, the question shall be referred to the arbitration of a person to be named by **[265]** the secretary for the time being of the Master of the Rolls; and all expenses and costs shall be subject to the decision of such arbitration: and the award made on such arbitration is to be taken as a final settlement of the question, and may be made a rule of court (*a*):

"11. Before payment of the sum insured by any policy, proof satisfactory to the directors shall be furnished of the death or deaths, injury or injuries, accident or accidents, or other event or events on which such sum shall become payable, together with such further evidence or information (if any) as the directors shall think necessary to establish the claim, and, particularly, if required by the directors, a medical or other agent of the said company is to be admitted to see the person killed or injured, and to examine the wound or injury received by him, when and as often as in the opinion of the directors it may be necessary:

"12. Every policy granted by the company is granted **[266]** upon the terms and conditions comprised in the deed of settlement upon which the company is formed, the provisions of which shall have the same force and effect as if inserted in the policy."

Averment, that the said declaration hereinbefore mentioned, together with certain questions and answers to which the same had reference, were and are as follows, that is to say,—

"The person proposing to effect the insurance must state—

"His name	William Warre Simpson.
Residence	3 Cresswell Park, Blackheath.
Profession, business, or occupation	Russian Broker.
The name of an intimate friend to be referred to, and how long he has known him	Name, Charles S. Paris, Esq. Address, Salvador House. Has known me several years.
The sum to be insured	Two thousand pounds.
1. Where were you born, and when?	Saint Petersburgh, 1797.
2. Are you married or single?	Married.
3. Are you, or have you ever been, afflicted with epileptic or other fits?	No.
4. How long have you followed your present occupation?	Thirty years.
5. Is there any circumstance or information touching your profession, business, occupation, or habits of life, with which the directors ought to be made acquainted, as rendering you peculiarly liable to accidents?	No.

"Declaration.

"I, the above-named William Warre Simpson, being desirous of effecting an insurance with the Accidental Death Insurance Company for the sum of 2000*l.*, do

(*a*) "9. All premiums and other moneys which shall have been paid to the company in respect of any policy which may have become void, shall, subject to the preceding regulations and conditions, be forfeited to the company; and all claims upon the company in respect of such policy shall cease and be absolutely void.

"10. In all cases where any policy shall, either originally or at any time after its

[267] hereby declare that the answers to the above questions are true; and I agree that the questions and answers taken together shall be the basis of the contract between the said company and me, and that, if any false statement or misrepresentation be contained in any of the said answers, or if there be any wilful omission therein or concealment of any fact which ought to be made known to the directors of the said company, all moneys paid to them on account of such assurance shall be forfeited, and the assurance itself shall be null and void to all intents and purposes. Dated the 22nd of January, 1851." (Signed) "WILLIAM WARRE SIMPSON."

And the plaintiffs further said, that the said declaration so referred to in the said policy was and is in all respects true, and that the terms and provisions of the said deed of settlement, so far as the same were applicable to policies of the said company, were in all respects the same as and no other than the terms and provisions of the said policy thereinbefore set forth; that the said policy remained and continued in full force up to and until the death of the said William Warre Simpson as thereinafter mentioned; that, whilst the said policy was so in force as aforesaid, the said William Warre Simpson received and suffered bodily injury from an accident within the meaning of the said policy, which said accident caused his death within three calendar months after the occurrence of the said accident (*a*); that proof satisfactory to the said directors was furnished of the death of the said William Warre Simpson, more than one calendar month before suit, together with such further evidence and information as the directors thought necessary to establish the claim, and the medical agent of [268] the said company was admitted to see the said insured, and to examine the injury received by him, when and as often as in the opinion of the directors it was necessary; that the death of the said insured was occasioned by an external and material cause operating within the meaning of the said policy and as therein provided; that notice in writing of the plaintiffs' claim on account of the said accident, was given to the defendants within one calendar month after the occurrence thereof, and before this suit, the said accident having occurred in Great Britain; and that the said accident did not occur in consequence of the said insured being, or whilst he was, engaged or employed in actual service in any such capacity as in the said printed regulations and conditions mentioned, or whilst he was employed in any mine or quarry or otherwise as therein also mentioned, or whilst he was upon the sea in the course of his occupation as above mentioned, nor did his said death arise from any surgical operation the necessity for which was not occasioned by such accident or violence as aforesaid, or from duelling or prize-fighting, nor was the claim of the plaintiffs one made in respect of death by suicide, or by the hands of justice, or in respect of any injury inflicted intentionally on the said William Warre Simpson by himself or with his consent, or of death or injury which happened to him while acting in breach of the law, or which was occasioned by the wanton and voluntary exposure of himself to obvious or unnecessary risk or injury; that no difference of opinion had ever arisen between the plaintiffs and the defendants as to the amount of compensation payable in this behalf; and that, although all conditions precedent had been performed, and all things had been done and happened, and all times had elapsed, so as to entitle the plaintiffs to maintain this suit, and although the subscribed capital and other funds and property of the said company [269] for the time being remaining unapplied and undisposed of and not applicable to prior claims and demands in pursuance of the trusts, powers, and authorities of the said deed of settlement, at all times were and still remained sufficient to make good and pay to the plaintiffs the said sum of 2000*l.*, —of all which premises the defendants had always had notice,—yet no part of the said sum of 2000*l.* had ever yet been paid: and the plaintiffs claimed 2500*l.*

The defendants pleaded,—first, that, before the said William Ware, Simpson received or suffered such bodily injury from accident as in the declaration alleged,

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commencement, be or become subject to any mortgage or mortgages, trust or trusts whatsoever, the receipt of the mortgagee or mortgagees, trustee or trustees for the time being for the money which may become payable in respect of such policy, shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy, be an effectual discharge to the company and all proprietors and members thereof."

(*a*) "And within twenty-one days after the 22nd of January, 1856."

and before the death of the said William Warre Simpson, to wit, on the 22nd of January 1856, one of the said premiums of 12l. on the said policy, payable as aforesaid, accrued and became and was due, and the same remained and was unpaid for the space of twenty one days next after it first accrued and became due, and had never been paid; whereby the said policy became and was and is void; and that all claim on the defendants in respect thereof for the said 2000l. ceased.

And, for a third replication to the said plea, upon equitable grounds, the plaintiffs said, that the day on which the said premium became due as in the said plea mentioned, was the 22nd of January, 1856, and that the said William Warre Simpson died, as in the declaration mentioned, on the 1st of February, 1856; that the said William Warre Simpson had in his life time fully intended to pay the said premium within the said period of twenty-one days after the said 22nd of January, 1856, but had not done so at the time of his death, and that, from that time until after the expiration of the said last-mentioned period, there were no executors, administrators, or assigns of the said William Warre Simpson in existence legally authorised or entitled to pay the said premium, or to deal or intermeddle with the said [270] William Warre Simpson's personal estate or effects; that it was impossible for the said William Warre Simpson, his executors, administrators, or assigns, to pay the said premium during the said last mentioned period; and that, from the time when probate of the said will of the said William Warre Simpson was granted, the plaintiffs, as such executors as aforesaid, had always been and were ready and willing to pay and allow the said premium to the defendants in the usual way, together with interest thereon at the rate of 5l. per cent. per annum (if required) from the time when the same first became payable,—of which premises the defendants had always had notice.

Demurrer and joinder.

The demurrer was argued in Hilary Term last, by Hawkins, in support of it, and Byles, Serjt., contrà.

The points urged on behalf of the defendants, were.—First, that, as by the policy, it was expressly conditioned that the annual premium should be paid on or before or within twenty-one days after the 22nd of January in every succeeding year so long as the acting directors for the time being of the company should accept the same, the fact of the testator having died between the 22nd of January, 1856, and the twenty-one days after it, and of there being no executors, administrators, or assigns of the testator in existence authorised to make the payment, the facts stated in the replication, constituted no excuse or discharge at law or in equity for the non-payment of the premium on the 22nd of January, 1856, or within the twenty-one days afterwards, —Secondly, that the replication shewed no answer at law or in equity to the defendants' plea: and the following authorities were cited,—*Sparks* v. *The Liverpool Water works Company*, 13 Ves. 428, *Davis* v. *Thomas*, 1 [271] Russ. & M. 506, *Job* v. *Banister*, 2 Kay & J. 374, *Pearson* v. *The London and Croydon Railway Company*, 14 Sim. 541, and *Burgh* (or *Bird*) v. *Legge*, 5 M. & W. 418, 7 Dowl. P. C. 814.

The points urged on behalf of the plaintiffs, were,—First, that the third replication was a good answer to the plea, inasmuch as it disclosed circumstances which in equity entitled the plaintiffs to be relieved from the forfeiture of the policy.—Secondly, that as, by the terms of the policy, the premium might have been paid by the representatives of the deceased within twenty-one days after the 22nd of January, and as such payment became impossible by inevitable necessity, the plaintiffs ought in equity to be relieved against the forfeiture, and allowed the benefit of the policy: and the following cases were cited, *Eaton* v. *Lyon*, 3 Ves. 689, *Firman* v. *Lord Ormonde*, Beatty (Irish), 347, and also the 83rd, 84th, and 85th sections of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

After argument, the plaintiffs obtained leave to amend their replication, but ultimately they declined to avail themselves of it, and the defendants had judgment on the demurrer.

The cause went down for trial upon the issues of fact, which were as follows:—

Second plea,—that the said accident did not cause the death of the said W. W. Simpson.

Third plea,—that the death of the said W. W. Simpson was not occasioned by any external and material cause operating upon his person.

The plaintiffs took issue on the second and third pleas.

First replication, to the first plea,—that the defendants ought not to be admitted

or received to plead [272] the said first plea, or to make the allegations therein contained, because the plaintiffs said that the day on which the said premium became payable as in the said first count mentioned was the 22nd of January, 1856, and that the said W. W. Simpson died on the 1st of February, 1856: and that, from the time of his death until the expiration of twenty-one days next after the said 22nd of January, 1856, the plaintiffs were in communication both by letter and otherwise with the defendants upon the subject of the said policy and of the death and the cause of the death of the said W. W. Simpson, and the claim which is now made by the plaintiffs in this action: that, in the course of and during such communications, the defendants by their conduct caused the plaintiffs to believe, and the plaintiffs accordingly did believe, and acted upon the belief, that the said policy was in full force and effect for the year ending the 22nd of January, 1857: that the plaintiffs had no means of ascertaining, and did not nor could in fact ascertain, from any documents of the said W. W. Simpson, or otherwise than from the defendants themselves, whether or not the said premium had been paid or the said policy was in force for the year ending the 22nd of January, 1857: and that, if they, the plaintiffs, had known that the said premium had not been paid, and that the policy would not be in force for the said last-mentioned year, unless the same were paid within the said period of twenty-one years, and if the plaintiffs had not been deceived and misled by the words and conduct of the defendants as in the replication aforesaid, the said premium would have been paid within the said period of twenty-one days.

Second replication, to the first plea,—upon equitable grounds,—that the defendants ought not to be allowed to plead the said first plea, because the plaintiffs said that the day on which the said premium became payable [273] as in the said plea mentioned, was the 22nd of January, 1856, and that the said W. W. Simpson died on the 1st of February following: and that, from the time of the death of the said W. W. Simpson until after the expiration of the said period of twenty-one days in the said plea mentioned, the plaintiffs were in communication both by letter and otherwise with the defendants upon the subject of the said policy and of the death and the cause of the death of the said W. W. Simpson, and of the claim which is now made by the plaintiffs in this action: that, throughout the whole course of those communications, the defendants led the plaintiffs to believe, and the plaintiffs did accordingly believe, that the said policy was in full force and in effect for the year ending the 22nd of January, 1857, and that they, the plaintiffs, so considered it, and that there was no question between the plaintiffs and defendants as to the said policy being in full force and effect for that year, and that the only questions between the plaintiffs and defendants were whether the said accident did or did not cause the death of the said W. W. Simpson, and whether his death was or was not occasioned by any external or material cause operating upon his person: that they, the plaintiffs, had no means of ascertaining otherwise than from the defendants themselves whether the said premium had been paid by the said W. W. Simpson in his life-time: and that it was entirely owing to the premises in the replication aforesaid, and particularly to the conduct of the defendants in the course of the said communications, that the said premium was not duly paid within the said period of twenty-one days: that they, the plaintiffs, were in fact misled and deceived by the conduct of the defendants, and that the defendants intended to mislead and deceive them in that behalf, for that (amongst other things), immediately after the expiration of the said period of twenty-one days, when it was just too [274] late (according to the strict terms of the said policy) for the plaintiffs to pay the said premium, the defendants intimated to the plaintiffs for the first time, and in the course of communications which were then passing with respect to the aforesaid question, that the policy was not in existence, they the defendants having during the whole of the said previous communications led the plaintiffs to believe the contrary, and to deal with them the defendants upon that belief and understanding: and that they the plaintiffs on their part had always kept good faith with the defendants, and had been and were then ready and willing to allow the said premium, with interest, to the defendants, by way of deduction as aforesaid,—of which premises the defendants had always had notice.

The defendants joined issue on these replications.

The cause came on for trial before Cockburn, C. J., at the sittings in London after Hilary Term last, when the following facts appeared in evidence:—The plaintiffs were the executrix and executors of William Warre Simpson, who in his life-time resided

at Abbey Wood, in the county of Kent, and carried on the business of a Russia broker in Crown Court, Old Broad Street, London. The defendants are an insurance company legally incorporated, and established for the purpose of insuring against accidents, and carrying on business at No. 7 Bank Buildings, Lothbury.

On the 22nd of January, 1851, Simpson effected with the defendants a policy in the terms set out in the declaration; and the premiums on that policy were regularly paid as they became due, in the years 1852, 1853, 1854, and 1855.

On the 27th January, 1856, an accident happened to Simpson which caused his death on the 1st of February following. A question was raised at the trial, under the issues joined on the second and third pleas, whether [275] Simpson died in consequence of an accident within the meaning of the policy: but this was disposed of by the finding of the jury in the affirmative.

Three days after Simpson's death, viz. on the 4th of February, his executors handed the policy to Mr. Crowdy, who was acting as their solicitor, with instructions to take the necessary steps for obtaining the amount from the company; and Mr. Crowdy accordingly on that day addressed a letter to their secretary, Mr. Young, as follow:—

"17 Serjeants' Inn, Fleet Street,
"February 4th, 1856.

"Sir,—Mr. W. Warre Simpson, of Cronstadt House, Abbey Wood, Kent, who was insured in your office for 2000l., by policy No. 868, died on Friday last in consequence of a severe fall, and burns and other injuries resulting therefrom, which took place on Sunday evening the 27th of January last. His executors, observing by the policy that notice has at once to be given to your office, desire me to communicate this fact to you, and to add that the funeral will take place on Thursday next; but that it is found desirable to close the coffin this evening; but that, on hearing that you wished your medical officer to inspect the body (if such be your usual practice), it can perhaps be kept open until to-morrow, though longer delay is undesirable. The executors have only just seen the policy, or would have given you this intimation sooner, although in fact only one business day has now elapsed since the death.—Yours, &c., "JAMES CROWDY.

"W. Young, Esq.
"Secretary to the Accidental Death Insurance Co."

On the 5th of February, Mr. Young returned Mr. Crowdy the following answer:—

[276] "Accidental Death Insurance Company,
"7 Bank Buildings, Lothbury,
"5th February, 1856.

"Sir,—I have to acknowledge receipt of your letter of yesterday. Our surgeon went down to Abbey Wood yesterday afternoon to view the body of the late Mr. W. W. Simpson; and I have just heard from him, that, before he can decide whether a post mortem examination will be necessary, he must see Mr. Simpson's surgeon's certificate of the cause of death. You will, therefore, see the necessity of returning the inclosed form filled up immediately.—Yours, &c., "WILLIAM YOUNG.

"To Mr. Jas. Crowdy."

On the same day (the 5th), the form of certificate inclosed in Mr. Young's letter was duly filled up and signed by Mr. A. Kingdon, the surgeon who had attended Mr. Simpson from the time when the accident occurred until he died; and that certificate was then duly returned by Mr. Crowdy to the defendants' office.

Up to the time of Mr. Simpson's death, neither he nor the defendants had expressed any intention of discontinuing the said policy. The policy had been effected in the first instance by one of the defendants' country agents, who resided in the neighbourhood of Abbey Wood; and the premiums for the previous years had usually been paid to this agent by Mr. Simpson, upon the company's receipt.

The company were in the habit of sending down to their country agents printed forms of receipt for the premiums becoming payable from time to time within each agent's district; and the agent then received the money upon these receipts, and

transmitted it to the defendants' office in London. In accordance with this usage, the defendants had sent to their agent for the Abbey Wood district the printed form of receipt for Mr. [277] Simpson's premium: and that printed form was after Mr. Simpson's death returned to them by the agent on the 8th of February, with an intimation that the premium had not been paid. Up to this day,—the 8th of February,—the secretary had no reason to doubt that the premium had been duly paid.

On the 11th of February, a meeting of the board of directors, who had the management of the affairs of the company, took place: and the secretary mentioned to them at that meeting the subject of Mr. Simpson's policy. All other business which was brought before the directors was then disposed of: but a special meeting was fixed for the 13th of February (the day after the twenty-one days would have expired), for the further consideration of Mr. Simpson's policy.

The special meeting was accordingly held on the 13th, when the matter was considered by the board: and the result was, that a resolution was passed by the directors, the effect of which was communicated by Mr. Young to Mr. Crowdy by a letter of that date, of which the following is a copy:—

"Accidental Death Insurance Company,
"7 Bank Buildings, Lothbury,
"13th February, 1856.

"Policy No. 868_{a}.

"Sir,—I am directed to inform you that the case of the late Mr. Simpson has been considered this day, and that the board are of opinion that no claim is payable under the above policy.—Yours, &c., "WILLIAM YOUNG."

To this letter Mr. Crowdy replied as follows:—

"17 Serjeants' Inn, Fleet Street,
"February 14th, 1856.

"Policy No. 868^{2}_{a}.

"Sir,—I am in receipt of your letter informing me [278] that your board are of opinion that no claim is payable under the above policy. May I beg the favour of your informing me upon what grounds the board propose to dispute a claim which appears to be such a clear one upon the certificates and evidence which have been furnished to you?—Yours, &c., "JAMES CROWDY.

"W. Young, Esq.,
"Secretary to the Accidental Death Insurance Co."

On the 19th of February, Mr. Young addressed the following letter to Mr. Crowdy:—

"Accidental Death Insurance Company,
"7 Bank Buildings, Lothbury,
"19th February, 1856.

"Sir,—I have laid your letter of the 14th instant before the board, and am directed to say that it is not usual, nor can it be expected that they should enter into the reasons which have guided them in arriving at their decision communicated to you in my letter of the 13th instant.—Yours, &c., "WILLIAM YOUNG.

"James Crowdy, Esq."

To this letter Mr. Crowdy replied on the 20th, as follows:—

"17 Serjeants' Inn, Fleet Street,
"February 20th, 1856.

"Policy on life of Mr. W. W. Simpson.

"Sir,—I have received your letter of yesterday, stating that it is unusual and cannot be expected that your directors should enter into their reasons for resisting the claim under this policy. I cannot help observing hereon that I believe it is not only not unusual, but that it is very usual for insurance offices to offer at all events

some [279] reason whenever they repudiate their liability to a claim which, as in this case, is, to say the very least, primâ facie a fair and just one, upon the certificates sent in to your office. If, however, the directors are unable to give their reasons, or determine upon withholding them from Mr. Simpson's family, I will not here raise any further discussion upon the fairness of such a mode of proceeding.

"I shall feel obliged by your allowing me to take a copy of the proposal originally sent in by Mr. Simpson for this insurance, and will send or call in the course of to-morrow for that purpose.—Yours, &c., "JAMES CROWDY.

"W. Young, Esq.,
"Secretary to the Accidental Death Insurance Co."

Again, on the 20th of March, Mr. Crowdy addressed Mr. Young, as follows:—

"17 Serjeants' Inn, Fleet Street,
"March 20th, 1856.

"Policy on life of Mr. W. W. Simpson.

"Sir,—I must beg the favour of a reference to the solicitors to your office, as I have received instructions from Mr. Simpson's executors to take proceedings upon this policy. I regret that my clients should be forced to this course by the most extraordinary and unusual course of a refusal to pay, without one word of reason assigned for such refusal.—Yours, &c., "JAMES CROWDY.

"W. Young, Esq.,
"Secretary to the Accidental Death Insurance Co."

It did not appear that the defendants had ever intimated, either to Mr. Crowdy or to any other person on behalf of the plaintiffs, that the premium on the policy [280] had not been paid, or that it was on that account that the claim upon the policy was resisted,—the only question ever raised by them previously to the commencement of this action (on the 9th of April, 1856) being, that which was made the subject of the second and third pleas, viz. whether Mr. Simpson died from an accident within the meaning of the policy. The plaintiffs and their attorney consequently supposed that this was the only question at issue. If they had been informed by Mr. Young that the premium had not been paid, they would have paid it before the expiration of the twenty-one days.

The Lord Chief Justice, in his summing up, told the jury that the substantial question for them upon this part of the case was, whether the defendants wilfully and fraudulently misled the plaintiffs as to the fact of the premium not having been paid, and whether the consequence of so misleading them was to prevent them from paying the premium before the expiration of the twenty-one days.

The jury found that the defendants intentionally withheld from the plaintiffs the fact of the non-payment of the premium, from the 8th of February; that the plaintiffs were misled by the letter of the 5th of February, and thereby induced to make no further inquiries; but that, if they had made further inquiries, they might have ascertained the fact.

In answer to a question from the Lord Chief Justice, the jury also stated that they used the word "intentionally" as being a milder expression than "wilfully and fraudulently;" but that they found that the defendants withheld the fact of the non-payment of the premium, for the purpose of bringing about the result which followed, viz. that the plaintiffs did not pay the premium within the twenty one days.

Upon this finding, his Lordship directed a verdict to be entered for the plaintiffs upon the issues raised on the [281] first and second replications to the first plea,—reserving leave to the defendants to move to set aside that verdict and enter a verdict for them upon those issues.

A verdict having accordingly been entered for the plaintiffs for 1988*l.*,

Hawkins, in Easter Term last, obtained a rule calling upon the plaintiffs to shew cause why the verdict found for them on the replications to the first plea should not be set aside, and instead thereof a verdict be entered for the defendants thereon; or why judgment should not be entered thereon for the defendants non obstante veredicto; or why the entry of final judgment on the verdict entered on such replications should not be stayed; or why there should not be a new trial, on the grounds, that the

privilege of paying the premiums within the twenty-one days after the 22nd of January was the privilege of the insured alone, and that the executors had no power or privilege to pay after his death,—that, the assured having died within the twenty-one days after the 22nd of January, 1856, without having paid the premiums, the policy was void,—that the directors of the company had power to refuse the premium, and that payment of the premium, to be of any effect, must be accepted by the directors, and a receipt given by them,—that the replications afford no answer to the first plea,—that they depart from the declaration, that they were not proved by the finding of the jury,—that there was no duty on the defendants to inform the executors that the premium was not paid, and the omission to inform them of that fact, even though intentional, was no answer to the plea,—that there was no evidence of any wilful concealment on the part of the directors,—and that the verdict was against the evidence.

Byles, Serjt., James Wilde, Q. C., and Garth, shewed **[282]** cause. The second and third pleas having been disposed of by the finding of the jury, and the third replication by the judgment of the court, there only remained to be considered the first plea, and the first and second replications thereto. The first question is, whether the plea is a good answer to the declaration. The substance of the plea is, that, before the assured received the injury which resulted in his death, and before the death, one of the premiums of 12*l.* on the policy became due, and that the same remained unpaid for twenty-one days, whereby the policy became void. At the time of the death of the assured, the 2000*l.* would have been due provided the 12*l.* had been paid. The twenty-one days allowed by the terms of the first condition for the payment of the annual premium not having then expired, there was then due to the plaintiffs from the company 2000*l.* subject to the payment of 12*l.* within twenty-one days. Was it necessary that the 12*l.* should be actually paid? Would it not be enough that the executors were ready to deduct that sum from the amount due to them? In truth, the twenty-one days are covered by the premium for the preceding year. [Williams, J. You contend that the policy covers a year and twenty-one days, for the single premium?] For the first year. [Williams, J. When does the second year commence?] From the end of the twenty-one days. The only object of the twenty-one days was, to keep the assured protected for that extended time. In *Doe d. Pitt* v. *Shewin*, 3 Campb. 134, a tenant held premises under a lease in which there was a covenant to insure and keep insured a given sum upon the demised premises. He effected an annual policy on the premises with an insurance company in the usual printed form, by which it was declared that the policy should be for such longer period as the tenant should regularly pay and the company receive the premium; and a space of fifteen days beyond the **[283]** quarter days was given for payment of the premium, during which time the company was liable: the year expired on the 25th of March, 1811, but the tenant did not pay the premium for a renewal, till the 25th of April following: the company then gave a receipt for the premium, stating the insurance to be from Lady Day, 1811, to Lady Day, 1812: and it was held that the covenant was broken by reason of the non-payment of the premium on or before the 9th of April, and that the lease was forfeited, upon a clause of re-entry. Lord Ellenborough says: "There was an interval during which the insurance was discontinued. The fifteen days, which are an excrescence from the preceding year, expired on the 9th of April. The policy then became extinct, and the landlord was deprived of all protection till the 25th of that month. A fire might have happened in the meantime; and there is no pretence for saying that in that case the Phœnix office would have been liable. For a certain period the landlord ran the risk of fire, and the sum of 800*l.* was not kept insured upon the premises in any office. It may admit of considerable doubt whether by the revenue laws the policy could be lawfully renewed by the payment of the premium after the expiration of the fifteen days. At any rate, its existence was suspended from the 9th to the 25th of April. The covenant to insure was, therefore, broken; and the landlord is entitled to recover at law, whatever relief there may be for the tenant in equity." [Cresswell, J. There was an express insurance there for a year and fifteen days.] Provided the premium for renewal was paid within the fifteen days. [Cresswell, J. I do not so read it.] There is this important provision at the beginning of the fourth condition,—"In every case where a new premium shall become payable, the directors shall be at liberty to terminate the risk, by refusing to accept such premium; and shall also be at liberty, previously to accept-

ing any [284] new premium, to require such further information as they might think fit regarding the insured." [Cockburn, C. J. Suppose they ask for information, and find that the insured has met with an accident likely to result in death, may the company then refuse to receive the premium? Williams, J. The information might be as to habits of life rendering him an ineligible subject for insurance. Milward. Or as to his occupation.] The company must at all events be liable until the expiration of the twenty-one days. [Cockburn, C. J. If the party means to drop the insurance, and meets with a serious accident within twenty-one days after the expiration of the year of insurance, he may, according to your argument, tender the premium which he never intended to pay, and so make the company liable?] The first condition admits of no other construction. [Cockburn, C. J. Is not this the true construction of the first and fourth conditions, taken together,—If the insured chooses to renew the policy, he may do so by paying the premium within the twenty-one days, provided the directors do not exercise the option given them of terminating the risk by refusing to receive the money; and, in that case, the company shall be liable notwithstanding the happening before the expiration of the twenty-one days of the event upon the happening of which the money secured by the policy becomes payable?] Any other construction than that which makes the twenty-one days part of the portion of time covered by the insurance, renders the reservation of that period useless. If this was not an existing policy during the twenty-one days, it could not be revived. It is submitted that it was a continuing policy at the time of the death of the insured, and there was then an inchoate claim against the company,—defeasible, possibly, under the fourth condition. Then, as to the option of the directors, how and when is it to be exercised? When a new premium becomes payable. [285] Now, the new premium accrues or becomes due on the 22nd of January. That appears from the second condition, which provides, that, "if the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same." The same meaning must be given to the same words in the fourth condition. If it be optional for the directors to refuse the premium at any time during the twenty-one days, the provision giving the twenty-one days for payment of the premium, which was intended for the benefit of the insured, is altogether nullified. The policy, which is made by the company themselves, must be construed most strongly against them. In *Salvin* v. *James*, 6 East, 571, by a policy under seal referring to certain printed proposals, a fire-office insured the defendants' premises from the 11th of November, 1802, to the 25th of December, 1803, for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the said premium at the said times, and the office should agree to accept it; and by the printed proposals it was stipulated that the insured should make all future payments annually at the office within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium was paid: and, by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there by policies for a year or more had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies: it was held, that notwithstanding this latter clause, the assured having, before the expiration of the year, had [286] notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured had refused, the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made, though the assured, after the loss, and before the fifteen days expired, tendered the full premium which had been demanded, the effect of the whole contract, &c., taken together, being only to give the assured an option to continue the assurance or not during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not before the end of the year determined the option by giving notice that they would not renew the contract. In delivering the judgment of the court, Lord Ellenborough there says, "The office had the power at any time during the year of saying to the assured, we will not contract with you again: we will not receive from you the premium for another year; and, by such declaration, the object would cease for which the fifteen days were allowed; and,

as no premium would be in such case to be received, no indemnity could be claimed in respect of it. The consideration of the indemnity during the fifteen days, is, the premium which may be paid within that period; but, when that cannot be any longer looked to, or expected, the right to the indemnity must determine also. The effect of the third article and advertisement are, to give the parties an option for fifteen days to continue the contract or not: with this advantage on the part of the assured, that, if a loss should happen during the fifteen days, though he have not paid his premium, the office shall not after such loss determine the contract: but that it shall be considered as if it had been renewed: but this does not deprive them of the power of determining the contract at the end of the term, by **[287]** making their option within a reasonable time before the end of the period for which the insurance was made. When the premium is received, the effect of it is to give the assured an insurance for another year, to be computed from the expiration of the first policy, and not from the expiration of the following fifteen days, which would be the case if the argument of the plaintiffs' counsel were well founded, that the interval of the fifteen days is not comprised in the policy: if that were so, a new policy and new stamps would be necessary; whereas, according to the present policy, regard being had to its relation to the printed proposals, it is an insurance for one year, and so long as the parties please, provided the assured pay the annual premium within fifteen days of the expiration of each year; with a restriction of the office alone from determining the policy after the year during fifteen days of the following year, in case a loss should happen during that period." The language of the conditions here is somewhat different; but the effect was intended to be the same. [Willes, J. The conditions do not provide for payment of the premium for renewal by any one but the assured. That is the difficulty I feel. Cresswell, J. What answer have you on the record to the first plea? That plea alleges that the premium became due on the 22nd of January, 1856, and that it never has been paid.] It would, in effect, be paid by adjustment. The plaintiffs claim 2000*l.* less the 12*l.* premium.

Then, as to the replications. The first replication in substance is, that the defendants are by the conduct of their secretary and agent estopped from saying that the premium had not been paid. [Cresswell, J. Where is the evidence that the plaintiffs were intentionally misled? Cockburn, C. J. The directors abstained from communicating to the executors the fact of the premium not having been paid, until after the expiration of the **[288]** twenty-one days.] It was an unintentional misleading at first, but became culpable when the directors subsequently were made aware of the true state of things. [Cockburn, C. J. Were they bound to give the executors notice that the premium was unpaid? If they had done anything actively to induce the executors to abstain from inquiry, possibly the directors might be estopped from objecting that the policy had dropped. But the question is, whether there is any evidence of conduct on their part which amounts to such a misleading as to excuse the non-payment of the premium.] This is very analogous to the case of *Gregg* v. *Wells*, 10 Ad. & E. 90, 2 P. & D. 296, where it was held, that the owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bonâ fide, cannot recover them from the vendee. The facts of that case were these:—Gregg, the owner of the fittings of a public-house, demised them to one Durham, who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. Gregg was present at the execution of such agreement. Durham afterwards sold the goodwill and fittings, without Gregg's knowledge or assent, to Wells, who, being told by the landlord that Durham was his tenant, bought them bonâ fide, in ignorance of Gregg's title, and was accepted by the landlord as tenant in the place of Durham. And it was held that Gregg could not maintain trover for the fittings against Webb. In giving judgment, Lord Denman, who tried the cause, said,—*Pickard* v. *Sears*, 6 Ad. & E. 469, 2 N. & P. 488, was in my mind at the time of the trial; and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute **[289]** that fact in an action against the person whom he has himself assisted in deceiving." Would the principle of that case have been at all varied, if the plaintiff had been ignorant at first that the goods were his, and had allowed the sale to take place after he had become acquainted with the fact? Surely not. In the judgment in *Pickard*

v. *Sears*, the court say that "the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." [Williams, J. The rule in *Pickard* v. *Sears* is somewhat qualified by the judgment of the court of Exchequer as delivered by Parke, B., in *Freeman* v. *Cooke*, 2 Exch. 654, 663, which must now be considered as the governing rule. After referring to *Pickard* v. *Sears*, and *Gregg* v. *Wells*, and the earlier cases of *Greaves* v. *Key*, 3 B. & Ald. 313, and *Hearn* v. *Rogers*, 9 B. & C. 557, 4 M. & R. 486, that learned judge says: "Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears*, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself as that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negli-**[290]**-gence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised." And he adds, "In truth, in most cases in which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it." Then, as to the second replication, which is substantially the same as the first, but pleaded on equitable grounds. [Williams, J. Can there be an equitable replication to a plea shewing a legal objection to the plaintiffs' recovering upon the policy (*a*)?] The matter alleged in the replication is matter of defeazance, which it was not necessary for the plaintiffs to allege in their declaration. The defendants clearly are liable for having wilfully abstained from removing from the minds of the plaintiffs the delusion under which they knew them to be labouring.

Hawkins and Milward, in support of the rule, were stopped by the court.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court:—

This was an action by the executors of William Warre Simpson on a policy effected by him with the defendants on the 22nd of January, 1851; and the declaration averred that it continued in force at the time of William Warre Simpson's death, and that, while it continued in **[291]** force, he met with an accident which within three months after its occurrence, and within twenty-one days after the 22nd of January, 1856, caused his death.

The defendants pleaded, that, before William Warre Simpson suffered injury from an accident as alleged, and before his death, to wit, on the 22nd of January, 1856, one of the premiums of 12*l.* payable as in the policy mentioned became due, and the same remained unpaid for twenty-one days next after it became due, and had never been paid, whereby the policy became void.

They also pleaded two other pleas, which it is not necessary to notice.

The plaintiffs replied, first, that the defendants ought not to be admitted to plead the first plea, because they said that William Warre Simpson died on the 1st of February, 1856; and that, from the time of his death until the expiration of twenty-one days next after the 22nd of January, the plaintiffs were in communication, both by letter and otherwise, with the defendants, on the subject of the policy and of the death and the cause of the death of William Warre Simpson, and the claim which is now made by the plaintiffs in this action, and that, in the course of and during such communications, the defendants by their words and conduct wilfully caused the plaintiffs to believe, and the plaintiffs accordingly did believe, and acted in the belief, that the policy was in full force for the year ending the 22nd of January, 1857, and

(*a*) See *Vorley* v. *Barrett*, ante, vol. i. pp. 225, 234.

that they had no means of ascertaining from any documents in their possession whether the premium had been paid or not, &c.

There was a second replication in substance the same.

Upon these replications issue was joined.

There was a third replication, to which the defendants demurred, and upon that judgment was given in their favour.

The cause was tried before the Lord Chief Justice at [292] the sittings in London, after Hilary Term last, when the jury found, on the issues raised by the replication, that the defendants intentionally withheld information of the non-payment of the premium from the plaintiffs, from the 8th of February; and that the plaintiffs were misled by the letter of the 5th of February, and were thereby induced to make no further inquiry, while by making further inquiry they might have ascertained the fact; and thereupon the verdict was entered for the plaintiffs, the defendants having leave to move to enter the verdict for them, on the ground that the evidence did not sustain the plea.

A rule nisi was granted in Hilary Term, against which cause was shewn in Easter Term: and, after consideration, we are of opinion that the rule should be made absolute to enter the verdict for the defendants.

The evidence given on the trial was, that the deceased had effected an insurance against death or injury from accident, the premium on which was payable on the 22nd of January in each year. The deceased died on the 1st of February. The premium due on the preceding 22nd of January was then unpaid. The policy was on the 4th forwarded by the executors, by whom it had been found, to a Mr. Crowdy, the solicitor who acted for them. Mr. Crowdy on the same day wrote to the defendants announcing the death of the assured. On the ensuing day, the secretary of the company wrote to Mr. Crowdy in reply, transmitting a form to be filled up in the ordinary way, and notifying the necessity for the certificate of a medical man as to the cause of death.

This letter was silent as to the premium due on the 22nd of January not having been paid. In point of fact, it was at that time unknown to the secretary or the defendants, as it also was to the plaintiffs and their solicitor, that the premium in question had not been paid. It had been left to an agent through the medium of [293] whom this insurance had been effected, to receive the premium, as was usual in such cases; and the defendants were not aware that it had not been received in due course, till a letter was received on the 7th, calling attention to the death of the assured, and to the fact that the premium remained unpaid. This fact the secretary brought to the knowledge of the board of directors at a meeting on the 11th, when direction was given to him to convene a special meeting of the board on the 13th to consider the subject of this policy. At that meeting the directors resolved to repudiate the claim, on the ground that the premium had not been paid within the twenty-one days; and a letter to that effect was written by the secretary to the plaintiffs' solicitor. This was the first communication made by the defendants to the plaintiffs, that the premium had not been paid; and this, in our judgment, was not evidence to sustain the issue on behalf of the plaintiffs; for, it amounts to nothing more than that the defendants abstained from giving information to the plaintiffs of the non-payment of the premium; and we think that the principle of *Pickard* v. *Sears* is not applicable to this case.

But the main question argued before us regarded the construction of the policy, the conditions annexed to it, and the right of the executors to keep it alive by paying the annual premium after the happening of the event against which the insurance was effected; it being contended on the one hand that the plea was bad and gave no sufficient answer to the declaration, and that, if the verdict was entered for the defendants, judgment ought nevertheless to be entered for the plaintiffs; and, on the other, that the plea was good, and, if the verdict for the plaintiffs remained undisturbed, judgment ought to be arrested.

The policy declared, that, if the assured should receive or suffer any bodily injury from any accident or violence [294] on or before the 22nd of January, 1852, and subsequent thereto, during the continuance of that policy, provided he, the assured on or before, or within twenty one days after, the 22nd of January, 1852, and on or before, or within twenty-one days after, the 22nd of January in every succeeding year so long as the acting directors for the time being of the said company should accept the same, pay or cause to be paid to the said company the annual premium of 12*l.*,

then, subject as therein or in the indorsement thereon was mentioned or referred to, the subscribed capital, &c. should be liable, &c.: and the policy was declared to be subject to the several regulations and conditions printed on the back thereof, so far as they might respectively be applicable, in the same manner as if such regulations and conditions had been incorporated in the policy.

The first, second, and fourth conditions were the material ones, and were as follows:—The first condition is: "The premium on this policy is to be paid within twenty one days from the day on which the same shall first accrue or become due; and, provided the same be from time to time paid within such space of twenty one days, this policy shall not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by this policy shall, according to the terms thereof, become payable." The second condition is: "If the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same." The fourth condition is: "In every case when a new premium shall become payable, the directors shall be at liberty to terminate the risk by refusing to accept such premium; and [295] shall also be at liberty, previously to accepting any new premium, to require such further information as they may think fit regarding the insured: and no payment of any such new premium shall suffice to keep on foot or renew a policy, unless the person or persons paying such premium shall take a receipt for the same in writing under the hand of any two of the directors, or of some person or persons duly authorised by the directors to give such a receipt."

It was contended for the plaintiffs that the plea gave no sufficient answer to the declaration; for, that the twenty one days allowed for the payment of the premium were days of grace, and operated as a prolongation of the time for which the insurance was effected; that the policy had not ceased to exist at the time when the death of the assured occurred; and that, in order to avail themselves of the fourth condition, the directors should have given notice, before the expiration of the preceding year, that they would not renew the policy. The case of *Salvin* v. *James*, 6 East, 571, was relied on. It was further contended, that payment of the premium was not necessary to keep the policy alive; for, that the event on which the sum insured was to be paid having happened within the twenty-one days, it was in effect paid, as the directors might deduct it out of the sum which was in their hands payable to the plaintiffs: and that, if the plea was bad, the plaintiffs would be entitled to judgment, notwithstanding the verdict on the issue joined on the replication might by order of the court be entered in favour of the defendants.

We are of opinion that none of these arguments are well founded.

The policy was to continue provided he, the assured, paid the premium within the twenty-one days; and this, we think, did not give his executors the right to pay it after his death; and that the payment of premium [296] mentioned in the first condition, means, such payment as provided for in the body of the policy; and, consequently, that, even if the plaintiffs had tendered the premium within the twenty one days, the directors would not have been bound to accept it.

But, if this were otherwise, the second condition appears decisive, viz. that, if the premium is unpaid for twenty one days after it becomes due, the policy shall be absolutely void; for, we have already said that the defendants were not by their conduct estopped from denying the payment, for that they had not, as alleged in the replication, by their words and conduct wilfully caused the plaintiffs to believe that the policy was in full force till the 22nd of January, 1857; and therefore the doctrine of estoppel by conduct could not apply in this case.

We also think that neither the plaintiffs nor the assured, had he been living, would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty one days, the fourth condition giving to the directors the right of keeping alive or renewing a policy, or of refusing to do so, at their pleasure. The case of *Salvin* v. *James*, 6 East, 571, or rather the dictum of Lord Ellenborough (for, the judgment there was for the defendants on another ground), when carefully examined, confirms this view of the question. That case had been preceded by the case of *Tarleton* v. *Staniforth*, 5 T. R. 695, —an action on a policy of insurance against fire. The policy was subject to certain articles, one of which was,

that the assured "shall pay the premium to the next quarter-day, and for one year more at least, and shall, so long as the managers agree to accept the same, make all future payments annually within fifteen days after the day limited by their respective policies, upon pain of forfeiture of the benefit thereof; and no insurance is to take place until [297] the premium be actually paid by the assured." A loss by fire happened within fifteen days after the expiration of the time for which the policy was effected. The premium for renewal had not then been paid, but was tendered within the fifteen days. The court held that the policy was void; for that two things were necessary in order to keep it alive, the payment of the premium, and the acceptance of it by the managers. After that decision, an advertisement was published by the managers of the Sun Fire Office, and was never afterwards retracted: it was as follows,—"The managers of this office do hereby inform the public that all persons insured in this office by policies taken out for one year or for a longer term, are and always have been considered by the managers as insured for fifteen days beyond the time of the expiration of their policies: but that allowance of fifteen days does not extend to policies for shorter periods, which cease at six o'clock in the evening of the day of the expiration of the time mentioned in the policies." Salvin & Co., on the 11th of November, 1802, caused to be effected in the Sun Fire Office a policy for 3000l., on their cotton mill, &c., from the 11th of November, 1802, to the 25th of December, 1803. In November, 1803, the managers gave notice, that, from and after the 25th of December, 1803, they would not continue the insurance without an increased premium, which Salvin & Co. refused to pay. On the 7th of January, 1804, being within fifteen days from the expiration of the time mentioned in the policy, the premises were consumed by an accidental fire; and, on the 18th, Salvin & Co. tendered the increased premium which had been demanded by the office. This was refused: and an action was commenced against the office on the policy. The declaration averred, that, in consideration, &c., the defendants undertook and promised the plaintiffs that their property should be considered by the managers as in-[298]-sured for fifteen days beyond the time of the expiration of the policy, and that, within the fifteen days, a loss by fire happened. Plea, non assumpsit. The policy, when produced at the trial, contained a reference to the printed proposals, the third of which was as follows, —"On be speaking policies, all persons are to make a deposit for the policy, stamp-duty, and mark, and shall pay the premium to the next quarter day, and from thence for one year more at least: and shall, as long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place till the premium be actually paid by the assured. A special case was stated for the opinion of the court; and, on the argument, the decision in *Tarleton* v. *Staniforth* was not questioned; but it was contended, that the policy in this case must be construed by the advertisement, and that the property was protected by the original policy for fifteen days after the expiration of the year. Lord Ellenborough and the court held, that the third article must be considered as corrected by the advertisement, for, that both could not stand together; that the result was, that the latter part of that article must be considered as applicable to the first year only, and that the option of the managers to continue the policy or not must be exercised before the expiration of the current year; that, if the option to discontinue the policy had not been so exercised, the property would have been protected during the fifteen days; but that, it having been so exercised, the policy ceased on the expiration of the year, and the plaintiffs could not recover. The former decision, therefore, remained unquestioned; and the fourth condition of the policy now under consideration, being, in substance, the same as the third in that, and being unqualified by anything analogous to the advertisement [299] published by the Sun Office, both the cases of *Tarleton* v. *Staniforth* and *Salvin* v. *James* are authorities for saying that this policy expired on the 22nd of January, 1856.

The result is, that the plea is good, and therefore there is no ground for entering up judgment for the plaintiff notwithstanding the verdict on the issue joined on the replication to that plea.

Judgment for the defendants (*a*).

(*a*) An appeal is (M. T. 1859) pending. [No appeal appears to be reported.—Ed. E. R.]

ORCHARD AND ANOTHER *v.* SIMPSON. May 7th, 1857.

By a written contract, the plaintiffs agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvass used to be equal to pattern, and of the market value of 11d. per yard, and the making to be charged at 5d. per yard: and it was agreed, that, if the market value of the canvass should be less than 11d. per yard, the amount (the difference) should be deducted: —Held, that "market value" meant the price in the market to an ordinary consumer, irrespective of the particular contract.

This was an action for work and materials, goods bargained and sold and sold and delivered, and money due upon accounts stated. The plaintiffs claimed 200l.

Pleas,—first, except as to 36l. 11s. 2d., never indebted, secondly, except as to the same sum, payment before action, —thirdly, payment into court of 36l. 11s. 2d.

Replication, joining issue on the first and second pleas, and taking the 36l. 11s. 2d. in satisfaction pro tanto.

The cause was tried before Williams, J., at the second sitting at Westminster in this term. The facts were as follows: The plaintiffs are tent and marquee-makers: the defendant is the proprietor of a place of public entertainment called Cremorne Gardens. In March, 1856, the defendant was desirous of erecting a tent in the [300] grounds attached to Cremorne Gardens, for the purpose of a flower-show; and, after some preliminary discussion, the following agreement was entered into with the plaintiffs for covering it with canvass:—

"Specification of an agreement made this 19th of March, 1856, between Messrs. Orchard & Cunnington, 107 Brick Lane, Old Street, tent-makers, of the first part, and T. B. Simpson, Esq., of the Cremorne Gardens, Chelsea, in the county of Middlesex, of the second part:

"We, the undersigned, do hereby agree to make a covering for the said wooden framework, situate in the Cremorne Gardens, Chelsea, with cotton canvass, equal in quality to pattern, and of the market value of 11d. per yard, 24 inches wide; 5d. to be charged for making up the same according to the plan submitted and explained, making together the sum of 1s. 4d. per yard of 24 inches: and we hereby agree, that, should the market value of the cotton canvass be less than 11d. per yard of 24 inches, the amount to be deducted from the said sum of 1s. 4d.

"1. That the roof marked A. shall be covered as specified; each seam shall be one inch wide, sewed with tarred twine, tabling all round six inches wide, made in thirteen pieces 38 feet long, thirteen breadths two feet wide sewed canvass, and laced together; each piece to have 144 galvanized rings worked in with tarred twine for the holes for lacing, &c., 40 screw-hooks and rings to fasten same to framework, or as many more as may be necessary.

"2. That roof B. shall consist of twenty-six pieces of the same material, each piece 24 feet long, 13 breadths wide, with holes, ropes, &c., for lacing, thirty large hooks and rings, or as many more as may be necessary to fasten each piece at top, also holes and lines at bottom.

"3. That the walls shall consist of canvass equal to pattern, but of No. 9., and less in price by 1d. per yard [301] run, 2 width; to be fastened with brass hooks and eyes at top and at bottom, with the necessary number of proper pegs and latchets.

"4. That roof C. shall consist of two pieces, 24 feet long, thirty breadth two feet canvass, equal to pattern, with rings and hooks to fasten top, lines and holes at bottom, lacing at sides.

"5. We hereby agree to send in one third of the canvass made up to the roof and walls by Saturday, the 6th of April, 1856, the second delivery of one third more by Saturday, the 13th of April, and the remaining portion to complete the same by Saturday, the 20th of April, 1856; and, further, we undertake the completion of the whole by the 26th of April, 1856, to the satisfaction of Mr. Simpson, or to forfeit 3l. per day so long as the same shall remain unfinished; the said sum to be deducted from the balance to be paid.

"That 100l. be paid on the delivery of the first portion, 100l. on the delivery of the

second portion, and the balance when completed to the satisfaction of Mr. Simpson or whomsoever he may appoint.

"And, further, in consideration of the above prompt payment, we do hereby guarantee that the durability of the materials specified to be used shall last and keep out the water for five seasons; otherwise we undertake the necessary repairs to make it do so free of cost to Mr. Simpson."

(Signed) "T. G. ORCHARD,
"for ORCHARD & CUNNINGTON."

The work having been done, and various payments having been made by the defendants to the plaintiffs on account thereof, the latter delivered a bill, in which they gave the former credit for the payments so made, as follows:—

[302] T. B. Simpson, Esq.—to Orchard & Cunnington.

1856.		£	s.	d.
April.	Covering framework of pavilion with canvass,			
	12 pieces top roof, 55 feet over, 13 breadths wide, 2903 yards at 1/4	193	17	4
	1 piece ditto, 55 feet over 7½ breadths wide, 139½ yards at 1/4	9	6	0
	24 pieces side roof, 27 feet 6 in. long, 13 breadths wide, 2860 yds. at 1/4	190	13	4
	2 pieces ditto, 27 feet 6 in. long, 7½ breadths wide, 137½ yds. at 1/4	9	3	4
	2 end roofs, 27 feet 6 in. long, 26 breadths wide, 476 yds. 2 ft. at 1/4	31	15	6
	4 corner pieces, 27 feet 6 in. long, 13 breadths wide, 476 yds. 2 ft. at 1/4	31	15	6
	2 gable-ends, 108 yards, at 1/4	7	4	0
	36 pieces walls, 2¾ yards long, 13 breadths wide, 1287 yds. at 1/3	80	8	9
	2 pieces ditto, 2¾ yards long, 7 breadths wide, 39 yds. at 1/3	2	8	9
		£556	12	6
	Cash received on account	300	0	0
	Balance due	£256	12	6

Further payments were afterwards made amounting to 225l., leaving a balance of 31l. 12s. 6d.; and, some extra work having been done by the plaintiffs for the defendant, a second account was sent in, as follows:—

T. B. Simpson, Esq.—to Orchard & Cunnington.

1856.					£	s.	d.
April 11.	To account rendered				556	12	6
Cr.							
April 12.	By cash	£100	0	0			
„ 19.	Ditto	100	0	0			
„ 26.	Ditto	100	0	0			
May 9.	Ditto	50	0	0			
[303]							
May 17.	By cash	50	0	0			
					400	0	0
					£156	12	6
„ 19.	Reefing side roofs, as agreed				30	0	0
„ 31.	Waterproof cloth, 223 square yards, 2/				22	6	0
					£208	18	6

A third account was afterwards sent in, as follows: –

T. B. Simpson, Esq.—to Orchard & Cunnington.

1856.		£	s.	d.
April 11.	To balance of tent left due	31	12	6
„ 26.	Extra galvanised screw-hooks, &c. to fasten gable-ends	2	2	0
	Extra ditto to fasten walls, &c.	5	0	0
May 16.	Reefing side roofs of tent, as agreed, iron blocks, ropes, brackets, &c.	30	0	0
„ 31.	Fixing 223 yards of oil-cloth round side roof of pavilion, 2	22	6	0
June 14.	Securing side roofs of tent, top roof, &c., new lines, screws, hooks, &c.	6	10	0
July 8.	Securing tent, and decorating ditto with flags, &c., for licensed victuallers' dinner, &c.	10	0	0
August 29.	Attending upon Mr. Simpson, and instructing him how to take down the tent	1	1	0
		£108	11	6

The plaintiffs by this action sought to recover this balance of 108l. 11s. 6d. The claim was resisted by the defendant, on the ground, that, by an understanding between the parties before the agreement was entered into, the only profit the plaintiffs were to derive from the transaction was 2d. per yard upon the making of the tent-covering, and that the canvass was to be charged [304] for at cost-price; and it was submitted that this was the true construction of the contract itself. And witnesses were called, —two tent-makers, and a dealer in canvass,—who proved that canvass of the qualities used in the making of the tent, and which the plaintiffs had charged for at the rates of 10d. and 11d. per yard respectively, were procurable at 8½d. and 9½d. per yard, or, considering the quantity required, even at a less price. And, all the other items of the plaintiffs' demand being proved or admitted, it was insisted that the balance due to the plaintiffs beyond the sum into court was 8l. 6s. 2d. only.

On the part of the plaintiffs, witnesses were called to prove that the "market value" of the canvass used was that charged by them: and it was submitted that those words in the agreement meant, not "cost-price," or "wholesale price," but "consumer's price."

The learned judge ruled that the latter was the proper construction of the agreement; and he directed the jury accordingly, and they returned a verdict for the plaintiffs for 67l. 0s. 4d.

Montagu Chambers, Q. C. (with whom was Wordsworth), pursuant to leave reserved to him at the trial, on a former day moved to reduce the verdict to 8l. 6s. 2d. He submitted that the plaintiffs were not entitled to charge more for the canvass than they themselves had actually paid to the manufacturer for it. [Cockburn, C. J. In effect, you want to import words into the contract, viz. market value for the large quantity required.] Precisely so. [Cockburn, C. J. "Cost-price" would have made it clear.] The expression used being ambiguous, in construing the contract, regard may be had to the surrounding circumstances.

COCKBURN, C. J. We will speak to my Brother [305] Williams before we decide whether the rule should be granted or not.

Cur. adv. vult.

COCKBURN, C. J., now said: We have communicated with my Brother Williams, and we are all of opinion that there is no ground for the application. We think the words "market value" in this contract must be taken to mean the price of the commodity in the market as between the manufacturer and an ordinary purchaser; and that those words are not to receive a different interpretation, because a person requiring so large a quantity as was wanted in this case, might, as was insisted by Mr. Chambers, have purchased the canvass at a lower rate. We think the contract is only to be construed to mean, the ordinary price in the market, irrespective of the particular contract. There will therefore be no rule.

Rule refused.

[306] HODGES AND ANOTHER *v.* CALLAGHAN. April 16th, 1857.

[S. C. 26 L. J. C. P. 171; 3 Jur. N. S. 369; 5 W. R. 531. See *Huffer* v. *Allen*, 1866, L. R. 2 Ex. 17; *Hughes* v. *Justin*, [1894] 1 Q. B. 670; *Muir* v. *Jenks*, [1913] 2 K. B. 416.]

Where a writ of summons is specially indorsed under the 25th section of the Common Law Procedure Act, 1852, and judgment is signed for default of appearance, pursuant to s. 27, after payments made by the defendant on account, the plaintiff is not entitled to sign judgment for the sum indorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid.—By a special indorsement under the above statute, the plaintiff claimed 34l. 11s. 7d. The defendant, after the issuing of the writ, and before judgment, paid 25l. on account, and judgment was signed and execution issued for the full amount, but with a direction to the officer to take the balance only, and costs. The defendant having been arrested and detained under this writ, a judge at Chambers made an order to reduce the amount for which the judgment was signed to the proper sum, and to discharge the defendant from custody, in pursuance of the 7 & 8 Vict. c. 96, s. 57, the sum recovered not exceeding 20l., exclusive of costs:—The court refused to rescind the order.—The arrest took place on the 14th of August, and the application for the defendant's discharge was not made until the 11th of December:—Held, not too late.

A writ of summons issued against the defendant on the 5th of December, 1855, at the suit of the plaintiffs, which was specially indorsed with the particulars of the debt, pursuant to the 25th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, as follows:—

"The following are the particulars of the plaintiffs' claim.

			£	s.	d.
"1855. Sept. 18.	To 53¾ gallons gin 17. 11/2	.	29	14	7
	2 „ British brandy, 14/	.	1	8	0
	3 „ spirits of wine, 21/4	.	3	4	0
	2 bottles . . .		0	5	0
			£34	11	7

"Account stated, £34, 11 7."

Having been served with the writ, the defendant called upon the plaintiffs' attorneys, and proposed to pay the debt and costs by instalments, and subsequently by various instalments paid 25l. on account, leaving a balance of 12l. 19s. 7d.

On the 8th of August, 1856, the plaintiffs' attorneys signed judgment for want of appearance for the 34l. 11s. 7d., the debt indorsed upon the writ of summons, and 3l. 8s. for costs, and issued a fi. fa. on the 14th, indorsed to levy "12l. 19s. 7d. and 1l. 9s. for costs of execution, and also interest on 12l. 19s. 7d. at **[307]** 4l. per cent. per annum from the 8th of August, 1856, besides, &c." There being nothing upon the defendant's premises whereon the officer could levy, a ca. sa. similarly indorsed was issued on the 14th of August, under which the defendant was on the same day arrested and conveyed to White-Cross Street prison.

On the 11th of December, a summons was taken out calling upon the plaintiffs to shew cause why the judgment and ca. sa. should not be set aside, and the defendant let in to appear and defend, or why the amount for which judgment was signed and execution issued should not be reduced from 37l. 9s. 7d. to 12l. 19s. 7d., and why the defendant should not be discharged from custody, on the ground that at the time the judgment was signed the debt due was under 20l., and why the plaintiffs should not pay the costs of and incident to the application. This summons came on to be heard before Cresswell, J., on the 15th of December, when that learned judge made an order to reduce the sum for which judgment was signed to 12l. 19s. 7d., and for the defendant's discharge from custody, with 1l. costs.

Upon an affidavit of these facts, and also stating that the defendant had on the 22nd of December commenced an action against the plaintiffs to recover damages in respect of the imprisonment under the ca. sa.

Lush, in Hilary Term last, obtained a rule calling on the defendant to shew cause why the above order should not be rescinded. He submitted that the case did not fall within the 7 & 8 Vict. c. 96, s. 57, the fruits of the action exceeding the value of 20l., referring to *Johnson* v. *Harris*, 15 C. B. 357, where Williams, J., thought that the true test was, for what amount the judgment was signed. [Cockburn, C. J. The object of the statute was, to prevent the arrest of a debtor upon final process for a less sum than 20l.] Not where it is the **[308]** balance of a larger sum for which judgment has been signed. It is worthy of remark, that, at the time this statute passed, the legislature were about to establish the county-courts, with a jurisdiction limited to sums not exceeding 20l.; and this will throw some light upon the meaning of the word "recovered" in this act. [Williams, J. In the 43 G. 3, c. 46, s. 3, "recovered" means recovered by the judgment.] The special indorsement of the writ under the 15 & 16 Vict. c. 76, s. 25, is given in substitution of the declaration and particulars of demand. The 27th section enacts, that, "in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form thereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule A. to the act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, &c.; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before," &c. Payments could not be given in evidence in reduction of damages, but must be specially pleaded. The plaintiffs were not bound to give the defendant credit for the sums paid on account, until after judgment. Then, the application is too late. The fi. fa. issued on the 3rd of August, the ca. sa. on the 14th, and the defendant was arrested on the 15th. If there was any irregularity in the proceeding, the defendant was bound to take the objection promptly. Instead of doing so, he lies in prison without making any attempt to obtain his release until the 11th of December. **[309]** [Williams, J. This is an application to the justice and equity of the court. Cresswell, J. My order was, to reduce the sum for which the judgment and execution were signed and issued, and to discharge the defendant out of custody, not to set aside the judgment.] Its effect was, to set aside the judgment signed, and to sign judgment for a smaller sum.

C. Wood now shewed cause. The order was properly made, the sum to be recovered by the judgment being less than 20l. The 57th section of the 7 & 8 Vict. c. 96, reciting "that it is expedient to limit the present power of arrest upon final process," enacts "that no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county-court, court of requests, or other inferior court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20l., exclusive of the costs recovered by such judgment." According to the construction put upon the statute by this court in *Johnson* v. *Harris*, 15 C. B. 357, the defendant was clearly entitled to be discharged, inasmuch as he was detained for a sum not exceeding 20l., and might at any time purchase his liberty by payment of such smaller sum (*a*). In Archbold's Practice (by Prentice), p. 641, it is said that "it would seem that the act does not apply to a case where the real debt recovered exceeds 20l., and the amount has been reduced below that amount by payment or otherwise since the judgment was recovered." *Walker* v. *Hewlett*, 6 D. & L. 732, is exactly in point. There, a writ of summons in debt was indorsed for a sum under 20l.: in the declaration **[310]** the sum claimed was above 20l.: judgment was signed by default, and a ca. sa. issued: the sum inserted in the judgment, and in the mandatory part of the writ, was the sum claimed in the declaration, but the writ was indorsed to levy 12l. only, being the amount of debt and costs: and it was held that this was a case in which "the sum recovered" did not exceed 20l., within the meaning of the 7 & 8 Vict. c. 96, s. 57: and the court accordingly set aside the ca. sa., and ordered the defendant to be

(*a*) The same argument would apply, and with equal force, if the defendant, having been taken in execution for a larger debt, reduces it by subsequent payments to a sum not exceeding 20l.

discharged out of custody. So, in *Blew* v. *Steinau*, 11 Exch. 440, where the debt was reduced below 20*l.* by payment, before judgment signed, an arrest on a ca. sa. for the entire debt was held irregular. [Willes, J. This is the case of a specially indorsed writ under the 27th section of the Common Law Procedure Act, 1852. Under the old practice, the course was, to sign judgment for the amount in the declaration; but, under this section, the plaintiff is authorised, in default of the defendant's appearance, to sign judgment "for any sum not exceeding the sum indorsed on the writ." The plaintiffs should have signed judgment only for the amount actually due, as if there had been a plea of payments puis darrein continuance. Why resort to cases when you have the express words of s. 27 to rely on, the very object of which was to do away with the technical necessity of signing judgment for the whole amount claimed?]

Lush, in support of his rule. This case is neither within the letter nor the spirit of the 7 & 8 Vict. c. 96, s. 57. The question is, what have the plaintiffs recovered by means of the action? Suppose the defendant were sued for a debt of 10,000*l.*, and, after action brought, paid all but 19*l.*, could it be said that the plaintiffs recovered by means of the action only 19*l.*? [Cresswell, J. Suppose the debt reduced by set-off to 10*l.*, what would [311] be the amount recovered?] 10*l.* clearly. But non constat that the set-off will be pleaded. [Cresswell, J. Is it not as much against the policy of the statute that the defendant should be arrested for a large sum where there is a set-off, as it would be if the smaller sum had been the only transaction between the parties? Crowder, J. A man who does not owe 20*l.* is not to be deprived of his liberty.] Here, the defendant at the time the action was commenced owed the plaintiffs 34*l.* 11*s.* 7*d.*, and that sum the action has been instrumental in recovering. In *Johnson* v. *Harris*, the action, as Crowder, J., observes, was really brought to recover 16*l.* only. Some light is thrown upon the subject by the 8 & 9 Vict. c. 127, which makes provision for the recovery of debts not exceeding 20*l.* for which a judgment has been obtained, by summoning the debtor before a commissioner of bankruptcy, or court of requests, or other inferior court of record. And it is also worthy of remark that the first county-court act was passed in the following session. In *Walker* v. *Hewlett*, the action was really brought to recover a debt of 2*l.* 19*s.* 10½*d.* only. Suppose this had not been the case of a specially indorsed writ, and a declaration had been delivered claiming the real sum due, 34*l.* 11*s.* 7*d.*, and the defendant had suffered judgment by default,—for what amount would the plaintiffs have signed judgment? Clearly for the whole debt, even though a portion of it had been paid since the commencement of the action, inasmuch as payment could not be given in evidence unless pleaded. [Willes, J. The defendant might by pleading the part payment to the further maintenance of the action have prevented the plaintiffs from recovering more than the balance actually due. The language of the 27th section of the 15 & 16 Vict. c. 76, was deliberately intended to prevent the plaintiff from signing judgment for more than the sum actually due.] It does not in terms say that judgment shall be signed only for the sum actually due, but "any sum not exceed [312]-ing the sum indorsed on the writ." There can be no difference in this respect between the special indorsement and the old course of practice. Then, if this is mere irregularity, as was held in *Blew* v. *Steinau*, 11 Exch. 440,—the defendant was bound to come promptly. [Crowder, J. Is it mere irregularity to arrest a man for a sum for which the statute says he shall not be arrested?] The real question is, whether the 57th section of the 7 & 8 Vict. c. 96, was intended to apply to a case where the action has actually produced to the plaintiff a sum exceeding 20*l.*

Crowder, J.(*a*). I am of opinion that this rule should be discharged. This is an appeal against an order made by my Brother Cresswell to reduce the sum for which judgment was signed, from 37*l.* 19*s.* 7*d.* to 12*l.* 19*s.* 7*d.*, and to discharge the defendant from custody. It appears that the action was originally brought to recover 34*l.* 11*s.* 7*d.*, that the writ of summons was specially indorsed under the 27th section of the 15 & 16 Vict. c. 76, that no appearance was entered, and that, after payments had been made on account amounting in the aggregate to 25*l.*, judgment was signed for the whole debt, 34*l.* 11*s.* 7*d.* and 3*l.* 8*s.* costs, and the defendant taken on a ca. sa. issued for the entire amount, but indorsed with a direction to the officer to take 12*l.* 19*s.* 7*d.*, with costs of levy, &c. It appears to me that the order was properly made. The judgment should have been signed only for the sum really due, the

(*a*) Cockburn, C. J., was absent on account of indisposition.

object of the 27th section of the 15 & 16 Vict. c. 76, being that the case of a want of appearance should be dealt with in the same way as if under the old practice the defendant had appeared and pleaded. The proper meaning of the 27th section, when fairly construed is, that final judgment may be signed for the sum really due, taking into consideration pay-[313]-ments made. If, instead of filing an affidavit of personal service of the writ of summons, a judge's order had been obtained for leave to proceed (under s. 17), the judgment clearly could only have been entered for the sum actually due. That being so, I am of opinion, that, upon the liberal and proper construction of the 57th section of the 7 & 8 Vict. c. 96, there is no justification for the taking of a defendant in execution for a debt not exceeding 20l. The object of the legislature is apparent from the recital "that it is expedient to limit the present power of arrest upon final process:" and the enacting words are large enough to meet such a case as this. The judgment ought to have been entered up for 12l. 19s. 7d. only: the sum recovered in the action, therefore, was a sum not exceeding 20l. within the meaning of the statute. For these reasons, I am of opinion that the rule to rescind my Brother Cresswell's order must be discharged, but without costs, unless the defendant will undertake to bring no action.

WILLES, J. I am entirely of the same opinion. This was a proceeding by a writ specially indorsed under the 25th section of the Common Law Procedure Act, 1852, where judgment has been signed for default of appearance, and where therefore there could be no plea. The true construction has, I think, been put upon the statute by my Brother Crowder. It has been contended on the part of the plaintiffs, that, under the 27th section, they might at their election sign judgment for the entire sum mentioned in the indorsement, or for the sum as reduced by payments in the mean time. I am of opinion that that is not the correct construction of the act. Before the passing of the 15 & 16 Vict. c 76, a plaintiff could only recover in respect of a cause of action alleged in a declaration: and, where payments were made after the commencement of the action, the defendant was allowed to [314] plead them to the further maintenance, and the plaintiff could only have had judgment for the balance remaining due. It may be true, that, if the payments had not been pleaded, the judgment would have been taken and execution issued for the whole sum claimed, the levy being limited by the direction to the sheriff to take the true amount due. If the question had arisen upon that course of proceeding, possibly the amendment here made would not have been justifiable, and might have affected the operation of the 57th section of the 7 & 8 Vict. c. 96,—though, as at present advised, I am of opinion that it would not, because the sum which that section deals with, is, the sum which the plaintiff claims and the sum for which the action is brought and the judgment obtained. My impression would be, that the question whether the defendant pleaded payments or not, or whether the plaintiff was bound to give him credit for them, would be altogether immaterial. I do not express any formal or decided opinion upon that point: but it is important that we should not be understood as laying down that the defendant would not in that case be entitled to be discharged. But, when we come to deal with the 27th section, the case is stripped of all technical difficulties arising from the rules of pleading. Under that section, there are no pleadings: the plaintiff, having indorsed on the writ of summons the amount he seeks to recover, is impowered, in case of non appearance by the defendant, to sign judgment "for any sum not exceeding the sum indorsed on the writ," with interest and costs. The sum so indorsed may have been reduced by payment: and that is the case in which it was necessary to give the plaintiff the option of signing judgment for the sum indorsed or for any less sum, so as to represent the actual amount due at the time the judgment is signed. It is absurd to suppose that the statute intended to give an option to be exercised at the mere caprice of [315] the plaintiff. The plaintiff ought to represent the court as pronouncing judgment in his favour only for the sum which is really due to him. The 28th section puts the matter beyond all doubt, shewing that the word "may" is used with reference to the amount really due: it enacts, that, in the case there provided for, judgment may be signed "and execution may issue for an amount not exceeding the amount indorsed on the writ of summons." If the argument urged by Mr. Lush is correct, the word "may" in that section should be in like manner construed as giving the plaintiffs an option as to the amount for which execution shall issue. Upon the whole, it appears to me that the plaintiffs were bound, in signing judgment under the 27th section, to give credit for the intermediate

payments, and, that being so, that the sum recovered within the meaning of the 7 & 8 Vict. c. 96, s. 57, was, the sum remaining due after giving credit for the payments made on account of the debt, viz. 12*l.* 19*s.* 7*d.* The order, therefore, directing the sum for which the judgment was signed to be reduced to that amount, was rightly made; and, the judgment being so reduced, it follows that the defendant was entitled to be discharged. The defendant will be entitled also to the costs of the rule, if he will undertake not to bring, or proceed with, an action; otherwise, the rule will be discharged without costs.

CRESSWELL, J. When this matter was before me at Chambers, I thought it involved a question of considerable doubt and difficulty, and but for the circumstance of the defendant being in prison, I should have referred it to the court. The difficulties, however, which I entertained have been very much cleared away by the discussion which has taken place, and the judgments which have been pronounced by my two learned Brothers.

Rule discharged accordingly.

[316] BAYLIS *v.* LE GROS AND OTHERS. April 28th, 1857.

The Common Law Procedure Act, 1854, does not authorise the issuing of a writ of injunction in an action of ejectment.

This was an action of ejectment to recover possession of a factory and premises at Tottenham, in the county of Middlesex. The writ was issued on the 12th of February, 1855, and the cause came on for trial before Jervis, C. J., at the sittings at Westminster after Hilary Term, 1856, when his Lordship suggested that a case should be stated for the opinion of the court. A verdict was thereupon taken for the plaintiff, subject to such special case, but the terms thereof were never agreed on. The defendants having in the meantime removed from the premises certain machinery, and being about to remove more, the plaintiff, on the 13th of March last, obtained a judge's order for a writ of injunction, pursuant to the 82nd section of the 17 & 18 Vict. c. 125, to restrain them from so doing. The writ was as follows:—

"Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, To Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, of Tottenham, in the county of Middlesex, crape-manufacturers, and their agents and servants, and each of them, greeting: Whereas, by an order bearing date the 13th day of March, 1857, and made by Sir John Taylor Coleridge, knt., one of the justices of the court of Queen's Bench at Westminster, in a certain action depending in our court of Common Pleas, wherein James Baylis was plaintiff, and the said Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, were defendants, it was ordered that a writ of injunction issue to restrain the said defendants and their workmen, servants, or agents, from removing the machinery and other effects **[317]** from a factory and premises at Tottenham, in the county of Middlesex, in the occupation of the defendants, and from selling and disposing of the same and of that already removed, the said action in which the said order was made being an action brought for the recovery in ejectment of all that messuage, tenement, or factory for the manufacturing, dyeing, and finishing of crapes, situate, lying, and being in Love Lane, Church Road, in the parish of Tottenham, in the county of Middlesex, with all outhouses, buildings, yards, and other appurtenances to the same belonging: We therefore do strictly injoin and command you the said Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, and your agents and servants, and every of you, under the penalty of 3000*l.*, to be levied upon your and each of your lands, goods, and chattels, to our use, that you and every of you do from henceforth altogether absolutely desist from removing the machinery and other effects from a factory and premises at Tottenham, in the county of Middlesex, in the occupation of the defendants, and from selling and disposing of the same and of that already removed, until our said court shall make order to the contrary. Witness," &c.

On the 16th of March, a summons was taken out, calling upon the plaintiff to shew cause why the order of the 13th, and the writ of injunction issued in pursuance

thereof, and the copies and service thereof, should not be set aside, with costs. This summons came on to be heard before Coleridge, J., on the 19th of March, when that learned judge made an order referring the order of the 16th to this court, the defendants to give security to reinstate as before removal whatever machinery they should remove which was upon the premises during the life time of the plaintiff's testator.

C. Pollock, on a former day in this term, obtained a **[318]** rule nisi to set aside the order of the 13th of March, and the writ of injunction issued in pursuance thereof, on the grounds,—first, that the Common Law Procedure Act, 1854, did not authorise an injunction in an action of ejectment, - secondly, that, if it did, it could only be granted in those cases where the plaintiff has claimed a writ of injunction in the action itself, —thirdly, that the order was obtained ex parte and upon an untrue statement of the facts. He referred to *Gillins* v. *Symes*, 15 C. B. 362, where it was held that the rule for a writ of injunction to restrain a defendant from infringing a patent, under the 82nd section of the Common Law Procedure Act, 1854, is a rule to shew cause only in the first instance.

Prentice now shewed cause. The main question is, whether this is a proceeding in which a writ of injunction can be granted. The 79th section of the Common Law Procedure Act, 1854, enacts, that, "in all cases of breach of contract or other injury, where the party injured is entitled to maintain or has brought an action, he may, in like case and manner as hereinbefore [ss. 66-77] provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages, or other redress." The 80th section enacts that "the writ of summons in such action shall be in the same form as the writ of summons in any personal action, but on every such writ and copy thereof there shall be indorsed a notice, that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction." The 81st section enacts **[319]** that "the proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and, in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require; and, in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge." Then comes the 82nd section, which enacts that "it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply ex parte to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms, as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable or just; and, in case of disobedience, such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: Provided always that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order." It will be contended on the other side that these provisions do not apply to ejectment, the interpretation clause, s. 99, declaring that the word "action" shall be understood to mean any personal action, which ejectment is not. The 227th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, provides, that, in the construction of that act, the word "action" shall be understood to mean any personal action **[320]** brought by writ of summons in any of the superior courts: and in *Messiter* v. *Ross*, 13 C. B. 162, it was held that the 86th section of that act applied to all pleadings in the superior courts, even though the action were commenced in an inferior court, and removed by certiorari. That case does not seem to have been followed, and therefore the question may still be considered an open one. [Willes, J. There is no provision in the act for an injunction until an injury has actually commenced and an action has been brought for it. There is no mode of preventing an apprehended injury. The recommendations of the commissioners in the reports upon which the common law procedure acts were founded

were not carried out in this respect (*a*).] In the clauses as to man-[321]damus, ss. 68-77, replevin and ejectment are expressly excepted. As to interrogatories, s. 51 applies to ejectment as well as to other actions. The court will grant a writ of injunction to restrain waste: and, although the [322] order and the writ use the word "effects," the plaintiff only seeks to restrain the defendant from removing the fixtures. [Cockburn, C. J. The appropriate remedy for taking away fixtures is not ejectment, but trespass. Willes, J. The plaintiff might recover in the ejectment, and yet the defendants might be entitled to the fixtures.] Then, this rule asks for the costs of the application. [Cresswell, J. Costs are never given on setting aside a judge's order.]

COCKBURN, C. J. Upon looking at the 79th and 82nd and intervening sections of the Common Law Procedure Act, 1854, I am of opinion that they do not apply to ejectment, in which this remedy is only sought because it is alleged that fixtures forming part of the freehold have been taken away by the tenant. The remedy afforded by those provisions is intended "to restrain the defendant in the action from

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(*a*) The suggestions here referred to are found at pp. 74 and 75 of the third report, made in 1831, and in the second report made in 1853, p. 44.

In the former, the commissioners make the following recommendations:—"That, in all cases of injury or breach of contract, or threatened injury or breach of contract, for which an action at law for damages may be maintained (whether such action shall have been commenced or not), application shall, upon proper affidavit, be allowed to be made by way of motion in any of the courts of common law at Westminster, or in vacation time to a judge at Chambers, for a writ of prohibition; and that, if the court or judge shall be satisfied that the case is such that the recovery of damages would be an inadequate remedy, or that the amount of damages could not be precisely or conveniently ascertained, a rule or order shall be made for issuing a writ of prohibition forthwith, directed to the proper party or parties, prohibiting him or them from the commission or further commission of the acts which are the subject of complaint:

"That such party or parties, upon proper notice to the opposite party, shall be at liberty to move the court or judge to quash the writ of prohibitions so issued; and that, after both parties have been heard upon such motion, it shall be at the discretion of the court or judge, under the circumstances of the case, either to quash or support the writ, or to make such new rule or order, by way of qualification or exception of the prohibition first granted, as may seem fit; and, where it shall appear expedient, to direct that a proper action of trespass, trespass on the case, covenant, or other form of action (according to the nature of the case) be brought, or (when found more convenient) that an issue be tried for the further investigation of the matter in dispute, and to make any order as to the costs of the motion or proceedings aforesaid as may be just or reasonable; and, when the result of any proceeding or action brought either by the direction of the court or otherwise, for determination of the matter in dispute shall appear, the party or parties against whom a prohibition shall have been obtained shall be at liberty to apply to the court for an order that it be dissolved: and

"That, instead of granting the prohibition in the first instance, the court may at its discretion grant a rule to shew cause only why a writ of prohibition should not issue."

After citing these remarks, the repart of 1853 proceeds as follows:—

"We concur in the principle of the above remarks (though somewhat modified by recent changes in the law) and of the suggestions founded upon them. It has been acted upon by the legislature so far as to confer the power of injunction upon the common law courts in the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 42, and so far as to confer the power of granting prohibitions to judges at Chambers, in the County-Court Amendment Act, 13 & 14 Vict. c. 61, s. 22. We, however, propose that the party injured shall be entitled to maintain an action in the ordinary form, save that in the declaration he may claim the prohibition of a wrongful act commenced or threatened, either separately or together with damages for the injury which he has actually sustained, and that the application for a prohibitory writ may be made at any stage of the cause, either before or after judgment, and granted or denied upon such terms as to keeping an account, giving security, or otherwise, as may be thought just by the court or judge."

the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right." That cannot apply to ejectment, which is an action not for an injury in taking away goods, but simply to recover the possession of the premises.

CRESSWELL, J. Without referring to the variance between the recommendation of the commissioners in their reports and the act which was founded thereon, but looking at the act of parliament alone, I think it is perfectly clear that the 82nd section does not apply to ejectment.

CROWDER, J. I am of opinion that the whole language of the 82nd section, without referring to the interpretation clause, shews that it was not meant to apply to actions of ejectment: and the interpretation clause [323] shews that "action" is limited to personal actions. The reference to the report of the commissioners still further strengthens the argument: for, it is plain that the legislature did not intend to carry out the recommendation of the commissioners to its fullest extent. The rule must, therefore, be discharged.

WILLES, J. I also am of opinion, taking all the clauses of the act which are applicable to the subject together, that the legislature did not intend to confer upon the common law courts power to grant injunctions where no action had been brought. The recommendation of the commissioners in the report of 1853 merely followed those contained in the third report of the former commissioners, made in 1831. That recommendation, if carried out, would have given power to the common law courts to issue an injunction ex parte, leaving the other party to move to dissolve it, or that an action or an issue should be directed to try the question. But, when the various clauses of the act of parliament are looked at, it would seem that the legislature did not think fit to invest the common law judges with that extensive power, but only to enable them to grant injunctions in certain cases after action brought, "to restrain the defendant from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right." That at once shews that the injunction in the common law court can only be granted where an action has been brought in respect of a breach of contract, —that it is merely ancillary to an action brought complaining of an injury or breach of contract. Now, ejectment is not an action in which the plaintiff complains of a breach of contract or injury of a like kind, but is simply a proceeding to put the plaintiff in possession of the land. One [324] might readily conceive a case where the plaintiff might be entitled to the possession of the land, and not to the fixtures. In every point of view, therefore, I am of opinion that the clauses in question were not intended to apply to cases of this sort. The order of my Brother Coleridge will, therefore, be rescinded, but not with costs, which will be costs in the cause.

Rule absolute accordingly.

SIMOND *v.* BRADDON. May 8th, 1857.

[S. C. 26 L. J. C. P. 198; 3 Jur. N. S. 719; 5 W. R. 594.]

A. agreed to sell to B. "a cargo of Arracan rice per 'Severn,' now on her way to Akyab, viâ Australia; the cargo to consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account and in conformity with his invoice. The buyer to have the option, agreeably with the terms of the charterparty, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburgh, both inclusive. This contract to be void provided the above vessel makes the intermediate voyage between Akyab and Calcutta agreeably with the conditions of the charterparty. Payment to be made in cash on the arrival of the vessel at port of call, in full, less freight, at invoice net weights, &c., on handing the buyer bills of lading and charterparty, with the policies of insurance, indorsed to buyer, for full value, which are to be effected in London, with particular average in the usual way, free under 3 per cent. Should the vessel be lost, this contract to be null and void:" — Held, a warranty on the part of A. to deliver a cargo consisting

of "fair average Nicranzi rice," provided neither of the events occurred in which the contract was to be void.

This was an action for a breach of warranty on a sale of a cargo of rice.

The first count of the declaration stated that the plaintiff bought from the defendant, and the defendant sold to the plaintiff, a cargo of Arracan rice by the ship "Severn," then on her way to Akyab, viâ Australia, upon certain terms then agreed on between the plaintiff and the defendant; that is to say, that the said cargo was to consist of fair average Nicranzi rice, the price of which was to be 11s. 6d. per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the defendant engaged to deliver what was shipped on his account and in conformity with his invoice. The [325] plaintiff to have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburgh, both inclusive. The contract was to be void, provided the said vessel should make the intermediate voyage between Akyab and Calcutta agreeably with the conditions of the charterparty. Payment to be made in cash on arrival of the vessel at the port of call, in full, less freight, at invoice net weight, taken at eighty-six baskets to the ton (English), allowing four per cent. to cover loss in weight on the voyage, on handing the plaintiff bill of lading and charterparty, with the policies of insurance, indorsed to the plaintiff, for full value, which were to be effected in London, with particular average in the usual way, free under three per cent. Should the vessel be lost, the said contract to be null and void: Averment that the said vessel did not make the aforesaid intermediate voyage, and was not lost, but afterwards arrived at her port of call, to wit, at Falmouth, and thence sailed and proceeded to her port of delivery, to wit, to Amsterdam, and there delivered her said cargo of rice according to the directions of the plaintiff; and the plaintiff paid defendant for the said rice at the rate of 11s. 6d. per cwt., less freight, at the invoice net weights, with the allowance of 4 per cent. as aforesaid: That all things had happened and had by the plaintiff been observed and performed which were necessary to entitle him to have the aforesaid terms observed and performed in all respects by the defendant, yet that the said terms were not observed or performed by the defendant, in this, that, although the said cargo consisted of Nicranzi rice, yet the said rice was not fair average Nicranzi rice, whereby not only was the said rice of less value to the plaintiff, but also by means of the premises the plaintiff had lost the profits which he would have made by a re-sale of the said cargo of rice to [326] Messrs. E. Bekh & Co., to whom he, the plaintiff, relying on the observance of the aforesaid terms by the defendant, re-sold the said cargo of rice on the said terms on which the plaintiff had purchased the same from the defendant as aforesaid; and the plaintiff had also incurred great expense in and about ascertaining the quality of the said rice, and in and about the warehousing thereof.

The declaration also contained counts for money received by the defendant to the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them: and the plaintiff claimed 1500l.

The defendant pleaded, to the first count,—first, that he did not promise or agree as alleged,—secondly, that the said Nicranzi rice was fair average Nicranzi rice; and, to the residue of the declaration, never indebted. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—The plaintiff was the surviving partner in the firm of Cuylits, Simond, & Co., merchants, in London, and the defendant also a merchant in London, carrying on a considerable trade as an importer of rice.

On the 10th of October, 1854, the plaintiff's house, through one Meugens, their broker, agreed with the defendant through his brokers, Messrs. Macnaughtan & Parry, for the purchase of a cargo of rice intended to be shipped at Akyab by a vessel called the "Severn," which vessel the defendant had chartered, and which was then on her way out to Akyab, viâ Australia. The terms having been arranged verbally, the defendant's brokers prepared bought and sold notes in the usual way, delivering to the plaintiff's broker a copy of the former, which was in the following terms:—

[327] "London, October 10th, 1854.

"Bought for account of Messrs. Cuylits & Simonds, per J. P. Meugens, of our principal, W. C. Braddon, Esq., this day, the following cargo of Arracan rice per

'Severn,' Captain Prynn, now on her way to Akyab, viâ Australia. The cargo to consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for Larong, or any other inferior description of rice (if any): but the seller engages to deliver (*a*) what is shipped on his account and in conformity with his invoice. The buyers to have the option, agreeably with the terms of the charterparty, of discharging the rice at any good and safe port in the United Kingdom or on the continent between Havre and Hamburgh, both inclusive. This contract to be void, provided the above vessel makes the intermediate voyage between Akyab and Calcutta, agreeably with the conditions of the charterparty. Payment to be made in cash, on arrival of the vessel at port of call, in full, less freight, at invoice net weight, taken at 86 baskets to the ton (English), allowing 4 per cent. to cover loss in weight on the voyage, on handing the buyers bills of lading and charterparty, with the policies of insurance indorsed to buyers, for full value, which are to be effected in London, with particular average, in the usual way, free under 3 per cent.

"Should the vessel be lost, this contract to be null and void.

"Brokerage, ½ per cent. (Signed "MACNAUGHTAN & PARRY."

The "Severn" arrived at Akyab in January, 1855, and the defendant's correspondents there shipped for him 6000 bags described in the invoice as "old Nicranzi [328] rice." On her arrival at Falmouth, in June, 1855, Messrs. Macnaughtan & Parry delivered to the plaintiff an invoice, describing the cargo as 6000 bags old Nicranzi rice of the net weight of 434 tons, 8 cwt. 0 qrs. 25 lbs. at 11s. 6d. . £4,995 14 6

Less freight 4l. 5s. per ton	£1,846 5 0	
Two months' discount at 5 per cent. . . .	15 7 8	
		1,830 17 4
		£3,164 17 2
Brokerage, ½ per cent. . .		24 19 7
		£3,189 16 9

The plaintiff immediately handed over to Messrs. Macnaughtan & Parry a cheque for the amount of this invoice, in exchange for the bill of lading, policies of insurance, and the original invoice sent to the defendant by his correspondents at Calcutta.

The "Severn" having been sent to Amsterdam, it was found, when the cargo was unloaded, that the rice was considerably below the fair average of Nicranzi rice, an unusual quantity of "paddy," or rice in the husk, being mixed with it, though it did not appear that it contained any Larong or other inferior description of rice. Immediately on discovering that the rice did not answer the description in the contract, the plaintiff gave the defendant notice of that fact, and that he should hold him responsible for the difference.

On the part of the plaintiff, it was contended that the defendant bound himself by his contract to deliver a cargo which should consist of "fair average Nicranzi rice," and therefore that he was entitled to recover the difference between the price paid under the contract and the value of the rice actually delivered.

[329] For the defendant, on the other hand, it was insisted that the only warranty contained in the contract was, to deliver what should be shipped on his account and in conformity with his invoice; and that the stipulation that the cargo should consist of fair average Nicranzi rice was a condition, and not a warranty.

In answer to a question put to them by his Lordship, the jury said that the rice delivered was not fair average Nicranzi rice; and a verdict was thereupon taken for the plaintiff, the amount of damages to be referred, and leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that the contract did not contain the warranty contended for; and it was agreed that the declaration should, if necessary, be amended by alleging, that, although the said cargo consisted of Nicranzi rice, yet it was not fair average Nicranzi rice, and the defendant

(*a*) In the sold note the word "only" was introduced here after the contract was signed.

did not make a fair allowance for its inferior quality, but neglected and refused so to do.

Montague Smith, in Hilary Term last, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be entered for the defendant on the first issue, or why the judgment should not be arrested, on the ground,—first, that there was no warranty that the cargo to be shipped should be fair average Nicranzi rice,—secondly, that the contract alleged did not support the breach.

Byles, Serjt., and Unthank, shewed cause. That which the plaintiff complains of is, that the defendant has failed in the performance of his contract in two respects, inasmuch as he has not delivered rice of the quality contracted for, nor the quantity he engaged to deliver. The cargo was to consist of "fair average Nicranzi rice," the price of which was to be 11s. 6d. per [330] cwt. The contract then goes on to provide what shall be done if any of the rice should turn out to be of an inferior description,—not an inferior quality of Nicranzi rice. The declaration is drawn upon the hypothesis that "description" here means "sort" A fair allowance is to be made for Larong or any other inferior description of rice, if any. Larong is a description of Arracan rice very inferior in quality to Nicranzi; so also is Latouri. If the cargo should contain a mixture of these, an allowance was to be made. If, however, "description" is to be read "quality," then the plaintiff would be entitled to recover in respect of the inferiority of quality; and the declaration may be amended, as arranged at the trial. The vessel having arrived at Falmouth, and the plaintiff having paid for the cargo without having had an opportunity of inspecting it, he is clearly entitled to recover under the special count the fair allowance stipulated for, as well as the sum paid in excess for the deficient quantity. The breach assigned in the first count, is that, although the cargo consisted of Nicranzi rice, yet the said rice was not "fair average Nicranzi rice." The first question, therefore, will be, whether the contract contains a warranty that the cargo shall consist of rice of that description. If the words of the contract had been, "the cargo to consist of fair average Nicranzi rice," without more, it would unquestionably have amounted to a warranty: *Hutchinson* v. *Booker*, 5 M. & W. 535: *Allan* v. *Lake*, 18 Q. B. 560. In this latter case, the defendant, by his agent, sold the plaintiffs a parcel of turnip-seed, and gave the following sold-note: "Mr. T. C. R. (the defendant's agent) sold to Messrs. B. & Co. (the plaintiffs), for Mr. C. L. (the defendant), 14 qrs. Skirving's Swedes, at 17s. per bushel:" and it was held that the jury were properly directed that the description of the seed in the sold-note amounted to a warranty that it was Skirving's Swedes. Upon a motion for a new trial, Erle, [331] J., said: "The statement that the seeds were Skirving's Swedes was, in one sense, mere matter of description: but it was a description of a known article of commerce; and the defendant was not at liberty to substitute another sort of turnip-seed which did not answer that description. He could not vary from that contract as regarded the seeds being Skirving's, any more than he could with regard to their being Swedes." [Cockburn, C. J. Either the stipulation as to allowance for inferior descriptions of rice includes Nicranzi, or upon the finding of the jury the defendant has failed to perform his contract.] The plain and obvious construction of the contract is, that the buyer is to have a fair average Nicranzi rice, or an allowance for rice of inferior description. Assuming that "description" is to be taken as synonymous with "quality," the declaration may be amended, as suggested at the trial. The clause which will be relied on by the other side,—"but the seller engages to deliver what is shipped on his account, and in conformity with his invoice,"—was evidently put in to meet such a controversy as that which took place in *Vernede* v. *Weber*, 1 Hurlst. & Norm. 311,—to prevent either party taking advantage of a rise or fall in the market. In that case, the plaintiff and defendant, by their agent, contracted as follows:—"Sold for W. to V. the cargo of 400 tons (provided the same be shipped for seller's account), more or less, Arracan Nicranzi rice, of the average quality of the crop as shipped to Europe, per British vessel 'Minna' sailed last September from Antwerp in ballast, direct to Akyab, to proceed from thence to a port in the Channel for orders, at 11s. 6d. per cwt. for Nicranzi, or at 11s. for Larong; the latter quantity not to exceed 50 tons, or else at the option of buyers to reject any excess: to be taken at invoice weight, &c., and to be paid for by cash on arrival of the vessel at the port of call, on delivery of the bills of lading, charterparty, and policy of insurance: insur-[332]-ance effected in London or Holland, upon usual London terms (with particular average), to the full amount of invoice. The vessel loaded

285 tons of Larong, and 150 tons of Latouri: and it was held, first, that the contract did not contain a warranty that the rice should consist of Arracan Nicranzi rice, but that the contract was conditional upon a cargo of Arracan Nicranzi rice being shipped on the seller's account,—secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong, because the contract was for an entire cargo which would substantially satisfy the description of Arracan Nicranzi rice. At all events, the plaintiff is, upon the authority of *Deraux* v. *Cunolly*, 8 C. B. 640, entitled to recover as money had and received the excess paid in respect of the "paddy," which the evidence shewed to have been more than double the usual proportion found in these cargoes.

M. Smith, Q. C., and Tomlinson, in support of the rule. This contract, it is submitted, contains no warranty as suggested. In the older cases, it was doubted whether any words of description could amount to a warranty. In *Chandelor* v. *Lopus*, Cro. Jac. 2,—the notes to which in 1 Smith's Leading Cases (4th edit.), 140, give the history of the law upon this subject,—the inclination of the court was that it did not. By the course of modern decisions, however, it seems, that, in the case of the sale of an existing chattel by a particular description, the vendor warrants that it is of the kind described. That is exactly the case of *Allan* v. *Lake*, 18 Q. B. 560. Contracts for chattels to be manufactured for a particular purpose belong to a totally different class. Where the article is to be made or procured, it is open to conjecture whether it will or will not answer the purpose intended. Here, the contract is for an article of commerce of very recent introduction, and subject to much fluctuation of price and [333] quality. The true construction of the contract is, that the seller shall deliver only what was shipped, and in conformity with his invoice; and, if what was shipped was Arracan Nicranzi rice, it was to consist of fair average quality, and be at a given price. It was manifestly uncertain when the ship would arrive at Akyab, or what sort of cargo she would bring. If she arrived there before the season for the new rice to come down to the port of shipment, she must necessarily take on board old, which of course would be below the average quality. All that the defendant binds himself to do is, to deliver the cargo that is shipped for him; and no engagement can be inferred other than that express engagement. In *Budd* v. *Fairmaner*, 8 Bingh. 48, 1 M. & Scott, 74, in an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller,—"Received of A. B. (the purchaser) 10*l.* for a gray four-year-old colt, warranted sound in every respect:" and it was held, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description. So, here, there being an express warranty to deliver what was shipped on the seller's account, and in conformity with his invoice, a warranty that the rice shipped should be of a particular quality cannot also be inferred. [Cockburn, C. J. Suppose a cargo of Larong came, could the buyer exercise the option of taking it, subject to an allowance?] The seller would be bound to offer it, but the buyer might reject it; the latter being only bound to accept the cargo, if fair average Nicranzi rice came. This is substantially the same contract as that in *Vernede* v. *Weber*. In delivering judgment there, Alderson, B., says: "There can be no doubt that the contract contemplates a cargo consisting principally of Arracan Nicranzi rice, and that Larong rice was to form but a subsidiary part. The contract is described [334] as one contract for an entire cargo, one bill of lading, one charterparty, and one policy of insurance: and we think it would have been impossible for the defendant to have insisted upon the plaintiff's accepting a cargo consisting only of a minute portion of Arracan Nicranzi rice; for, unless the cargo was what would substantially satisfy the description of a cargo of Arracan Nicranzi rice, we think that the plaintiffs could not have been forced to accept it. It is true that the contract included Larong rice also, if the cargo included it. But it is obvious that this was so much considered subsidiary to the other, that the cargo is described merely as one of Arracan Nicranzi rice, and the buyer was not obliged to accept more than 50 tons of Larong rice included in a cargo so described; and, if the plaintiff would not have been bound to accept the cargo brought, the defendant was not obliged to deliver it, for, the contract must be mutual and reciprocal." Here, if a small proportion of Larong or other inferior description of rice should come, a fair allowance is to be made: but, if the rice brought home is Nicranzi rice, though not of fair average quality, the clause as to allowance does not apply, though the buyer might be entitled to reject it. *Johnson*

v. *Macdonald*, 9 M. & W. 600, is also an authority to shew that there is no warranty here. And *Decaux* v. *Conolly*, 8 C. B. 640, has no application. The deficiency of weight arising from the excessive quantity of paddy, affects only the quality of the cargo. No decided case at all approaches this. It is, therefore, open to the court to look at all the surrounding circumstances, to ascertain what the parties really meant by the contract they have entered into.

COCKBURN, C. J. I am of opinion that this rule should be discharged. The language of the contract certainly is not altogether free from ambiguity or doubt: **[335]** but, looking at all its terms, it appears to be a contract whereby the seller engages, that, unless the "Severn," then on her way to Akyab, should be sent thence to Calcutta, agreeably with the terms of the charterparty, or should be lost, she should ship a cargo of rice, and bring it home for the benefit of the buyer; and, further, the seller warrants that the cargo so shipped shall consist of "fair average Nicranzi rice." Some difficulty was introduced into the case, and some discussion arose as to the effect of that part of the contract which provides that the price is to be 11s. 6d. per cwt., "with a fair allowance for Larong or any other inferior description of rice (if any)," followed immediately by this stipulation,—"but the seller engages to deliver what is shipped on his account, and in conformity with his invoice." Looking at the extrinsic evidence, one can entertain but little doubt that the intention of the parties was, that the seller engaged to deliver only what was actually shipped on his account. But that does not appear upon the face of the contract, the word "only" not having been inserted until after the execution of it. We must construe the contract as we find it,—that word being excluded. Having so to construe the contract, I do not think, looking at that which follows the words "fair average Nicranzi rice," there is anything to be found which ought to have the effect of detracting from the warranty which arises from the former part of the instrument. And, although it was held in *Vernede* v. *Weber*, 1 Hurlst. & Norm. 311, that the seller was not bound to deliver the cargo where it did not substantially consist of Nicranzi rice, we may gather from that case that it is not unusual for these cargoes to be made up of a portion of rice of an inferior description, and called Latouri and Larong; and that it is fair to suppose, that, though the buyer intended that the seller should warrant the cargo to be fair average Nicranzi **[336]** rice, nevertheless he meant to secure to himself the right to claim the delivery of it, though a portion should consist of Latouri or Larong or other inferior rice, and so should not satisfy the contract, and to take care to protect himself by stipulating for a fair allowance for rice of an inferior quality, if any such there were. Looking, then, at the whole contract, and at the probable intention of the parties, it seems to me that the fair construction is, that it amounts to a warranty on the part of the seller that the cargo should consist of fair average Nicranzi rice, with a stipulation, introduced for the benefit of the buyer, that he may if he chooses take the cargo such as it is, and claim a deduction in price for the inferior quality. No question arises here as to Latouri or Larong, none having in fact came. But, the jury having found that the cargo shipped did not consist of "fair average Nicranzi rice," I am of opinion, that, without resorting to any amendment, the plaintiff is entitled to recover upon the declaration as it stands.

CRESSWELL, J. I am of the same opinion. It seems to me that this contract amounts to an undertaking that the vendor shall at Akyab ship a cargo of rice and bring it home for the purchaser, unless the ship should be lost or should be sent upon the contemplated intermediate voyage from Akyab to Calcutta,—in either of which cases the contract was to be void. It being, then, an undertaking that this cargo should be shipped, the vendor undertakes further that it shall consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per cwt. The question is, whether that amounts to a warranty. I do not know why it should not. The seller undertakes to ship a cargo, and that it shall be of a specific description. I see no reason why that should not be held a warranty. This construction receives confirmation from the stipulation which follows,—"with a fair allowance for Larong or any other inferior description of rice, if any." The **[337]** cargo might be fair average Nicranzi rice, though it should contain a small admixture of rice of an inferior quality or of an inferior description or denomination. It is somewhat remarkable, that, though the parties have provided that an allowance shall be made if the cargo should contain any Larong or other inferior description, though it should not be sufficient to prevent the cargo from being fair average Nicranzi rice, there is no such provision as to

Nicranzi rice, but that rests on quality. The buyer would not be entitled to claim any allowance if any part of the cargo should consist of Nicranzi rice of inferior quality provided the whole answered the description of "fair average Nicranzi rice," though he would be if any part consisted of Larong or any other inferior description of rice. The latter words throw no light upon that part of the contract. Why they were introduced, I do not stop to inquire. We must take the contract as we find it. Those words may have been introduced because the parties may have supposed that the contract could not be fulfilled by the delivery of a cargo consisting of any portion of Larong or other inferior description of rice. But, whatever they may have intended, the words thus introduced cannot affect the construction of the other part of the contract, which is perfectly plain and simple,—"I undertake to bring you a cargo which shall be fair average Nicranzi rice, and the price shall be 11s. 6d. per cwt."

CROWDER, J. I also think that this is a contract for a cargo of fair average Nicranzi rice. That plainly is the substance of the contract. If the cargo had been on board the ship at the time the contract was entered into, there could have been no doubt. But here the ship was to go and get a cargo of the description mentioned, viz. fair average Nicranzi rice. Such being the contract, there is a stipulation that it shall be void in [338] certain events,—if the ship should be lost, or if she should make the intermediate voyage contemplated by the charterparty, from Akyab to Calcutta. The contract, therefore, was to enure as a contract to bring home a cargo of fair average Nicranzi rice, unless one of those events should take place. The price also is fixed. Then comes the clause which has given rise to the only doubt that could arise upon the construction of this contract,—"with a fair allowance for Larong or any other inferior description of rice, if any." It seems to me that the introduction of that clause is explainable by the fact that a cargo might arrive which might contain a portion of rice of the descriptions called Larong or Latouri, and yet answer the description of "fair average Nicranzi rice." It would seem but reasonable that in that case a fair allowance should be made in respect of the inferior description of rice. Then comes the stipulation that "the seller engages to deliver what is shipped on his account, and in conformity with his invoice." It is contended on the part of the defendant that that is all he engages to do. There may, however, have been a good reason for introducing that clause, inasmuch as a rise in the market might make it profitable to the seller to withhold the cargo, and therefore the buyer may have been desirous of having the option to take it, though of inferior quality. Upon any other construction of the contract, a difficulty would arise upon the clause providing for the time and mode of payment, which is "to be made in cash on arrival of the vessel at port of call, in full, less freight at invoice net weight, &c., on handing the buyers bills of lading and charterparty, with the policies of insurance, indorsed to buyers, for full value." It is difficult to suppose that the parties contemplated that the cargo should be paid for without the buyer's having an opportunity to inspect it, and that his only remedy, in the event of the cargo turning [339] out to be of less than fair average quality, was to be by an action to recover back his money. For these reasons, I agree with my Lord and my Brother Cresswell in the construction which they have put upon the contract.

WILLES, J. I am entirely of the same opinion. This is a bargain for the purchase by the plaintiff from the defendant of a cargo of Arracan rice, to be shipped by the latter on board a vessel chartered by him, and to consist of "fair average Nicranzi rice," at a given price per cwt. There is a stipulation for an allowance to be made for Larong or any other inferior description of rice: but, as the ship did not bring any Larong or other inferior description of rice, there is no necessity to refer to that stipulation or to those relating to the delivery or payment, except in so far as they may effect the construction of the previous part of the contract describing the rice to be delivered. Those provisions are evidently introduced for the benefit of the buyer, who may insist upon having the cargo delivered to him, though its inferiority of quality might entitle him to some allowance. Thus the parties are thrown back upon the first part of the contract, viz. that the cargo is to consist of fair average Nicranzi rice. Then there is a stipulation that the contract is to be void if the ship is sent from Akyab to Calcutta, or if she should be lost. One would naturally infer from those stipulations, that the contract was to remain in force if neither of these events should happen. The cargo to be obtained by the buyer is to consist of rice of a given quality. The circumstance of the price being fixed at the time it was, would lead one

to expect that the parties were dealing with a thing the value of which could be ascertained by reference to its quality. That is given: it is to be "fair average Nicranzi rice." The buyer is not to pay 11s. 6d. per cwt. for rice of any quality: he therefore stipulates **[340]** for rice of a certain description, and of fair average quality. That clearly amounts to a warranty.

Rule discharged.

GARDNER *v.* GROUT. May 5th, 1857.

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds: but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods.

This was an action for the breach of a contract to deliver 24½ tons of sacks and bags, which the defendant had agreed to sell to the plaintiff at the price of 11l. per ton.

At the trial before Williams, J., at the first sitting in London in the present term, a contract by word of mouth was proved in the terms alleged in the declaration; but there was no contract in writing, nor any part payment. The plaintiff, however, relied, for the purpose of taking the case out of the Statute of Frauds, upon a part delivery and acceptance, as to which the evidence was as follows:—Four days after the sale, the plaintiff went to the defendant's warehouse, and asked for samples of the sacks and bags, which were given to him by the defendant's foreman, and which he promised to pay for when the bulk (which was all there at the time) was taken away. The samples so given to the plaintiff were by the defendant's order weighed and entered.

On the part of the defendant, it was submitted that the taking the samples was not such a part acceptance of the thing sold as would satisfy the 17th section of the statute.

For the plaintiff, the case of *Hinde* v. *Whitehouse*, 7 East, 558, was relied upon. There, sugars, which were in the King's warehouse, under the locks of the King and the owner, from whence they could not be removed **[341]** till the duties were paid, were advertised for sale by auction on the 20th of September, when samples of ½lb. weight from each hogshead, drawn after the sugars had been weighed and the duties ascertained at the King's beam, were produced to the bidders assembled; and the auctioneer,—having then before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper containing the conditions of sale, which latter he read to the bidders as the conditions on which the sugars mentioned in the catalogue were to be sold, but the two papers were not externally annexed, nor did they contain any internal reference to each other,— wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; having first informed the bidders that the duties had not then been paid, but would be paid on the morrow by the seller: and, after the biddings closed, the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase, to make up the quantity marked as weighed at the King's beam: and a fire having consumed the sugars on the 22nd of September, before the duties could be paid, and without the default of the seller,—it was held, first, that, at common law, there was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; and, consequently, that the loss must fall upon the buyer,—secondly, that, assuming a sale of goods by auction to be within the 17th section of the statute of frauds, 29 Car. 2, c. 3 (*a*), and therefore requiring to be **[342]** evidenced by a memorandum in writing of the bargain, signed by the party to be charged, or his authorised agent, except where the buyer shall receive part of the goods sold: yet here the delivery to and acceptance

(*a*) See *Emmerson* v. *Heelis*, 2 Taunt. 38, *White* v. *Proctor*, 4 Taunt. 209, and *Bird* v. *Boulter*, 4 B. & Ad. 443.

of the samples by the buyer, which delivery was made as part of the thing purchased, and upon which the duties were paid, at any rate took the case out of the statute.

The learned judge left it to the jury to say whether the samples of the sacks and bags were delivered and accepted as part of the bulk. The jury found that they were, and accordingly a verdict was taken for the plaintiff (damages 40l.), leave being reserved to the defendant to move to enter the verdict the other way, or a nonsuit, if the court should be of opinion that there was no acceptance of part, to take the case out of the statute.

Hawkins now moved accordingly. The acceptance of the samples clearly was not an acceptance of part of the things sold, so as to take the case out of the 17th section of the Statute of Frauds. In *Hinde* v. *Whitehouse*, the samples were, according to the practice of the particular sales, to be taken by the buyer as part of the bulk: there was, however, no such evidence here. [Cresswell, J. The whole of the bulk was there?] Yes. [Cresswell, J. Suppose the parties here were reversed, could the buyer have insisted that he had not accepted a part of that which he had purchased?] It is submitted that he might. [Cockburn, C. J. Generally speaking, the sample is shewn separately, as a specimen of that which the seller is offering to dispose of. But here, the buyer takes it as a part of something which he has already bought.] This question arose in a case of *Simonds* v. *Fisher*, at the sittings in the Queen's Bench after last term. There, the plaintiff shewed the defendant samples of wine, which the latter agreed to buy; and, after the bargain was concluded, the buyer asked to have the samples handed over **[343]** to him, and wrote on the labels the prices agreed upon. An action having been brought against him for not accepting the wine, the taking the samples was relied on by the plaintiff as a part acceptance, so as to take the case out of the statute. But Wightman, J., before whom the cause was tried, directed a nonsuit, reserving the plaintiff leave to move. A motion was accordingly made on the 27th ult., and a rule nisi granted, which is now pending (*a*).

Cockburn, C. J. That is a very different case from the present. There, the buyer never saw the bulk: the things handed to him really were mere samples. But here the plaintiff receives part of the very things which he has already bought. I think there should be no rule.

The rest of the court concurring,

Rule refused.

[344] The Great Northern Railway Company *v.* Wyles and Another. April 25th, 1857.

The defendants hired sacks from the plaintiffs for the conveyance of grain on their railway, subject to certain regulations, amongst which were the following.—"2. The charges for the use of sacks will be ½d. per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line; and 1d. per sack when sent to foreign stations: 3. Demurrage of ½d. per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days: 10. None of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station:"

Held, that the company's claim for demurrage arose at the expiration of fourteen days from the hire of the sacks; and that the only person with whom there was any contract for demurrage was the consignor, by virtue of the 3rd regulation; but that, by the operation of the 10th regulation, his liability ceased upon the company's permitting the sacks to get into the hands of the consignee, whether with or without a guarantee.

This was an action brought by the Great Northern Railway Company for money payable by the defendants to the plaintiffs for the demurrage of sacks of the plaintiffs

(*a*) The rule never came on for argument, it having been discharged under the authority of a judge's order on the 29th of July, 1857.

kept on demurrage by the defendants, and for the hire of sacks by the plaintiffs let to hire by the defendants, and for money found to be due from the defendants to the plaintiffs on accounts stated between them: and the plaintiffs claimed 50*l*.

As to 1*l*. 15*s*. 6*d*., parcel of the plaintiffs' claim, the defendants brought that sum into court, and said that it was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to,—secondly, they pleaded never indebted as to the residue of the declaration,—thirdly, to the same residue, payment before action.

The plaintiffs took out the 1*l*. 15*s*. 6*d*., and joined issue as to the rest.

The cause was tried before Cresswell, J., at the sittings at Westminster after last Michaelmas Term. It appeared that the plaintiffs sought to recover 20*l*. 11*s*. 5*d*. for demurrage of sacks let by them to the defendants. The particulars of demand specially indorsed on the writ were as follows:—

[345]

		£	s.	d.
"1854.	To sack demurrage, as per account delivered	8	1	5
1855.	To do. do.	1	15	6
1854.	To sack demurrage, as per account rendered	2	6	3
1854.	To do. do.	3	18	3
1854.	To do. do.	3	4	9
1855.	To do. do.	0	17	6
1855.	To do. do.	0	7	9
		£20	11	5"

The defendants are corn-merchants carrying on business at Grantham and at Nottingham. They are in the habit of buying and selling corn and grain of and to farmers and merchants in numerous districts on the Great Northern, Midland, Ambergate, North Stafford, and other railways, a great portion of which is consigned by and to the defendants in sacks belonging to the Great Northern Railway Company, to which the regulations hereinafter mentioned apply. Where corn or grain so consigned travels on the plaintiffs' and other lines of railway, one line only receives the rates or tolls for the entire journey, and the division of the tolls between themselves is arranged (quite apart from consignors or consignees) at the railway clearing-house. The hire of the sacks, however, is always charged by the company from whom they are taken up, though the freight of the consignment may be charged by another. The sacks are furnished, not by the company, but by a person named Lee, with whom they contract for this purpose. The general sack-depôt of the plaintiffs or their contractor being at Boston, the course prescribed by the regulations is this:—From that depôt, each station requiring sacks shall obtain them: and to that depôt they shall be returned, not from the consigning or forwarding station, [346] but from the receiving station. The merchant or farmer requiring sacks wherein to forward his corn, is to apply for them at the forwarding station: and the forwarding station is to apply to the depôt. The forwarding station having received them, hands them over to the merchant, who fills them and returns them to the same station, with a forwarding note directing where they are to go. The forwarding station then advises the depôt of the particulars of the sacks, consignors, consignees, places of consignment, &c. The regulations above referred to were as follows:—

"Great Northern Railway Company.

"General Sack Regulations. Mr. Lee, contractor.

"1. Applications for sacks to be made to the clerk in charge of the station where the sacks will be put on the rail when filled, who will forward them to the sack-contractor's office, Boston.

"2. The charges for the use of sacks will continue as formerly, viz. ½d. per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line; and 1d. per sacks when sent to foreign stations. The district where the ½d. charge is in force comprises all places north of Doncaster.

"3. Demurrage of ½d. per sack per week will be charged after the expiration of fourteen days: the hire to commence from the time the sacks leave the station to be

filled; and that the time to be allowed for filling and returning to the station be seven days.

"4. None of the company's sacks must be allowed to leave the station for the purpose of being filled, unless a deposit equal to the value is left with the clerk in charge, or the signature of well known and respectable parties obtained for their immediate and safe return according to the third regulation.

[347] "5. The first hiring to be pre-paid; and, when the sacks leave a station for the purpose of being filled with corn to be sent by railway, they must in all cases be returned to the stations from which they are delivered to the sender for that purpose, in accordance with rule 1.

"Parts of a week to be charged as a week.

"7. In all cases, foreign stations are required to return Great Northern sacks directly; and they must be addressed to the sack-depôt at Boston, and not to the station from which sent.

"8. No Great Northern sacks must be re-consigned from a foreign station to any other station, but immediately returned to the sack-depôt at Boston, according to rule 7.

"9. It is arranged, that, in all cases, sacks will be supplied direct from the depôt at Boston; and it is therefore required that sacks, if received at any of the stations, be sent to Boston, and not re-issued, unless by special order or permission obtained from the contractor's office, Boston.

"10. None of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station.

"If, under any circumstances, this rule is disregarded, the clerk in charge is required to make a special report to the sack contractor at Boston, who reserves to himself the right of refusing any party the same privilege on a second application.

"11. The contractor engages to supply stations applying for sacks not later than thirty-six hours after the application is received.

"12. A complete debtor and creditor account must be kept at every station where sacks are supplied to the [348] public, and when they are received with grain in them. This account must shew how and when all sacks are received, and how disposed of, so that the state of the stock can be at all times ascertained by reference thereto." (Signed) "SEYMOUR CLARKE.

"General Manager's Office, King's Cross, 1853."

It was admitted that the defendants knew of these regulations: and it was proved that the company had never been in the habit of enforcing the 10th article of the regulations, by requiring a guarantee.

Similar regulations were issued by the company in 1854: and, on the 1st of January, 1855, the several companies interested (the Great Northern included) made a general regulation which contained, amongst others, the following provisions:—

"5. The time allowed for filling and returning the sack by senders to the forwarding station with a forward consignment note is four days, after which demurrage at ½d. per sack per week will be charged to sender.

"6. The time allowed to consignee is fourteen days from date of invoice from the forwarding station; and, if he is allowed to remove the sacks from the receiving station, he must return them to the same station within the time stated above, or demurrage at ½d. per sack per week will be charged to consignee."

On the part of the plaintiffs, it was objected that these latter regulations were not admissible.

The second item in the particulars, for 1l. 15s. 6d., in respect of which the defendants had paid that sum into court, was claimed as demurrage of sacks where the defendants were themselves both consignors and consignees.

A number of accounts were put in, in which demurrage was claimed by the plaintiffs in cases where the sacks had been obtained by the defendants, but consigned to third persons: but there was no charge made against the defendants in any of them for demurrage, except in cases where [349] they were consignees: and the main contention between the parties was, whether the demurrage was payable by the consignors of the corn, who obtained the sacks for the company, or by the consignees,

the plaintiffs insisting that it was payable by the consignors, the defendants that it was chargeable only to the consignees.

At the suggestion of the learned judge, a verdict was entered for the plaintiffs for 8l. 1s. 5d., the amount of the first item, subject to a motion to enter the verdict for the defendants if the court should be of opinion that their construction of the regulations was the correct one,—the court to have power to draw any inference of fact as a jury, if they should think any question of fact ought to have been left to the jury; and also whether the rules of 1855 were admissible. If the defendants were held liable, the amount of their liability to be ascertained by a reference.

Manisty, accordingly, in Hilary Term last, obtained a rule calling upon the plaintiffs to shew cause why a verdict should not be entered for the defendants, on the ground that there was no evidence of any contract by the defendants to pay the demurrage in question, or upon the ground that the weight of evidence was in favour of the defendants, and shewed that the consignees and not the consignors of the sacks were the parties liable to pay the demurrage sought to be recovered.

Pigott, Serjt., and H. James, in the course of the same term, shewed cause. There was abundant evidence of a contract on the part of the defendants with the company to pay the demurrage in question. It was admitted that the defendants knew of the regulations, and that the sacks were originally hired by them, and filled with grain forwarded by them along the plaintiffs' line, and thence on to foreign lines. By the 2nd article of **[350]** the regulations of 1853, the hirer is to be charged ½d. or 1d. per sack per journey, according as the sacks are sent to a station upon the company's own line or to a foreign station, or a place off their line. By the 3rd article it is provided that "demurrage of ½d. per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled: and that the time to be allowed for filling and returning to the station be seven days." Suppose the time occupied in filling and returning were three weeks,—the party hiring would have to pay the ½d. or 1d. for the hire, and ½d. per sack demurrage for the week which had elapsed beyond the fourteen days, and ½d. per week until the sacks were returned to the depôt. [Cresswell, J. The regulations are a little ambiguous in that respect: it may be that they are applicable to demurrage accruing before the sacks are sent upon the journey: but, if these regulations only make the defendants responsible for demurrage accruing at the commencement of the journey, the plaintiffs made out no case entitling them to a verdict.] No question was raised at the trial as to the period at which the demurrage accrued: the only question was, whether the bailee of the sacks contracted with the company to pay demurrage. The only person the company deals with or knows is, the person who applies to them for sacks. It cannot be supposed that the regulations were intended to apply to strangers. At the time the sacks leave the contractor's premises for the purpose of being filed, the contract must necessarily be with the consignors. When does the express contract with the consignors end, and the implied contract with the consignee commence? If the consignee were to be held liable for demurrage, see the hardship that would be entailed on him, where the sacks do not reach him until after the expiration of the fourteen days. The 10th article of the regulations of 1853 **[351]** strongly fortifies the argument. It provides that "none of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station." That plainly shews that no demurrage is contemplated as being incurred through delay on the consignee's part.

Manisty and Field, in support of the rule. The question is, not simply whether the consignor or the consignee is liable for demurrage; but whether, upon the construction of the 2nd, 3rd, and 10th articles of the regulations of 1853, which were in force when this claim arose, these defendants ever entered into any contract, express or implied, to pay demurrage for the detention of sacks by the consignees, after they had ceased to be at the orders or under the control of the defendants. These regulations, it is to be observed, are prepared by the company rather for the guidance of their own servants than with the notion of their constituting a contract between themselves and the public, though, coupled with conduct, they may amount to a contract: and for this purpose they must be construed in conformity with the mode in which the parties have dealt with them. By the 3rd article, demurrage of ½d. per sack per

week is to be charged after the expiration of fourteen days: the hire to commence from the time the sacks leave the station to be filled; and seven days are to be allowed for filling and returning to the station. When do the fourteen days begin to run? Is it from the commencement of the hiring? That can hardly be; for, if so, what becomes of the provision allowing seven days for filling and returning? Is the consignor to be held responsible for delay the fault of the company at either **[352]** station? Having filled and returned the sacks to the station, the consignor's duty is performed, and his liability ended. [Cresswell, J. The 3rd article, whatever its extent may be, is evidently directed against the consignor.] It is difficult to say that that is not so. [Cresswell, J. That being so, what rule is there which obliges the consignee to pay demurrage eo nomine?] There is none. But the 10th article gives the company a claim for unliquidated damages against the consignee, provided it is acted upon and a guarantee taken from the consignee that the grain will be immediately discharged, and the sacks returned the same day, and to the same station. Suppose the consignors kept the sacks ten days, and then the consignee came and received the sacks, giving the guarantee provided by the 10th article, but failed to perform it,—would not the company have a clear right of action for that breach of contract, even though the fourteen days should not have expired? [Cresswell, J. It may be that the consignee would be liable to an action for the breach of contract: but, is he liable for demurrage?] Not as demurrage. [Cresswell, J. Suppose when the goods arrive at their destination, the consignee declines to accept them,—who is to pay demurrage?] The consignor, no doubt. But the moment the sacks are allowed to get into the hands of the consignee, the consignor's responsibility is at an end: otherwise, what is there to prevent the company from charging him with six years' demurrage? This is the construction the plaintiffs themselves have put upon the regulations, by their mode of dealing with them. [Cresswell, J. No distinction was suggested at the trial between demurrage at the beginning or the end of the journey. Your argument now is, that, where the liability of the consignee arises under the 10th article, the liability of the consignor to demurrage under the 3rd is discharged.] Precisely so. If the demurrage arises be-**[353]**-fore the sacks reach the hands of the consignee, the consignor is liable. The subsequent regulations of 1855 shew the construction which the plaintiffs themselves put upon those of 1853. There are numerous authorities to shew, that, where the words of a contract are ambiguous, resort may be had to the acts or conduct of the parties to aid its construction. Thus, in *Doe d. Pearson* v. *Ries*, 8 Bingh. 178, 1 M. & Scott, 259, Tindal, C. J., says: "If the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." Again, in *Chapman* v. *Black*, 4 N. C. 187, 5 Scott, 515, the same learned judge says,—"We may look at the acts of the parties also; for, there is no better way of seeing what they intended, than seeing what they did under the instrument in dispute."

CRESSWELL, J.(*a*) Some little difficulty has arisen in disposing of this case, in consequence of the course it took at nisi prius. The question as opened by my Brother Pigott was, whether the demurrage charged under the regulations issued by the company was payable by the consignors or the consignees. Neither party made any concession. It was admitted that the defendant knew of the regulations, and that the sacks were hired, filled, and returned to the station under them: and it was supposed that that concession involved the whole case. The various accounts rendered by the company were put in; and there the case rested. Upon full consideration of the regulations, I am of opinion that each party is to a certain extent right, and each wrong. Mr. Manisty admits to-day what he did not concede at the trial, viz. that there must originally have been a contract between **[354]** the consignors and the company to pay demurrage, because the 2nd article of the regulations of 1853 having fixed the sum payable for the hire of the sacks for the journey, the 3rd article provides that "demurrage of ¼d. per sack per week will be charged after the expiration of fourteen days," that the hire is "to commence from the time the sacks leave the station to be filled," and "that the time to be allowed for filling and returning to the station be seven days." I agree that the consignor on obtaining the sacks is to pay the stipulated charge for the journey, and to be prepared to start from the forwarding

(*a*) Cockburn, C. J., and Willes, J., were sitting in the court of Criminal Appeals.

station within seven days; and he must be taken to have agreed that demurrage of ½d. per sack per week shall be paid by him for any detention of the sacks beyond the fourteen days,—so long as they continue under his control. I am of opinion that the true construction of the regulations is this, that, when the consignor obtains sacks from the company, or the contractor, and has them conveyed to a distant station either on or beyond the plaintiffs' line, whence the company would not let them go forward without a guarantee for their immediate return, his liability continues so long as the sacks containing his grain remain there; but that, when the company take a guarantee from the consignee under the terms of the 10th article, or allow the sacks to go forward without such guarantee, the sacks are no longer under the control of the consignor, and he is not responsible for their return to the depôt. It would be very hard if it were otherwise. The company have lost their right to call upon the plaintiffs, by neglecting to do what they undertake by the 10th article to do. By that article they pledge themselves not to allow the sacks to get into the hands of the consignee without exacting from him a guarantee for their return within one day. To allow the consignee to impose demurrage upon the consignor, would come very **[355]** nearly within the rule as to circuity of action. Upon the whole, it seems to me that the liability of the consignor for demurrage is limited to the detention before the commencement of the journey and at the receiving station; and that he is not responsible for any demurrage incurred after the sacks have been allowed to get into the hands of the consignee. If any demurrage is due to the plaintiffs from the defendants upon this principle of construction, the parties have agreed upon a mode of adjusting it.

CROWDER, J. I am of the same opinion. The argument urged by Mr. Manisty this morning has introduced the subject in a view which differs materially from the aspect it bore when the former part of the argument took place. My impression then was, that the sole question between the parties was, whether the demurrage was to be paid by the consignor or by the consignee. But, when the 3rd regulation is looked at, it seems to be very clear that the only contract for demurrage is made between the company and the consignor; and then the 10th regulation puts a limit upon the liability of the consignor. If the company had acted upon that regulation, they would have been entirely satisfied. Any other construction would impose considerable hardship upon the consignor. I therefore agree with my Brother Cresswell that the proper mode of determining this question is, by holding that the consignor is not liable for demurrage occurring after the sacks get into the possession of the consignee.

The rule was drawn up as follows:—

"Rule absolute to enter a verdict for the plaintiffs for such demurrage, if any, beyond the sum of 1l. 15s. 6d., as accrued due to the plaintiffs in 1854 in respect of the detention of sacks by the defendants as consignors for a period beyond **[356]** fourteen days after the hiring and before the delivery of such sacks to the consignees: and, in the event of no such demurrage having accrued beyond the said sum of 1l. 15s. 6d., or, if the detention of the said sacks was owing to any default of the plaintiffs, then it is ordered that the verdict be entered for the defendants: and, by consent of counsel on both sides, it is ordered that it be referred to Hayes, Serjt., as arbitrator, to ascertain how the said verdict is to be entered, having regard to the circumstances and directions above stated."

Manisty, on a subsequent day, stated that some difficulty had occurred between the parties as to whether the demurrage was payable at the end of fourteen days from the hiring, or from the expiration of the seven days allowed for filling and returning to the station.

CRESSWELL, J. From the hiring, of course.

Rule accordingly (*a*).

(*a*) The reference was not proceeded with, the plaintiffs assenting to a verdict being entered for the defendants.

[357] French *v.* Styring. May 8th, 1857.

[S. C. 26 L. J. C. P. 181; 3 Jur. N. S. 670; 5 W. R. 561.]

A. & B. being joint owners of a race horse, it was agreed between them that A. should keep and train and have the general management of the horse, conveying him to and entering him for the different races; that 35s. per week should be allowed for his keep; and that the expenses of keep, &c. should be borne jointly by A. and B., and the horse's winnings be equally divided between them. A. having paid all the expenses of the keep and management of the horse, and there being no winnings to divide:—Held, that,—even assuming that this agreement constituted a partnership between A. and B. (which the court, dissentiente Cockburn, C. J., thought it did not),—A. was entitled to recover from B. a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for B.

The declaration in this case contained a count in which the plaintiff claimed 100*l.* the amount of a bet alleged to have been made by him with one Littler on behalf of the defendant, and which he alleged he had paid to Littler by the defendant's authority.

There was a second count,—for work and materials, journeys made by the plaintiff at the request of the defendant, training and feeding horses for the defendant, goods sold and delivered, money lent, money paid, and money found due upon accounts stated,—under which the plaintiff sought to recover a sum of 165*l.* 11*s.* 10*d.*, for a moiety of the expenses of keeping, training, and managing a race-horse in which the plaintiff and defendant were jointly interested.

The defendant pleaded nunquam indebitatus.

The cause was tried before Cresswell, J., at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence:—

As to the first count, it was proved that the bet was made with the defendant's authority, and the amount paid by the plaintiff to Littler; but there was a conflict of evidence as to whether or not the plaintiff was authorised to make the payment. The jury found that he was: and the court declined to disturb their verdict thereon.

As to the claim in the second count, the facts were these:—The plaintiff was a trainer of horses at Newmarket: the defendant was a wine merchant at Huddersfield. In the month of March, 1854, a race-horse called [358] Census was jointly purchased by the plaintiff and one Cohen. The latter afterwards sold his share of the horse to one Mallinson; and it was agreed between Mallinson and the plaintiff that the plaintiff should keep the horse for the purpose of training him, and should have the entire control and management of him, that 35*s.* per week should be allowed as the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, that each of them should pay one half of the horse's keep and other expenses, and that the winnings should be equally divided between them. Mallinson having subsequently sold his share of the horse to the defendant, the latter agreed with the plaintiff that he should continue to keep, train, and manage him upon the same terms as had been agreed on with Mallinson. The horse was entered and ran at several races, but never won anything, and, having ultimately broken down, was sold at Tattersall's for 20*l.* The plaintiff now sought to recover from the defendant 165*l.* 11*s.* 10*d.*, being the moiety of the keep and expenses of the horse since the defendant became possessed of his moiety, allowing in the particulars credit for 10*l.*, the moiety of the sum for which the horse was sold. There had been no previous settlement of accounts between the parties.

On the part of the defendant, it was submitted that this community of profit and loss constituted a partnership between the plaintiff and defendant, and therefore that the plaintiff could not recover in a court of law in respect of the claim set up in the second count.

The learned judge directed a verdict for the plaintiff for the amount claimed, reserving to the defendant leave to move to reduce the damages by the sum mentioned in the second count, if the court should be of opinion that the transaction created a partnership.

Atherton, Q. C., in Hilary Term last, obtained a rule [359] nisi accordingly. He referred to *Bovill* v. *Hammond*, 6 B. & C. 149, 9 D. & R. 186.

Hawkins shewed cause. There was no partnership here. The transaction amounts simply to this:—The plaintiff, having, at the request of the defendant, incurred all the expense of keeping the horse, conveying him to the different races, and entering him to run, seeks to recover the moiety which the defendant agreed to pay him. The horse never won anything, and therefore there was never any account to settle between the parties. [Cresswell, J. This point was before the court of Queen's Bench in a very recent case (*a*)[1].] This is not a partnership at all. [Cockburn, C. J. If it is, each might sell his share in the horse, and so fix the other with a partnership with the vendee.] There is in one sense community of interest, but, as to the defendant's moiety of **[360]** the expenses, the plaintiff paid it as the defendant's agent. [Crowder, J. Each might have sent in half the hay, corn, &c.] No doubt. The present case is very like that of *Helme* v. *Smith*, 7 Bingh. 709, 5 M. & P. 744, where it was held by this court that a part-owner of a ship is not necessarily a partner, and therefore a part-owner who as ship's husband incurred the expense of the outfit might sue the other part-owners separately for their respective shares of the expense. In giving judgment, Tindal, C. J., said: "Part-owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to shew that they were more than part-owners, and the question is, whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to shew that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance; and, if the plaintiff had lent either of the part owners the capital he was to contribute, that would clearly have formed the ground of a separate claim." It is impossible to distinguish that case from this (*a*)[2]. *Gale* v. *Lockie*, 2 Stark. **[361]** N. P. C. 107, is also an authority very much in point. A. agreed with B. to supply him with a manuscript work to be printed by B., the profits of which were to be equally divided. An action having been brought by B. against A. for refusing to supply the manuscript, it was objected for the defendant that the action was not maintainable, since it was brought by one partner against another, in order to recover partnership profits. But Lord Ellenborough said: "I cannot accede to this objection: the action is not brought against the defendant to recover partnership profits, but for not contributing his labour towards the attainment of profits to be subsequently divided between the parties. I have known similar actions brought in several cases; for instance, actions for not entering into partnership according to an agreement."

(*a*)[1] *Hollingworth* v. *Buckstone*, Hilary, 1857. It was an action brought to recover the half of certain freight earned by two vessels which the plaintiff had chartered for the purpose of carrying materials to Sweden, for the Swedish Railway Company, upon an agreement whereby the defendants, the ship-brokers, were to have half the surplus freight which the ships might earn by carrying the goods of other shippers when the Swedish Railway Company did not supply a full cargo. The question was, whether the agreement was for a participation of losses and profits, so as to create a partnership between the plaintiff and the defendants, or whether the half of the surplus freight was to be paid to the defendants as a mere remuneration for their exertions in obtaining the shipments. At the trial a verdict was taken for the defendants, subject to leave reserved to the plaintiff to move to enter the verdict for him for such amount as the master should find to be due upon an account between the parties. *Hesketh* v. *Blanshard*, 4 East, 144, *Rawlinson* v. *Clark*, 15 M. & W. 292, *Stocker* v. *Brocklebank*, 3 M'N. & G. 250, and *Borill* v. *Hammond*, 6 B. & C. 149, 9 D. & R. 186, were cited upon the motion. The rule is yet pending.

(*a*)[2] And see *Wilson* v. *Whitehead*, 10 M. & W. 503. There, A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments, B. to be the editor, and C. the printer; and, after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to C., for the purpose of being used by him in printing the periodical: and it was held that A. and B. were not jointly liable with C. for the price of it. But see *Barry* v. *Nesham*, 3 C. B. 541.

Atherton, Q. C., and Manisty, in support of the rule. The plaintiff and defendant became joint owners or partners in the horse in question; and, consequently, this demand arising out of a partnership transaction, and no account having been settled between them, according to the principle laid down in *Bovill* v. *Hammond*, 6 B. & C. 149, 9 D. & R. 186, the action is not maintainable. [Cockburn, C. J. If a partnership, it is one of a very anomalous nature: either might sell his interest in the horse, and so impose upon the other another partner.] Two persons having an interest in an undivided and indivisible chattel, must necessarily be partners. [Willes, J. In Littleton, § 221, it is said, that, "If two have jointly, by gift or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to an-**[362]**-other, the grantee and the other which did not grant shall have and possess such chattels in common."] The agreement here was, that the plaintiff should keep, train, and manage the horse, entering it for the different races, paying all necessary expenses: and, if the horse won, half the stakes were to be the property of each party, and, in the event of loss, each was to bear his share of the loss. There is nothing to distinguish the case from that of an ordinary partnership: the circumstance of its relating to an isolated transaction, and that there is loss but no profit, makes no difference. Suppose profit had been made, and the present defendant had brought an action for his share, he clearly could not have recovered. [Cresswell, J. If the plaintiff had incurred debts in keeping the horse, for corn and hay, or for a farrier's bill, or had contracted a debt with an innkeeper on a journey, would the defendant have been liable?] It is submitted that he would be liable for every debt necessarily incurred in furthering the joint interests of the partners. [Cresswell, J. In the case of a partnership, the law gives to each authority to contract debts for the concern: but there is no such implied authority where there is no partnership.] The ordinary test of partnership is, the right to share in profit, and the liability to contribute to loss. In *Pott* v. *Eyton*, 3 C. B. 32, 39, Tindal, C. J., says: "Traders become partners between themselves by a mutual participation of profit and loss; but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them." [Cresswell, J. That has been said ever since the case of *Waugh* v. *Carver*, 2 H. Bla. 235: and some judges have pronounced it to be a very bad **[363]** rule (*a*).] The claim is in respect of a series of advances resulting in a partnership account. [Cockburn, C. J. Would there be a right of survivorship in this case?] Yes; at law. [Cockburn, C. J. Would not the plaintiff have been entitled to call upon the defendant from week to week to pay his proportion of the expenses incurred in the keep, &c. of the horse?] It would only have been matter of account: it could not have been recovered at law. [Cockburn, C. J. Instead of contributing his share of the expenses of keeping and training the horse, the defendant gets the plaintiff to advance it for him. Was the advance made quâ partner or quâ creditor?] The advance clearly formed a partnership account, which can only be adjusted in a court of equity.

Cockburn, C. J. I am of opinion that this rule should be discharged. I think the fair result of the evidence is, that there was no partnership between the plaintiff and the defendant in the horse in question. They were owners in common, each being entitled to an undivided moiety, — part owners, but not partners in the ordinary sense of the term. I incline to agree with the defendant's counsel, that, though not partners in the horse, the plaintiff and defendant might be partners in the mode of working and managing it for their common benefit. They appear to have come to an agreement that the horse should be kept and trained by the plaintiff, and entered at races to run for the common benefit of the two, that a certain sum should be allowed weekly for the horse's keep, and that there should be an equal division of the profit and loss between them. That, I think, would constitute a partnership between them in the ma-**[364]**-nagement of the horse. But then comes the question, whether the plaintiff may not, notwithstanding such partnership, recover from the defendant his proportion of the disbursements made by him in keeping, training, running, and managing the horse. Now, it is incidental to every partnership that there shall be capital advanced

(*a*) Probably alluding to a discussion in the Exchequer Chamber in *Holman* v. *Cox*, which now (Michaelmas Term, 1857) stands for judgment.

by the partners for the purpose of carrying on the concern. It seems that the capital in this case consisted of the necessary disbursements for the horse's keep, and for working it for the common benefit. If the two had agreed that a certain sum should be contributed by them in equal moieties as the capital for the partnership, and the defendant had failed to advance his share, and the plaintiff had advanced it for him, there could be no doubt that the plaintiff would have been entitled to maintain an action for the capital so advanced. Now, it being agreed that each should contribute a moiety of the stipulated capital, it clearly can make no difference in principle whether such capital is all advanced at the outset or from time to time as the necessities of the concern require it. Here, instead of obtaining advances from time to time from the defendant, it seems the plaintiff paid his share of the expenses for him. No doubt, the moment money is paid in as capital, it becomes part of the partnership fund, resulting only in matter of account, and cannot be made the subject of an action at law. But that is clearly distinguishable from advances made by one partner, not to the concern, but to the other in respect of what he is to contribute to the joint capital; and there is no principle of law that I am aware of which prevents such advances from being recovered back: it is a matter altogether dehors the partnership. Without, therefore, in the slightest degree intending to trench upon any of the fundamental principles of the law of partnership, it appears to me that we may give effect to what justice demands here, by holding that the plain-[365]-tiff is entitled to recover the debt claimed in his second count.

Cresswell, J. I am of the same opinion. Assuming that the agreement between these parties to keep, train, and run the horse in question constituted a partnership between them, I think the payments made by the plaintiff amounted to an advance by one partner of capital on behalf and at the request of the other, and may be recovered in an action at law. I do not feel at all pressed by the difficulty suggested by Mr. Manisty, as to the complication of the account, where there are advances on behalf of each other in the case of a partnership consisting of several members. However complicated the account, the principle remains the same. This is the simple case of an advance of capital by one partner at the request of the other.

Crowder, J. I also think the plaintiff is entitled to recover in respect of the demand in the second count. It seems to me to be very doubtful whether there was any partnership at all between the plaintiff and the defendant. There clearly was no partnership in the horse: it was a mere case of joint-ownership. But it is said the agreement that the horse should be kept, trained, and run for stakes, and the winnings divided between the joint-owners, constituted a partnership between them. If so, what is the capital? The money required for keeping, training, and conveying the horse to the various races for which he might be entered, in other words, the money expended in placing the horse in a condition to win the stakes. Suppose, instead of the agreement that the plaintiff should provide for those incidental expenses from time to time as they arose, it had been calculated that a sum of 100*l.* would be required for the purpose, of which each party was to ad-[366]-vance 50*l.*,—could there be a doubt, that, if the plaintiff advanced the 50*l.* for the defendant, at his request, he could recover it back by an action? If so, it can make no difference, that, instead of being advanced in one sum at the commencement, the defendant's share of the capital was advanced by the plaintiff from time to time in such sums as the common purpose required.

Willes, J. I am entirely of the same opinion. The agreement here amounts to the sort of tenancy in common mentioned in the section of Littleton to which I referred in the course of the argument. The effect of the agreement seems to be this,—that the plaintiff should keep and train and have the exclusive management of the horse, entering it and conveying it to the different races, and doing everything necessary to put it in a condition to run, and, in the event of the horse winning, paying over to the defendant one half of the amount of such winnings. It in truth amounts to no more than a contract between two tenants in common, whereby the one agrees, in consideration of certain things to be done by the other, to abstain from exercising his rights in respect of the chattel held by them in common. It is no more a partnership than if two tenants in common of a house agreed that one of them should have the general management, and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided between them equally. Even if this were to be looked upon as a contract

of partnership, the point at which the partnership would necessarily commence is, that at which the horse is put upon the turf in a condition to run for stakes. The payments sought to be recovered here are, payments made by the plaintiff in the nature of advances on behalf of the defendant anterior to the time at which any partnership could com-[367]-mence. Without expressing any decided opinion upon the first point, upon the second ground I concur with the rest of the court in thinking that the plaintiff is entitled to recover upon the second count as well as upon the first, and therefore that the rule to reduce the damages must be discharged.

Rule discharged.

LEIGH AND WIFE, Executor and Executrix of Henry How, Deceased, *v.* ANN BAKER, Executrix of William Baker, Deceased. May 5th, 1857.

A writ issued under the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, in a case which is not within the act,—the bill or note having become due and payable more than six months before,—may, by virtue of the 222nd section of the Common Law Procedure Act, 1852, be amended, by turning it into a writ under the last-mentioned act.—The defendant was, in May, 1856, served with a writ of summons under the Bills of Exchange Act, 1855, for the recovery of principal and interest on a promissory note alleged to have been made by her testator in March, 1851, payable on demand. No appearance having been entered, judgment was signed, and execution issued. Nine months afterwards, the defendant moved to set aside the writ and subsequent proceedings, on the ground that they were coram non judice and void, and also suggesting that the testator's signature to the note was a forgery. The court refused to set aside the writ, but allowed it to be amended, upon terms, by making it a specially indorsed writ under the 25th section of the Common Law Procedure Act, 1852.

This was an action brought by the plaintiffs as executor and executrix of Henry How, deceased, to recover 110l. 17s. for principal and interest on a promissory note in the following form:—

"1851. March 3rd.

"We, Robert Norman, John Norman, yeomans, of Northmolton and Winsford, William Baker, cordwainer of Winsford, jointly and separately do hereby promise to pay, on demand, unto Henry How, sen., of East Anstey, in the county of Devon, on his order, the sum of one hundred pounds of lawful money of Great Britain, with interest at 5 per cent., for value received by me Robert Norman this third day of March, one thousand eight hundred and fifty-one. Witness our hands,

"£100. "ROBERT NORMAN.
"JOHN NORMAN.
"Elizabeth How. "WILLIAM BAKER."

[368] In May, 1856, the defendant was duly served with a writ of summons indorsed pursuant to "The Summary Procedure on Bills of Exchange Act, 1855," 18 & 19 Vict. c. 67. On the 3rd of June, judgment was signed in the form given in schedule B. to the act annexed: and a fi. fa. issued de bonis propriis of Ann Baker.

Field, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why the writ of summons and all subsequent proceedings had thereon should not be set aside, or why the judgment signed in this cause and all proceedings had thereon should not be set aside, or why the said judgment and subsequent proceedings should not be set aside, and the defendant be at liberty to appear to the said writ of summons and to defend the action (*a*).

(*a*) The affidavit upon which the rule was moved was made by the defendant, who was described as "widow of William Baker, deceased, late of Winsford," and George Baker, her son. The former deposed that she was served with the writ of summons in this action in May last: that, at that time, and up to the time when she first consulted her attorney in this case, on or about the 17th of March, 1857, as hereinafter mentioned, she was wholly ignorant of the law in such matters, and of all proceedings thereunder, and that she then and still lived at a distance of nearly twenty miles from

[369] The act is limited to actions brought within six months after the bill or note shall have become payable. **[370]** This note was made in March, 1851, and was payable on demand: it was, therefore, due and payable immediately, and consequently the act does not apply to it, and the whole proceeding is a nullity. [Cresswell, J. The action is the demand.] The statute of limitations would begin to run from the date: *Norton* v. *Ellam*, 2 M. & W. 461. [Willes, J. It could not be said to be an over-due note, so that a person taking it would take it subject to its equities.] No. The judgment is wrong in form also: the 1st section of the act (*a*) only authorizes a

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any attorney, and that she then and still was very infirm, and for those reasons neglected to appear to the writ, or to take any steps in the matter: that she was some time afterwards informed that judgment had been signed in this action; that, about a month after she was served with the said writ, an officer of the sheriff of Somerset took possession of three leasehold dwelling-houses and premises left to her by the will of her late husband, and remained therein with her and her son (the other deponent) for upwards of a month, when the said dwelling-houses were sold to one William Quartly: that shortly after she had heard that the said judgment had been so signed against her in this action, she went with her daughter Eliza Webber to the office of Messrs. Pearse & Crosse (the plaintiffs' attorneys), in Southmolton, and there saw the promissory note upon which this action was said to be founded, and which purported to be signed by her late husband, William Baker, and she and her said daughter perceived that the name of William Baker signed on the promissory note was not the handwriting of her late husband: that she verily believed the said signature "William Baker" was not the handwriting of her late husband the said William Baker: that she verily believed the said William Baker, her late husband, never was indebted to the said Henry How, the payee of the said note, and that he never became surety to him for any other person, and she believed, that, if he had been so indebted, or had so become surety, he would have informed her thereof: that the words "William Baker, cordwainer, of Winsford," appeared to have been interlined in the body of the said note and that the said signature "William Baker" was written the last of the signatures at the foot of the said note: that she then and still believed that the said signature was a forgery: that, a few days after she and her said daughter had so inspected the said note, her son George Baker (the other deponent) told her he had been to the office of Messrs. Pearse & Crosse, the plaintiffs' attorneys, and had seen the said note, and found that the signature "William Baker" was not her said husband's signature, but that the said Mr. Crosse had told him, that, judgment having been signed in the action, it was too late to dispute the note: that she believed this statement of Messrs. Pearse & Crosse to be true, and, in consequence thereof, and of her ignorance of the law, she took no steps to obtain legal redress until she explained the facts to Mr. Waldron, attorney, of Wiviliscombe, as thereinafter mentioned: that, on or about the 17th of February last, she was served with a writ of ejectment brought by the said John Leigh against her and her said son, George Baker, and Isabella Gunter, to obtain possession of the above dwelling houses; that she had been informed, and believed, that the said William Quartly did not complete the purchase of the dwelling-houses and premises from the sheriff, and that the same were in fact purchased from the sheriff by the said John Leigh, and that he was in consequence bringing the said ejectment; that, on being served with the said writ of ejectment, and understanding she should be turned out of the house, she went to consult the said Mr. Waldron thereon, and then explained to him the facts thereinbefore mentioned; and that the said Mr. Waldron had informed her that the proceedings in this action on the part of the plaintiffs had been wrong, and had advised her to apply to have them set aside. The other deponent, George Baker, also swore positively that the name "William Baker" at the foot of the promissory note in question was not in the handwriting of his late father, and that he never knew or heard, and did not believe, that his father was ever indebted to the said Henry How, or ever became surety to him for any other person.

(*a*) The 1st section enacts, that, "from and after the 24th of October, 1855, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal

judgment [371] in the form given in schedule B., and that is a judgment against the defendant personally, there being no words in the section to allow of any deviation from that form. This is an action against the defendant as executrix: and it may well be doubted whether the statute intended to apply to actions against executors or administrators. [Cresswell, J. So far as regards the irregularity in the writ of summons, the application comes very late.] The affidavit sufficiently, it is submitted, explains the delay. The fi. fa. is also irregular, inasmuch as it is to be levied de bonis propriis. [Cresswell, J. The fi. fa. would necessarily follow the judgment.] The judgment is clearly a nullity. It would be bad on error: and, as the act, by s. 1, takes away the writ of error, the only remedy the party can have is, by application to the court.

Lush afterwards moved, on the part of the plaintiffs, for a rule nisi to amend the judgment and writ. The court directed, that, instead of granting a cross-rule, it should be made a term in the defendant's rule, that the plaintiffs should be at liberty at the time of shewing cause to renew the application to amend the judgment and fi. fa.

[372] Lush now shewed cause (*a*). The rule is founded upon the affidavit of the defendant and her son: neither of the parties to the note makes any affidavit. [Crowder, J. Is there an affidavit by Elizabeth How, the witness?] No. [Field. There is an affidavit of an application made to her, and of her refusal to make any affidavit.] It appears from the affidavits in answer that the plaintiffs' testator, Henry How, died in June, 1855. This application,—which resolves itself into a mere question of irregularity,—is too late: it is not made until ten months after the service of the writ, and nine months after judgment signed and execution executed. [Cresswell, J. Have you any affidavit explaining the circumstances under which the note was made?] None. [Cockburn, C. J. Is not that which is complained of something more than mere irregularity? It is contended on the other side that the case is not within the statute at all, inasmuch as the statute only applies to bills and notes which became due and payable within six months before the commencement of the action, and does not apply to actions against [373] personal representatives.] Still, it is submitted, it is merely irregularity. [Cockburn, C. J. It is more than irregularity: the act altogether changes the procedure. Cresswell, J. Is the defendant liable in any other capacity than executrix?] No. The court, however, have power to amend the writ, if necessary, so as to make it a good writ under the Common Law Procedure Act, 1852. [Cockburn, C. J. If the case is one which is not within the statute, the

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service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any), to the date of this judgment, and a sum for costs to be fixed by the masters of the superior courts, or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith."

(*a*) The affidavits filed in opposition to the rule, stated, amongst other things, that, on or about the 15th of July, 1856, the sheriff of Somerset caused the three cottages seized under the writ of fi. fa. to be advertized for sale at Winsford on the 21st of that month, and that the plaintiff John Leigh and several other persons attended the said sale, when William Quartly was the highest bidder for, and became the purchaser of, the said premises at and for the sum of 150l.: that Quartly afterwards relinquished the contract in favour of John Leigh; that the amount of debt and taxed costs owing under the execution, including the said execution, was 116l. 15s., which sum was allowed to him in account in the said purchase-money of 150l.; and that the balance thereof, amounting to 33l. 5s., was paid by him to the sheriff, and a proper deed of assignment from the said sheriff of the premises, dated the 28th of July, 1856, was executed by him to the said John Leigh.

necessary consequence is that the whole proceedings fall to the ground. The statute gives the court a new summary jurisdiction, to be exercised only in certain circumstances. If the writ has issued in a case to which the provisions of the act do not apply, the whole proceedings are coram non judice.] The fact of the writ of error being taken away shews that the legislature intended technical objections to have no weight. [Cockburn, C. J. The very fact of the defendant being deprived of that remedy ought to make us more cautious in exercising the new jurisdiction thus created. Are you prepared to argue that the court is to enforce proceedings upon a writ which the plaintiff has thought fit to issue in a case which is not within the statute?] Yes. The execution, and perhaps the judgment, may be wrong; but they are amendable. [Cockburn, C. J. Do you admit that the case is not within the statute?] It must be conceded that the note upon which the action is brought is not within the statute, a note payable on demand being payable immediately; but not that the statute does not apply to executors. The proceedings, though irregular, are not void. Assuming, for the sake of argument, that an executor is not within the act, the only way of taking advantage of that would, but for the prohibitory words in s. 1, be by writ of error. [Cresswell, J. Suppose, before the passing of the act, a writ had issued in this form, what would be the result?] It would have been an irregularity only: the writ is still a writ of the court. **[374]** [Cockburn, C. J. The statute introduces a new system of procedure of a very special and peculiar nature. Must it not be confined strictly to such cases as properly fall within it?] That being conceded, the question is, what is the consequence? The proceeding cannot be void; for, error will not lie. Then, the 7th section enacts that "the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be applicable, extend and apply to all proceedings to be had or taken under this act." Here, the plaintiff seeks to apply the provisions of the Common Law Procedure Act, 1852. By that act, three several forms of writ of summons are given, one, under s. 2, where the defendant is residing within the jurisdiction of the court,—a second, under s. 18, where the defendant is a British subject residing out of the jurisdiction of the court, in any place except in Scotland or Ireland, —a third, under s. 19, where the defendant is a foreigner residing out of the jurisdiction of the court: and in each case the form is given. Suppose a defendant were served with a writ in a form not properly adapted to the particular case, could it be contended with any hope of success that the process was therefore irremediably void? That case is specially provided for by s. 21, which enacts, that, "if either of the forms of writ of summons contained in the schedule A. to the act annexed, and marked respectively Nos. 1, 2, and 3, shall by mistake or inadvertence be substituted for any other of them, such mistake or inadvertence shall not be any objection to the writ or any other proceeding in such action, but the writ may, upon an ex parte application to a judge, whether before or after any application to set aside such writ or any proceeding thereon, and whether the same or notice thereof shall have been served or not, be amended by such judge, without costs." **[375]** [Cockburn, C. J. That would seem to imply, that, but for that provision, it could not have been done.] Precisely so. That provision is applicable to the Bills of Exchange Act, by virtue of the 7th section. The writ in this case is by mistake substituted for a writ under the Common Law Procedure Act: and the court is asked to amend it. [Cockburn, C. J. Then the defendant must be let in to appear and defend.] There she is met by the insuperable objection that she has allowed the time to go by. It must be assumed that she knew of the irregularity when she was served with the writ. [Cockburn, C. J. It must not be assumed that this is a mere irregularity. The question is whether the whole proceeding is not a nullity.] The whole scope of the statute shews that it is not a nullity, but a mere irregularity, which is amendable, and which may be waived by laches. [Cockburn, C. J. The statute introduces an entirely new course of proceeding, unknown to the law. A defendant who is served with process under it cannot defend the action,—which is the common law right of every subject,—without the special leave of a judge. If a plaintiff issues a writ in a case which is properly within the contemplation of the act, then he is of course entitled to the benefit of all the provisions as to amendment contained in the Common Law Procedure Acts: but, if he chooses to misapply the process created by the act in a case not within the purview of the act, I do not see how he can avail himself of those provisions.] It is only where the proceeding is in a form not warranted

by the statute that resort need be had to the powers of amendment contained in the Common Law Procedure Acts. If the statute now in question had formed part of the Common Law Procedure Act, 1852, as it might have done, there would have been a fourth form of writ. [Crowder, J., referred to *Knight* v. *Pocock*, 17 C. B. 177, where, upon a motion to set aside a copy and service of a writ **[376]** under this act, on the ground of an irregularity in the indorsement, the court allowed the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852.] There can be no greater difficulty in applying the 21st section of that act to a proceeding under this act, than the 20th section. [Cockburn, C. J. It is difficult to see how you can apply the provisions of the Common Law Procedure Act as to three writs, to an act which gives but one form of writ.] The amendment might, it is submitted, be made under s. 96 of the Common Law Procedure Act, 1854, which enacts that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for." [Cresswell, J. The 222nd section is much more favourable for you. If you claim to amend under the Bills of Exchange Act, it must be for the purpose of making the writ a good proceeding under that act: whereas, the 222nd section of the Common Law Procedure Act, 1852, confers a general power of amendment applicable to all proceedings in all civil actions. Cockburn, C. J. The amendment proposed takes the case out of the Bills of Exchange Act: with that amendment of the writ, all the subsequent proceedings necessarily fall.] Not so, it is submitted. The amendment of the writ would make it a specially indorsed writ under the Common Law Procedure Act; and there has **[377]** been no appearance. [Cockburn, C. J. The defendant asks us to annul all the proceedings because they are coram non judice.] The court must exercise its discretion as to the terms upon which the amendment is to be allowed, regard being had to all the powers of amendment contained in the former acts.

Field, in support of his rule. It is submitted, that that which is complained of here is matter of substance, and not mere irregularity, and that the court has no power to make the amendment proposed. [Cresswell, J. Do you contend that the writ would not have been amendable if the application for that purpose had been made before the expiration of the time for entering an appearance?] No amendment could have been made even then. The 21st section of the Common Law Procedure Act, 1852, clearly is not applicable to this case, and is not incorporated with the Bills of Exchange Act, 1855. That section is expressly limited in its operation to the three writs mentioned in the 2nd, 18th, and 19th sections, which differ merely in the mode and place of service and the time for appearance, the subsequent proceedings under each being the same. And, as to the 222nd section, the power of amendment thereby created is, only to make the proceedings conformable to what they were intended to be: but it confers upon the court no power to convert a writ of the peculiar nature of that now in question, giving a remedy which was before unknown to the law, into a common law writ, attended with consequences altogether different. [Crowder, J. I certainly have allowed amendments of this sort many times at chambers, without challenge, where it has turned out that the writ was issued more than six months after the bill or note became due. Willes, J. I have done the same.] The amendment which the 222nd section deals with seems to contemplate an exist-**[378]**ing suit: the amendment here sought destroys the existing suit. [Cresswell, J. Not so. This is an action by the plaintiffs against the defendant upon a promissory note: the question in controversy between the parties in the suit is, whether or not the defendant is liable on the note.] The object of the amendment is, to create a new suit attended with entirely different consequences. It may, indeed, be doubted whether the proceeding here was a suit at all,—the suit being a mere mode of bringing the defendant into court. [Cresswell, J. When do you say it becomes a suit?] When a declaration is delivered. [Cresswell, J. I cannot assent to that.] At all events, this is not a case to which any of the powers of amendment can properly be applied.

Cockburn, C. J. I must confess I am not quite satisfied that this is a case in

which the court has power to amend. Inasmuch, however, as my learned Brothers are all agreed that it is a fit case for amendment upon terms, and that we have power to amend, I will not hold out against their opinions.

CRESSWELL, J. I am of opinion that this is a case in which we have power to amend the writ so as to make it a good writ under the Common Law Procedure Act, 1852. It appears that this power has been repeatedly exercised by my Brothers Crowder and Willes at Chambers; and I think I have myself done the same. I arrive at this conclusion with the more confidence, because one of my learned Brothers has peculiar means of knowing what the intention of the framers of the act was. It seems to me that Mr. Field has successfully disposed of the 21st section of the Common Law Procedure Act, 1852. But I think we clearly have power to amend under s. 222, which contains the largest possible words, — "It shall be lawful for the superior courts [379] of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." There can be no doubt that the real question to be tried here was, whether or not the plaintiffs were entitled to recover against the defendant the amount of the promissory note. The plaintiffs erroneously thought they could recover it under the 18 & 19 Vict. c. 67. It turns out that he cannot do so. The power of amendment must be dealt with as it would have been dealt with if the application to amend the writ had been made the day after it issued. If the application had been so made, I think it is impossible to say that the case would not have been in terms within the 222nd section. This is an error in a proceeding in a civil cause, the writ has been erroneously issued. Mr. Field was driven to contend that this is not a suit at all; but in this he could hardly have been serious. I am clearly of opinion that it is a proper case for amendment, and that the only question is as to the terms upon which it ought under the circumstances to be made. My Brother Willes is prepared to suggest what these should be.

CROWDER, J. I am entirely of the same opinion. As I have already stated, I have repeatedly allowed writs which have been improvidently issued under the statute in question, to be amended. I always considered such amendments quite consistent with the spirit of the [380] 222nd section of the Common Law Procedure Act, 1852, I think Mr. Field has not succeeded in shewing that there is no suit here, or that the real question in controversy between the parties is not whether the amount claimed on the promissory note is not due.

WILLES, J. I am of the same opinion, upon the construction of the 222nd section of the Common Law Procedure Act, 1852. It appears to me that the 7th section of the Bills of Exchange Act, 1855, makes it incumbent on the courts to construe that as an act in pari materiâ with the Common Law Procedure Acts, 1852, and 1854. Although the process under this statute is of a very peculiar character, the defendant not being allowed to appear and defend except by leave of a judge, still it is to be treated in all other respects as any other writ for the commencement of an action, and subject to the like powers of amendment. And, after all, there is hardly a greater difference between this writ and the ordinary writ of summons under the Common Law Procedure Act, 1852, than that which is there recognised between the writ mentioned in s. 2, and the writs provided for by ss. 18, 19, for service upon persons residing out of the jurisdiction of the court. The 222nd section applies as much to the one as to the other. If, then, the writ may be amended, the question is, upon what terms that amendment should be allowed; and this is a matter of some difficulty, more especially as the proceedings which require to be amended were taken in May, 1856, when they could not have been taken in May, 1857. If the writ were amended as to the date simpliciter, that might give rise to a difficulty. The most convenient way to do it probably will be, to let the service stand, as in *Knight* v. *Pocock*, 17 C. B. 177. Then, the judgment must be set aside, and neither party must set up the proceedings under the judgment in support or defence of this action. [381] The defendant ought to be allowed a reasonable time to appear, otherwise the plaintiffs to be at liberty to sign judgment as upon a specially indorsed writ. It appears that

the judgment was for the amount of the bill and interest, amounting with costs to 116l. 15s., and that the property taken was sold for 150l., and that the plaintiff, the purchaser having failed to complete, took the cottages, paying the difference, 33l. 5s. It may be a question how far the judgment and writ would afford a defence to the sheriff or the purchaser: if, therefore, the defendant should object to the terms I propose, it may be necessary to make some order to provide against that. I think the plaintiff should retain the cottages, and the defendant the money, until the further order of the court or a judge. If these terms are assented to, it will not be necessary to impose any hostile order upon the parties.

With respect to the costs, inasmuch as there has been great delay on the one side, and irregularity on the other, the costs should be costs in the cause.

The rule was afterwards drawn up as follows:—

Rule absolute,—"that the judgment signed in this cause be set aside, and that the writ of summons issued herein be considered as amended as of its original date, and as if specially indorsed under the Common Law Procedure Act, 1852, and that the service of the said writ on the defendant do stand, the said defendant being at liberty to appear to such writ within a week, and in default thereof the plaintiffs to be at liberty to sign judgment: And it is further ordered that neither of the said parties shall set up the proceedings under the said first mentioned judgment in support or defence of this action: And it is further ordered that the said plaintiff John Leigh do retain the cottage or cottages, [382] if more than one, now in his possession, purchased on the sale thereof by the sheriff of Somerset under the writ of fi. fa. issued upon the said first-mentioned judgment, and the said defendant the other cottage or cottages now in her possession, until a judgment shall be obtained in this cause, or until the further order of this court, or one of the judges thereof: the respective parties in this cause by their counsel hereby undertaking to abide by such further order as the court, or one of the judges thereof, shall make as to the said cottages, the value thereof, or the balance of the purchase money: And it is further ordered that the action of ejectment, and the costs of either of the said parties of and occasioned by the said judgment and subsequent proceedings, and of the action of ejectment, and this application to the court, do respectively abide the event of this cause."

WEEDING *v.* MASON. May 6th, 1857.

Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side: those called for the plaintiff estimated the dilapidations, the one at 119l., the other at 124l.: those called for the defendant estimated them, the one at 63l. 15s., the other at 68l.: the jury returned a verdict for 36l. 10s:—The court ordered that the inquisition be set aside without costs, unless the defendant would consent to the verdict being entered for 63l. 15s.

This was an action for dilapidations. The defendant having suffered judgment by default, two surveyors who were called as witnesses for the plaintiff upon a writ of inquiry, estimated the dilapidations, the one at 119l., the other at 124l.: the defendant, on the other hand, also called two surveyors, one of whom estimated the dilapidations at 63l. 15s., the other at 68l. The jury returned a verdict for the plaintiff for 36l. 10s.

Maude, on a former day in this term, obtained a rule nisi to set aside the inquisition on the ground of the in-[383] sufficiency of the damages, unless the defendant would consent to the damages being increased to 63l. 15s.

Petersdorff shewed cause, submitting that the amount of damages was purely a question for the jury, and one with which the court would not interfere.

Maude, in support of the rule, was stopped by the court.

COCKBURN, C. J. The defendant will do well to accept the alternative offered by the rule, and consent to the verdict being entered for the lowest of the two estimates of his own witnesses. As it now stands, the verdict is far from satisfactory.

Petersdorff submitted, that, if a new inquiry were granted, it should be on payment of costs.

COCKBURN, C. J. I think we ought not to impose such terms, if the defendant

rejects so reasonable an offer. The rule must be made absolute for a fresh inquiry, unless the defendant will consent to the terms proposed.

The rest of the court concurred,

Rule accordingly.

[384] YOUENS *v.* KEEN AND BATES. May 8th, 1857.

A motion for leave to sign judgment and issue execution under the 210th section of the Common Law Procedure Act, 1852, may be made to the court, and is absolute in the first instance.

This was an action of ejectment brought to recover possession of a piece of land and a messuage at Islington.

Barnard moved for judgment and execution against the defendants under the 210th section (*a*) of the Com-**[385]**-mon Law Procedure Act, 1852 (15 & 16 Vict. c. 76), upon affidavits stating that the writ of summons was personally served upon one of the defendants (Keen), who was the lessee of the premises sought to be recovered; and, as to the other defendant (Bates), upon an affidavit of an agent of the plaintiff, stating that he went to the premises for the purpose of serving the writ, but was unable to obtain admittance, and that he thereupon affixed a copy of the writ on the outer door of the premises, that half a year's rent was in arrear, and that there was a power of re-entry reserved for non-payment of rent: and a further affidavit, that, upon a subsequent visit to the premises for the purpose of ascertaining whether or not the premises were empty, a person who stated that his name was Bates looked out of the

(*a*) Which enacts, that, "in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any further demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or, in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that a half-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and, in case the lessee, or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee are or ought to be performed."

first-floor window, and told the applicant that there were a few articles of furniture [386] of trifling value in the messuage, and that they belonged to the defendant Keen, that he (Bates) was about to remove them, that he had been occupying the said messuage by the permission of Keen, and that there was no sufficient distress to be found upon the premises countervailing the arrears of rent then due. [Willes, J. Should not this application have been made to a judge at Chambers?] The language of the section would seem to confine it to the court. [Willes, J. According to Mr. Justice Wilmot, in his judgment in *The King* v. *Almon*, Wilmot's Notes, 243, 246, "the court," in s. 210, means "a judge of the court." The word "court," says that learned judge, means "the judges who constitute it, and who are intrusted by the constitution with a portion of the jurisdiction, defined and marked out by the common law or acts of parliaments."] It was usual under the analogous provision of the 57 G. 3, c. 52, to make the application to the court.

Per Curiam. Take a rule.

Rule absolute (*a*).

[387] HOPE *v.* FENNER AND ANOTHER. May 6th, 1857.

[S. C. 26 L. J. C. P. 207; 3 Jur. N. S. 565.]

In order to determine whether or not a plaintiff is liable to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, for having without reasonable or probable cause made an affidavit of debt to found a summons under s. 78, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time.

This was an action in which the plaintiff sought to recover damages from the defendants for wrongfully preventing the plaintiff from building and completing a certain wharf pursuant to a contract contained in a letter addressed by the plaintiff to the defendants, in the following terms:—

"I hereby engage and undertake to build your wharf at Millwall, as described to me, that is to say, 75 feet long from Messrs. Swayne & Bovill's, taking the line as laid down, with the return end to the present footpath, and to provide at my own cost and expense the necessary materials and other things for the said purpose, as per the specification at foot, and finish the same in a substantial and workman-like manner and to your satisfaction, for the sum of 200*l.*; to be paid by three several amounts, that is to say, one third when the work is half completed, the second third when quite finished, and the last remaining sum three months from the day of finishing the same.

"The said wharf to be built with materials as follows:

"15 front piles 28 to 30 feet long, and not less than 12 inches square.

"15 land tie-piles 15 to 20 feet long.

"22 two-inch iron tie-rods 30 feet long, topped and headed.

"The front planking to be three-inch deals, spiked to the piles.

"The top to be finished off with a campshore 6 by 12, well and securely bolted and tied down.

"The whole to be fitted in level with the footpath and campshore."

[388] The contract was entered into on the 27th of March, 1856. On or about the 23rd of May, the defendants, being dissatisfied with the manner in which the work was proceeding, stopped it, and refused to allow the plaintiff to complete it.

This action was commenced on the 9th of July. On the 26th, the following particulars of the plaintiff's demand under the common counts were delivered pursuant to a judge's order.

	£	s.	d.
"To 850 feet of pileing, 12 in. by 12 in. . . .	59	10	0
105 feet for campshore, 12 in. by 6 in. . . .	5	5	0
Smith's work making land-ties, nuts, screws, heading-bolts, &c. for campshore plates outside and in, spikes, planking, &c. .	28	7	0
Carry forward, . . .	£93	2	0

(*a*) See 1 & 2 Vict. c. 74, s. 1

Brought forward, . . .	£93	2	0
Pile-driving	30	16	0
40 pile-shoes	10	0	0
Barge-hire, towing timber, rafting ditto, and attending .	3	19	2
2080 feet three-inch plank	60	13	4
Carpenters shoeing piles, planking, cutting piles, and fitting campshore, putting in land-tie bolts, heading piles, &c. 73 days, 4 hours	22	2	0
Labourers for removing stone and digging out for plank .	8	2	2
	£228	14	8"

Issue was joined on the 3rd of November last, and notice of trial given for the sittings after Michelmas Term. The cause was called on on the 28th of November, but, the plaintiff's witnesses not being in attendance, the record was withdrawn; and, on the following day, [389] the plaintiff caused the defendants to be served with a demand and notice in bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), setting out the particulars as above, giving them credit for two payments of 30l. and 36l. 13s. 4d. respectively, and allowing a set-off of 6l., and demanding immediate payment of the balance, 156l. 1s. 4d.

On the 10th of December, the plaintiff made and filed in the court of bankruptcy an affidavit in which he swore that the defendants were justly and truly indebted to him in the sum of 156l. 1s. 4d. "for work, labour, and materials supplied by him to the defendants at their request, for money found to be due from the defendants to the plaintiff on accounts stated between them, and for money paid by the plaintiff for the defendants at their request;" and a summons was thereupon issued against the defendants. This summons was heard before Mr. Commissioner Fonblanque on the 17th of December, and was by him adjourned to the 20th, for the defendants to file an affidavit that they had a good defence to the action, and that they were solvent. The required affidavit having been produced, the summons was discharged.

The cause was tried on the 23rd of January last, before Willes, J., when (the special count having been abandoned) a verdict was found for the plaintiff on the common counts for 76l. 11s. 8d.,—the jury explaining their verdict by saying that they gave the plaintiff credit for 200l. as due to him on the contract, and deducted therefrom the sums following, viz. 72l. 13s. 4d., being the amount of the payments made and set-off claimed by the defendants, and for which the plaintiff had given credit in the demand in bankruptcy: 40l., as the amount required to finish the wharf, according to one Bracebridge, a witness called for the plaintiff (the plaintiff himself, on [390] his examination, having admitted that it would have cost him 25l. to complete the work); 10l. for a deficiency in the size of the tie-rods; and 1l. 15s. for a deficiency in the length of the wharf,—making together 124l. 8s. 4d.

Upon an affidavit setting out the above facts, and also stating that the summons in bankruptcy was issued against the defendants vexatiously and in order to harass and annoy them, and without any reasonable or probable cause as to the amount of alleged debt deposed to by the plaintiff in his affidavit, and that the several items in the particulars of demand referred to the work done and materials supplied for and towards the erection of the wharf, and to no other work or materials.

Hugh Hill, Q. C., in Hilary Term last, obtained a rule calling upon the plaintiff to shew cause why the defendants should not be allowed their costs of the action, and of the application, and why the plaintiff should not be disabled from taking out execution for the sum recovered in this action unless the same should exceed (and then only for such excess) the amount of the defendants' said costs when taxed, and why, in case the said sum recovered by the plaintiff should be less than the defendants' said costs, the defendants should not be at liberty to issue execution for the difference.

The motion was founded upon the 86th section of the 12 & 13 Vict. c. 106, which enacts, that, "in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought,

provided that it shall be made appear to the [391] satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and, in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs, in like manner as a defendant may now by law have execution for costs in other cases."

Knowles, Q. C., and Hannen, now shewed cause, upon an affidavit of the plaintiff, in which he stated, amongst other things, that the sum of 156l. 13s. 4d. claimed by him from the defendants in his affidavit of debt in bankruptcy was the amount he then believed the defendants to be truly indebted to him, and which he obtained by deducting from the value of the work and materials supplied by him to the defendants all counter-claims then existing against him in relation to the same transaction or otherwise; and that the difference of 80l. 9s. 8d. between the amount of the said verdict and the balance claimed in his said affidavit of debt, arose partly from deductions mentioned in the affidavit upon which this motion was founded, viz. the deduction of 40l. for the sum required to complete the wharf, as stated by the [392] witness Bracebridge, instead of 25l., the amount stated by the plaintiff himself, all the materials necessary for completing the wharf having been delivered on the defendants' premises (with which fact Bracebridge was not acquainted at the time of the trial), the item of 10l. allowed to the defendants for difference in price of the tie-rods under circumstances which were mentioned (*a*), and the item of 1l. 15s. for unavoidable deficiency of a few inches in the length of the wharf, making together deductions amounting to 26l. 15s., to which at the time of making his said affidavit of debt he considered himself reasonably entitled, and therefore made no deduction; and that the remainder of the sum of 80l. 9s. 8d. was the difference between the price of the work as contract work and the actual value of it,—in confirmation of which latter statement, he referred to the evidence of one of the defendants' witnesses, a wharf-builder, who at the trial proved the inadequacy of the contract price. They also produced the affidavits of a civil engineer and a surveyor and architect as to the reasonableness of the charges contained in the particulars of demand.

The question here is, not whether the defendants really were indebted to the plaintiff in the amount sworn to, but whether the plaintiff had reasonable or probable cause for thinking that he was justly entitled to the sum for which the affidavit was made,—what was the state of his own mind upon the subject at the time of making the affidavit. The defendants having prevented him from performing the work under the contract, the plaintiff was not limited to the contract price, [393] but was justified in considering himself entitled to measure and value. [Cresswell, J. The plaintiff must shew that he had reasonable ground for believing that he was entitled to the sum claimed in his affidavit.] The cases upon the 43 G. 3, c. 46, s. 3, are analogous. In *Sherwood* v. *Taylor*, 6 Bingh. 280, 3 M. & P. 641, the defendant was arrested for 327l.; he tendered 250l., but did not pay it into court. An arbitrator to whom the cause was referred awarded the plaintiff only 250l.; and it was held not a case to entitle the defendant to costs as for a malicious and vexatious arrest. The principle which governs these cases is there laid down by Tindal, C. J., thus,—"The statute 43 G. 3 directs that the defendant shall be allowed his costs when he is arrested for a larger sum than is found to be due, provided it shall appear to the court that there was not any reasonable or probable cause for such arrest. It has been contended,

(*a*) The plaintiff, in his affidavit (which was uncontradicted in this respect), stated, that, although the contract stipulated for tie-rods of the thickness of two inches, it was understood and agreed that the rods used were to be like a sample produced by one of the defendants at the time, and which was of the substance of one inch and three eighths only.

that, if under all the circumstances of the case it was unreasonable in the plaintiff to arrest the defendant, the latter is entitled to his costs; but the construction which has been put on the statute is, that the defendant is only entitled to them if the plaintiff holds him to bail for a sum materially larger than that which is found to be due; and the labouring oar is thrown on the defendant to shew that so much was not due. The object of the statute was, to save the defendant the expense and inconvenience of an action for a malicious arrest, and the proof offered on applications such as the present must go to the same extent as the proof in such an action. Here, we do not see on the defendant's affidavit that there was not reasonable and probable cause for his arrest. On the contrary, he admits by his tender that 250l. was due: and he so far distrusted his own judgment as to the exact sum, that he abstained from paying into court the amount tendered. If the defendant conceived he should not be safe in paying in 250l., why **[394]** should not the plaintiff seek to recover more? The argument that the arrest was without probable cause, because the defendant by his tender shewed himself solvent to a sufficient amount, proves too much. According to that, the statute would give every defendant his costs where the plaintiff arrested, and recovered after a tender; but the recovery of costs by defendants is confined to cases where the arrest is without probable cause." [Cresswell, J. To sustain an action for a malicious arrest, or an application under the 43 G. 3 for costs for maliciously holding the defendant to bail for an excessive amount, malice should be shewn.] The language of the two statutes is substantially the same. The court is not bound by the verdict of the jury: *Gilbert* v. *Crosier*, ante, vol. i. 362. In that case, the plaintiff made an affidavit in bankruptcy, alleging the defendant to be indebted to him in the sum of 63l. 6s.: at the trial the jury returned a verdict for him for 10l., in addition 37l. 10s. paid into court on a plea of tender: the judge who tried the cause reporting that he was of opinion there was evidence to shew that the plaintiff was fairly entitled to recover the whole amount,—the court held that the case was not one for costs under this section.

Hugh Hill, Q. C., and Needham, in support of the rule, were stopped by the court.

Cockburn, C. J. I am of opinion that this rule should be made absolute. I am not satisfied that the plaintiff had any reasonable or probable cause for making the affidavit to the amount he did. When a creditor has recourse to the extraordinary remedy given by the 78th section of the bankrupt act, he does it at the peril of the consequences if there is not a debt justly due to him to the amount deposed to. We may assume, that, when the defendants put an end to the contract, the **[395]** plaintiff honestly believed that he was absolved from the contract price: but it by no means follows that he was justified in believing that he had reasonable or probable cause for swearing to a debt to the amount of 156l. 13s. 4d. It is admitted that the plaintiff was not performing the work in accordance with the terms of the contract, and therefore the defendants had a right to prevent him from going on with it. The plaintiff had a right to sue for the work done by him towards the performance of the contract, but he had no right to assume that he was absolved from the terms of the contract. If he had taken advice upon the subject, or if he had fairly brought the whole of the facts before the court of bankruptcy, the consequences might have been different. But, instead of adopting the only course that any prudent man would have adopted, he, without any advice to sanction his proceeding, made an affidavit which the circumstances did not warrant. He must take the consequences.

Cresswell, J. I am of the same opinion. The plaintiff has thought fit to make an affidavit in the court of bankruptcy, alleging that the defendants were justly and truly indebted to him in the sum of 156l. 1s. 4d. for work, labour, and materials supplied by him to the defendants at their request, for money found to be due from the defendants to the plaintiff on accounts stated between them, and for money paid by the plaintiff for the defendants at their request. It appears to me that there was no pretence for saying that the defendants were indebted to the plaintiff in any such sum. No work was done by the plaintiff at the defendants' request, except under the contract; and the plaintiff had no right to suppose, that, because he was prevented from proceeding with the work, the contract was cast adrift altogether, and he was entitled to claim for **[396]** part of the work more than he had contracted to do the whole for. When the very stringent nature of the proceeding under these provisions is looked at, I think it is incumbent on the party availing himself of them to be very careful.

Crowder, J. I am of the same opinion. In considering these cases, we must

not disregard the verdict, though we are not bound by it. Here, the jury have found that the plaintiff was entitled to an amount considerably less than that sworn to. Parties who seek to enforce payment of debts by a process so stringent should be exceedingly cautious not to exaggerate their claims: and I think, that, in considering whether or not there is reasonable or probable cause, we ought to look, not so much at what may have been the motive operating on the man's mind, as at the surrounding circumstances and the law as applicable to them. It seems to me that there is no pretence for saying that the plaintiff had any reasonable ground for acting as he did.

WILLES, J. I am of the same opinion. By the terms of the contract, the plaintiff was to be paid 200*l.* if he performed it fully. The utmost, therefore, that he could have recovered if he had performed his duty perfectly would have been 200*l.* He failed to perform it in several particulars. He might, however, be forgiven for supposing that he had sufficiently performed his contract so far as the tie rods were concerned. But there is another defect of a still more serious nature: he fell short in the performance of his contract by 25*l.* according to his own account, and by 40*l.* according to the evidence of his own witness. The utmost he could recover, therefore, -assuming that he was entitled to recover for a wrongful dismissal,—would be, 165*l.*, and such profit as he could have made by completing the [397] work under the contract: and that could not in any event exceed 190*l.* Any person making out a fair bill would not have claimed more than that sum. But the plaintiff sent in a bill for 228*l.* The plaintiff has thought proper to pledge his oath, and by the stringency of the proceedings under the bankrupt act has sought to compel the defendants to pay him a sum which he must or ought to have known he was not entitled to. I therefore think it is a clear case within the 86th section. Having thus improvidently sought to avail himself of the statute in a case to which it was not fairly applicable, the plaintiff must bear the penalty imposed by that section.

Rule absolute.

EDWARDS AND OTHERS *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. May 6th, 1857.

[S. C. 26 L. J. C. P. 224; 3 Jur. N. S. 590.]

The court refused to suspend or enlarge a rule for a sci. fa. against a shareholder in a railway company, upon a suggestion that the claim in respect of which the judgment against the company was obtained was founded upon an attorney's bill contracted by them in the prosecution of matters altogether ultrà vires.

Lush, on a former day in this term, obtained a rule calling upon James Butterworth to shew cause why a writ or writs of scire facias on the judgment obtained by the plaintiffs in this cause should not be issued forth against him as a shareholder of the Kilkenny and Great Southern and Western Railway Company, to enable the plaintiffs to have execution upon the said judgment to satisfy the plaintiffs the sum of 4417*l.* 3*s.* 10*d.*, the debt and costs recovered by the said judgment and still unpaid, to the extent of the said James Butterworth's shares in the capital of the said company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16. The affidavits upon which the motion was founded, stated that the company were indebted to the plaintiffs for work and labour as solicitors [398] for business done by them for the company from the year 1847 to the 31st of October, 1854; that the company was incorporated by an act of 9 & 10 Vict. c. ccclx. (which act incorporated the Companies Clauses Consolidation Act, 1845), and that final judgment was signed against the company on the 18th of December, 1854, for 4413*l.* 15*s.* 10*d.* debt, and 3*l.* 8*s.* costs; that a sum of 375*l.* had been received by the plaintiffs since the judgment was recovered, and that the company were justly indebted to the plaintiffs in the sum of 4138*l.* 15*s.* 10*d.* for debt, and 3*l.* 8*s* for costs; that a fi. fa. was issued upon the judgment, and returned nulla bona; that the defendants had not at the time of the judgment, or at any time since, or now, any lands, chattels, goods, or effects in England or Ireland whereon the plaintiffs could levy the amount of the said judgment, or any part thereof; and that due notice of this application was personally served on the 18th of February last. There was also an affidavit of the secretary of the company which stated that the company had not nor ever had any lands, chattels, goods, or

effects either in England, or Ireland, whereon the plaintiffs could levy the amount of the judgment, or any part thereof; that Mr. Butterworth was a shareholder of the company, and that his name was on the sealed register of shareholders for the years 1848 and 1854, as the holder of twenty shares of the value of 20l. each, upon which the sum of 1l. 10s. each share had been paid; that two calls of 10s. upon each of the said shares had been paid, and one call of 10s. upon each of the said shares was now due; and that the said shares had never been transferred, and the same were still standing in the name of Mr. Butterworth in the sealed registered share list.

Milward, for Butterworth, applied for an enlargement of the rule in order to enable him to make inquiries as [399] to the circumstances under which the debt was contracted. The application was supported by an affidavit alleging that the plaintiffs' bill was contracted in the prosecution by the company of matters which were altogether ultrà vires, in abortive attempts to obtain the sanction of parliament thereto, and in the defence of proceedings against shareholders. [Cockburn, C. J. Does your affidavit shew that you have reasonable ground for believing that you will obtain the information required?] It does (*a*).

(*a*) The affidavit was that of Mr. Butterworth, which stated, that, in or about the year 1846, in consequence of seeing a prospectus of a projected railway called the Galway and Kilkenny Railway, he applied for shares in the undertaking, and twenty shares were allotted to him accordingly: that, according to such prospectus, the proposed railway was to connect the towns or places of Galway, Ballinasloe, Cuddagh and Kilkenny, and to be in the whole about ninety-six miles in length, and the capital was to consist of 1,000,000l., divided into 40,000 shares of 25l. each: that, subsequently to the issuing of such prospectus, and the allotment to him of the said shares, the directors of the proposed company abandoned the greater part of the said projected railway, and confined the same to a line from Kilkenny to Cuddagh, a distance of twenty six miles only, and that the proposed capital of the said company was at the same time reduced to 225,000l. divided into 11,250 shares of 20l. each, and the title of the company changed from the Galway and Kilkenny Railway Company to the Kilkenny and Great Southern and Western Railway Company: that an act of parliament was obtained for the said railway, as thus altered, in the session of 1846, and received the royal assent on the 7th of August in that year: that no steps were, as deponent was informed and believed, taken after the passing of the act towards making the proposed railway, the company having, as deponent was informed and believed, no funds, and their affairs being in a very embarrassed state, and the powers for taking land and constructing the works, which had been extended for two years by the railway commissioners, finally expired, the former in 1851, and the latter in 1855: that, in 1848, the deponent was served with a writ for a call of 10s. per share, which had been made upon the shareholders of the company in February, 1848, for meeting the expenses incurred and then due and owing from the company, the amount of which call was remitted by his solicitor to Messrs. Edwards & Radcliffe, the solicitors of the company, in November, 1848: that, in June, 1850, deponent received an application from Messrs. Atkinson & Pilgrim, solicitors, for a second call of 10s. per share on the twenty shares so allotted to him in the said company, and, to avoid the threatened legal proceedings for the recovery thereof, he paid such call, which Messrs. Atkinson & Pilgrim stated they had every reason to believe would be the last: that deponent never attended any meeting of the said company, or otherwise interfered in any way in its affairs, and, after payment of such last-mentioned call, he did not expect to hear more of the said company, and did not in fact do so until February last, when the notice thereafter mentioned was served upon him: that he was totally ignorant of all proceedings of the company, save that nothing was being done towards the carrying out of the scheme, and was ignorant of the way in which the capital and shares were being dealt with, and he paid the said calls in such ignorance: but that he had lately been informed, and believed, that, in the year 1853, notwithstanding the position of the company and the insolvent condition of its affairs, and, as deponent believed, without the knowledge, assent, and concurrence of the body of persons who had subscribed bonâ fide to the original undertaking, a bill was introduced into parliament seeking to revive the compulsory powers contained in the act of 1846 for purchasing lands, and to extend the time limited for the completion of the line authorised by such act; and that, in the year 1854, there was also introduced a bill seeking, in

Lush, contra. There is no pretence for enlarging the [400] rule: the creditor has under the statute an absolute right to execution. The language of s. 36 is imperative,—[401] "If any execution, either at law or in equity, shall have been issued against the property or effects of the com-[402]-pany, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued

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addition to such last-mentioned objects, powers to abandon part of the old line, and to make a new line and certain branch lines of railway; but that, owing to the strong opposition of shareholders and others, the first bill, after passing the House of Commons, was thrown out in the Lords, and the second, after being introduced, was withdrawn: that such applications to parliament were conducted, as deponent believed, by the present plaintiffs, the solicitors of the company, who were in fact also, as he was informed and believed, the chief promoters of the original undertaking or project, and were shareholders in the company, and they and the secretary and engineers really were the acting persons in the affairs of the company, and were the persons by whom and for whose benefit the said applications to parliament were made: that deponent was no party to those proceedings, and never sanctioned or approved thereof, or indeed heard thereof until lately, nor, he believed, did the body of bonâ fide subscribers to the original undertaking know of such proceedings or sanction them; and deponent was informed and verily believed that the plaintiffs' bill of costs, on which the judgment thereinafter mentioned was founded, was incurred in the prosecution of those proceedings, which, as he had before stated, as he was informed and verily believed, were against the wishes of the general body of shareholders, and in opposing proceedings against an individual shareholder, and no part thereof was for business done relative to the concerns of the company: that the plaintiffs, in December, 1854, then being the solicitors of and the persons managing the affairs of the company, recovered judgment against the company for upwards of 4000*l.* alleged to be due to them from the company for such matters as aforesaid, and, as deponent was informed and believed, judgment was afterwards signed by default, there being then no board of directors or acting directors independent of the plaintiffs, or any one really to represent or protect the company or the shareholders therein: that, at the time the plaintiffs issued the said writ and signed the said judgment, they were in fact and to all intents and purposes the company, and they and their friends alone represented or knew anything of the affairs of the said company: that deponent had been informed, and believed, that there was very great doubt whether at the time of the commencement of the said action there was any duly appointed secretary or other officer of the company on whom process could properly be served: that, although, as deponent believed, it was alleged that the plaintiffs caused their bill of costs to be examined by one of the masters of the court of Exchequer, yet that such examination or taxation was not attended by any person on behalf of the company or the shareholders therein, and that the taxing masters of the court of Chancery were the proper authorities to tax the said bills: that the plaintiffs subsequently gave notice of their intention to proceed upon their judgment against certain shareholders of the company, but such shareholders, who, as he was informed and believed, were already in litigation in Chancery with regard to the affairs of the company and the favoured withdrawal of the shares allotted to certain of the directors, did, as he was informed and believed, resist the claim, and obtained an injunction from Vice-Chancellor Wood against the plaintiffs, to restrain proceedings, on various grounds, and, amongst others, that the judgment was obtained collusively; and that he was informed and believed that such proceedings in Chancery had been settled on terms most favorable to the shareholders the plaintiffs therein: that the plaintiffs were now making another attempt to render the judgment so recovered by them as aforesaid available against the deponent and other shareholders of the company, and on the 18th of February last, he was served with a notice of an intended application for a rule to shew cause why a scire facias should not be issued against him as a shareholder of the company upon the judgment or so much thereof as the amount unpaid on the shares held by him in the said company extended to, and a rule nisi was accordingly moved for and obtained on the 21st of April last pursuant to such notice, which was served on the deponent on the 23rd of April last: that the deponent was advised, that, in order to his protection and effectual defence, it might be necessary to file a bill or take other proceedings to set aside the judgment so as he was advised and believed collusively obtained by the plaintiffs as aforesaid, and

[403] against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly." The court is asked to stay the plaintiffs' proceedings, in order to give the shareholder time to make an application to the court of Chancery. What power has the court to grant any such indulgence? [Willes, J. The court of Queen's Bench have granted this in a case not falling within the principle of *Philipson* v. *The Earl of Egremont*, 6 Q. B. 587.] All the cases were reviewed in this court in *Morisse* v. *Harding*, ante, vol. i. 67, where it was expressly held that the execution against a shareholder under the Joint-Stock Bank Act, 7 & 8 Vict. c. 113, ss. 10, 13, was matter of right, the conditions imposed by the statute having been complied with. [Willes, J. That proceeded upon the assumption that the judgment was a valid judgment. Cockburn, **[404]** C. J. Where it is suggested that a judgment has been improperly obtained against the company, with a view to fix the shareholders, the court ought not to be called upon to act ministerially, without allowing time for inquiry.] The judgment was signed in December, 1854: the shareholder, therefore, has had abundant time for impeaching it. [Cockburn, C. J. He would have no interest in impeaching it until the plaintiffs sought to enforce it against him.] Notice of this application was served upon the party on the 18th of February last; and this rule was not moved until the 21st of April. [Cresswell, J. Before he could be heard to impeach the judgment, he would have to come and say that he was a shareholder. He now comes to shew grounds for disputing that fact.] If this application be successful, every shareholder will come and ask for time, upon an insinuation that the judgment against the company has been fraudulently and collusively obtained. It is to be borne in mind that this rule does not ask for execution, but merely for a scire facias: and, if the shareholder has any answer, he may plead it.

Milward. The facts here intended to be relied on could not be pleaded to the scire facias. [Willes, J. *Philipson* v. *Lord Egremont*, 6 Q. B. 587, and *Bosanquet* v. *Graham*, 6 Q. B. 601, n. shew that it would be a good plea to the scire facias, to set forth facts shewing the judgment obtained against the company to be void. And that doctrine is upheld by the House of Lords in *Shedden* v. *Patrick*, 1 Macqueen's H. L. C. 535.] In *Philipson* v. *Lord Egremont*, the judgment was bad as against the company itself. Where the obtaining of the judgment is a fraud upon the court, it may be pleaded: but that which is suggested here, viz. that there has been a fraud as against the shareholders only, is not pleadable.

[405] Cockburn C. J. I am of opinion that we cannot afford the shareholder the indulgence which he asks. If this had been an application for execution against him, the case might have been different. But, inasmuch as he may plead the matters suggested by way of answer on the scire facias, I see no reason why the rule should not be made absolute.

The rest of the court concurring,

Rule absolute (*a*).

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that it might also be advisable for him to apply to have the plaintiffs' said bill taxed, without prejudice to his liability thereto, and that, at all events, the question of his liability or non-liability thereto under the circumstances before stated, and the course to be taken for his effectual defence, was one of considerable difficulty, involving in its determination much more inquiry, investigation, and attention than with a due regard to the deponent's interests could be given to it within the limited time allowed, if the rule was to be argued during the present term; and that, if further time was allowed to deponent to investigate the facts of the case, which were for the most part in the knowledge of the plaintiffs and those acting with them, and of which there was great difficulty in obtaining accurate information and evidence, he believed such facts would shew that he had a defence to the plaintiffs' demand against him, on the merits: and that deponent had ample means to meet the plaintiffs' demands, if they should ultimately recover against him; and that the application (to enlarge the rule) was made bonâ fide, and not for the purpose of delay, save to enable him to obtain information and advice, as before stated.

(*a*) In *Shedden* v. *Patrick*, it was held, that, where a judgment has been obtained

POWIS *v.* HARDING, Official Manager of the Royal British Bank. April 28th, 1857.

Upon a rule for execution against a shareholder of a joint-stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it upon motion, but directed a special case to be stated.

Beasley, on a former day in this term, obtained a rule calling upon Henry Butler and Charles Walton, executors of Charles Walton, to shew cause why execution upon the judgment recovered by the plaintiff in this cause for the sum of 576l. 1s. 6d. should not be issued against the property and effects of the said Charles Walton, deceased, as a shareholder in the Royal British Bank, **[406]** in the hands of the said Henry Butler and Charles Walton as his executors, to satisfy the plaintiff in the sum of 130l. 13s. 8d., the balance remaining due in respect of the said judgment, pursuant to the statute 7 & 8 Vict. c. 113, with costs.

Phipson shewed cause, referring to the various sections of the statute 7 & 8 Vict. c. 113, and to the cases of *Ness* v. *Angas*, 3 Exch. 805, *Ness* v. *Armstrong*, 4 Exch. 21, and *Fell* v. *Burchett*, 3 Jurist, N. S. 388, and contending that the 21st section did not, at all events, apply to the case of an executor. It appeared that the judgment was recovered against the bank after the death of the testator and before the executors had come in and proved the will.

COCKBURN, C. J. The question raised here is far too important and difficult to decide upon motion. The better course will be to state the facts in the form of a special case, when it can be more solemnly argued and decided, and, if necessary, taken to a court of error.

The rest of the court concurring, the rule was drawn up as follows:—

"Upon reading, &c. it is ordered that a special case be stated between the said parties for the decision of this court, and that the same be set down for argument accordingly; and that the matters of the said rule do depend upon the decision of this court upon the said special case" (*a*).

[407] FRY *v.* HARDING, Official Manager of the Royal British Bank. May 6th, 1857.

Upon a rule for execution against a shareholder of a joint-stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it in a summary way, but directed that a sci. fa. should issue and a special case be stated.

Beasley, on a former day in this term, obtained a rule calling upon George Russell to shew case why execution upon the judgment recovered in this cause for 75l. 17s. 7d. debt, and 5l. 7s. 4d. for costs, should not be issued against the person, property, and effects of the said George Russell as a shareholder of the Royal British Bank, to satisfy the plaintiff in the said sums of, &c., pursuant to the 7 & 8 Vict. c. 113, with costs.

Milward shewed cause, commenting upon the various sections of the statute 7 & 8 Vict. c. 113, and citing *Thompson* v. *The Universal Salvage Company*, 3 Exch. 310, *Brettell* v. *Dawes*, 7 Exch. 307, *King* v. *The Parental Endowment Assurance Company*, 11 Exch. 443, *Hill* v. *The London and County Assurance Company*, 1 Hurlst. & N. 398, *Nixon* v. *Brownlow*, 1 Hurlst. & N. 405, *Henderson* v. *The Official Manager of the Royal British Bank*, 3 Jurist, N. S. 111, and *Baily* v. *The Universal Provident Life-Association*, 3 Jurist, N. S. 269. The substantial question was, whether a shareholder who had regularly transferred his shares to a third person who had been duly registered as the holder of them in the books of the bank before the commencement of the action, but whose name still remained on the last filed return, was liable to execution.

COCKBURN, C. J. I feel very reluctant to decide a case of this sort upon motion. I think the better course will be to state a case.

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by fraud, and more especially by the collusion of both parties, such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated as a nullity. But the allegations of fraud and collusion must be specific, pointed, and relevant, otherwise they cannot be admitted to proof.

(*a*) The case now (Michaelmas Vacation, 1857) stands for argument.

[408] Cresswell, J. The parties must so state the case as to try the real merits, —whether one who has sold and transferred his shares is liable as a shareholder, his name remaining upon the list returned to the stamp-office.

Willes, J. The better course will be to issue a scire facias, to which the shareholder will appear, and then state a special case for the opinion of the court.

The rule was accordingly drawn up as follows:—

"That a writ of scire facias on the judgment obtained by the plaintiff in this cause for 75l. 17s. 7d. debt, and 5l. 7s. 4d. for costs, be issued forth against the said George Russell as a shareholder of the said bank, to enable the plaintiff to have execution upon the said judgment to satisfy the plaintiff in the said sums of 75l. 17s. 7d. for debt, and 5l. 7s. 4d. costs, recovered by the said judgment, and still unpaid, and that the said George Russell do appear thereto: and that a special case be stated, &c., for the decision of this court, and that the same be set down for argument accordingly; and that the said rule, and the costs thereof, together with the costs of and occasioned by the application, do abide the event of the decision upon such special case" (*a*).

[409] Meux and Others *v.* Lloyd. May 5th, 1857.

Excessive and extortionate charges in a bill of costs as between attorney and client, form no ground for a summary application against the attorney, in the absence of evidence of wilful fraud,—the suitor being sufficiently protected by the taxation of the bill.—Nor is it any ground for calling upon the attorney to answer the matters, that he is unable to pay the amount found due from him to his client on such taxation.

Prideaux, on a former day, obtained a rule calling upon A. B., one of the attorneys of this court, to shew cause why he should not answer the matters contained in the affidavit. The ground of the application was, that defendant had employed the attorney to defend him in this action, and in other matters, upon the express understanding that he was to be charged only costs out of pocket, and that, in the event of his succeeding in the action, the attorney would refund any moneys which might be advanced by the defendant in the course of the proceedings; that the defendant having succeeded in the action, the attorney, having got the costs from the other side, sent in to the defendant a bill of costs as between attorney and client, containing very gross overcharges; that, upon an order to tax the bill,—the attorney denying the agreement alleged,—the master proceeded with the taxation, and made his allocatur in favour of the defendant for 57l. 7s. 8d.: that, on the 16th of January last, a judge's order (since made a rule of court) was made directing the attorney to pay to the defendant the sum of 67l. 5s. 4d., that the defendant should be at liberty to sign judgment against him for that sum, with costs, and that the attorney should deliver up all deeds, &c., in his possession, custody, or power belonging to the defendant; that an execution had issued against the attorney upon the judgment so signed, but that no fruits could be obtained, his goods having already been collusively taken in execution at the suit of another creditor; and that it was believed he kept out of the way to avoid being served with the allocatur.

Lush now shewed cause upon an affidavit of the attor-**[410]**-ney, admitting that he was indebted to the defendant in the amount stated and that he was unable to pay it, but denying that he had been guilty of any of the misconduct imputed to him, or of any wilful evasion of service of the allocatur and demand, as alleged. This is a vindictive and improper attempt to use the stringent process of the court for the

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(*a*) The special case was argued in Michaelmas Term, 1857, and the court took time to consider their judgment.

A similar course was adopted in a case of *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company, Ex parte Butterfield*: but the special case has not yet (Michaelmas Vacation, 1857) been set down. There, the party had executed the subscription contract as holder of twenty-five shares, for which he had scrip, in "The Galway and Kilkenny Railway Company; but, on the change of the name and course of the projected railway, he declined to send in his scrip for registration, and had taken no step since.

purpose of enforcing a mere money demand. There has been no professional misconduct. The client has obtained an order to sign judgment, and has done so: he has not proceeded to execution, because he apprehends that it will be fruitless. That surely is no ground for such a proceeding as this.

Prideaux, in support of his rule. The mere denial of the attorney is not enough. In the case of *In re Crossley*, 6 T. R. 701, it was held, that, if an attorney required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. [Cockburn, C. J. How can we attach the man, when he has answered the charges? He admits the debt, but says he is unable to pay.] He does not venture to deny that he is keeping out of the way to avoid service of the allocatur and demand of payment.

Cockburn, C. J. I am of opinion that this rule should be discharged. It was moved upon three grounds,—first, that an agreement was entered into between the attorney and the client that the former should pay back any advances he might receive during the progress of the proceedings, and that, in any event, he would charge the client only the costs out of pocket, and that that agreement has been violated, -secondly, that the bill of costs delivered by the attorney to his client contains overcharges so gross as to amount to fraud,—thirdly, that the attorney has evaded service of the allocatur **[411]** and demand of payment by abruptly quitting the masters' office when the allocatur was made, and by keeping out of the way since, and that he has procured a sham execution to be levied upon his goods in order to frustrate the client's remedy by execution. The case has been completely answered by the affidavits as to the first and last grounds. With regard to the alleged exorbitant charges in the bill delivered, if that had been the only ground of complaint, the rule would not have been granted. The taxation is a sufficient protection to the suitor in that respect. I therefore think the rule should be discharged with costs. It is obviously important that officers of the court should be kept under wholesome control with reference to their conduct and dealings with their clients. But, on the other hand, it is equally important that they should not be unduly prejudiced in their professional character by being brought before the court upon light grounds. As, however, it is admitted that the money is due, I think the costs of this application should be set off against the client's demand.

Cresswell, J. I am entirely of the same opinion. An attorney is always amenable to the court, where he has been guilty of professional misconduct: but the court is equally bound to protect him against false and unfounded charges. This rule undoubtedly would not have been granted on the mere ground of the reduction of the bill on taxation, unless it could have been shewn that the charges were so wilfully and outrageously excessive as to amount to fraud. Nor, I apprehend, would it have been granted merely on the ground of the attorney having quitted the masters' office before he could be served with the allocatur. The substantial grounds were, that the attorney had agreed to be content with taxed costs from the plaintiffs in the event of success, and with costs out of pocket in the event of failure, **[412]** and to return any moneys that might have been advanced to him for the purpose of the suit; and also that the attorney, for the purpose of defeating the client's remedy, had kept out of the way, and caused a sham execution to be levied on his goods. These grounds are completely answered, and therefore I agree with my Lord that the rule should be discharged, and with costs, to be set off as suggested.

Crowder, J. I will only add, that, as regards the alleged overcharges, the attorney seems to me to have given a reasonable excuse. I therefore think he has answered the whole application.

Willes, J., concurred.

Rule discharged accordingly.

Wootton *v.* Dawkins. April 18th, 1857.

The plaintiff entered the defendant's garden at night, and without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down and slightly injuring his face and eyes: Held, that the defendant was

not liable for this injury at common law, nor, in the absence of evidence that it was caused by a spring-gun or other engine "calculated to inflict grievous bodily harm," under the statute 7 & 8 G. 4, c. 18, s. 1.

The declaration contained two counts,—the first, founded upon the statute 7 & 8 G. 4, c. 18, s. 1 (*a*), for **[413]** unlawfully setting a spring-gun or engine calculated to inflict grievous bodily harm,—the second, claiming damages generally in consequence of a personal injury sustained by the plaintiff through the wrongful act of the defendant.

The defendant pleaded not guilty.

The cause was tried before Wightman, J., at the last Spring Assizes at Leicester. The facts were these:—The plaintiff, having lost a bantam fowl, and believing it to have strayed into the defendant's garden, obtained permission (during daylight) to go into the garden to search for it. Not finding it upon that occasion, the plaintiff went again (without permission, but getting over the wall with the aid of a ladder) about 9 o'clock at night, and proceeded to search for it among some bushes. While so engaged, with his head near the ground, the plaintiff came in contact with a wire which caused a loud explosion, whereby the plaintiff was knocked down and slightly injured in his face and eyes. There was no evidence to shew what was the nature of the engine or of the substance which caused the explosion.

On the part of the defendant, it was objected that there was no evidence that the injury complained of was occasioned by a spring-gun or other engine calculated to destroy human life or to inflict grievous bodily harm, or that it was caused otherwise than by the plaintiff's own carelessness: and the case of *Jordin* v. *Crump*, 8 M. & W. 782, was relied on.

For the plaintiff, *Bird* v. *Holbrook*, 4 Bingh. 628, 1 M. & P. 607, was cited.

[414] The learned judge yielding to the objection, non-suited the plaintiff, reserving him leave to move to enter a verdict (for such damages as the learned judge, with the assent of the parties, should assess,) for him, if the court should be of opinion that there was any evidence to go to the jury.

Mellor, Q. C., now moved accordingly. He submitted that there was abundant evidence that the injury complained of was caused by a spring-gun or other engine, calculated, in the language of the statute, to inflict grievous bodily harm. He cited and observed upon *Bird* v. *Holbrook*, 4 Bingh. 628, 1 M. & P. 609, *Jordin* v. *Crump*, 8 M. & W. 782, and *Barnes* v. *Ward*, 9 C. B. 392. He stated that he had by mistake moved for a rule in the court of Queen's Bench, but had failed to obtain it, that court thinking, that, to entitle the plaintiff to recover under the statute, it was not enough that the instrument was one calculated to create alarm, but that it must be calculated to destroy human life or to inflict grievous bodily harm, of which there was no evidence, and that there was no cause of action at common law.

Per Curiam. We think the conclusion the court of Queen's Bench came to was quite correct, and, for the same reasons, we decline also to grant a rule.

Rule refused.

(*a*) Which, reciting that "it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life or inflict grievous bodily harm," enacts, "that, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor."

The 5th section excepts guns, &c., set from sunset to sunrise in a dwelling-house, for the protection of the same.

[415] Sir G. E. Hodgkinson, Knt., *v.* Fernie and Another.
April 28th, 1857.

[S. C. 26 L. J. C. P. 217; 3 Jur. N. S. 818. See *The Tasmania*, 1888, 13 P. D. 118. Referred to, *Landauer* v. *Asser*, [1905] 2 K. B. 187.]

Semble, that the owner of a transport hired by government for the purpose of assisting in a warlike expedition, is not responsible for damage done to another transport forming part of the same expedition, where such damage results from the master's obedience to orders of the officer under whose immediate command he sails.—A. and B. were respectively owners of vessels which with many others were taken up by government for the conveyance of troops upon an expedition of war in the Black Sea: the transports were towed by steamers to their destination, each steamer having attached to her two transports, the masters of which were under her immediate order and control: the commander of the steamer to which B.'s vessel and another were attached, on reaching the anchoring ground in the evening, having dropped his anchor, desired the masters of his tows to hold on by their warps or hawsers: but, in the course of the night, a storm arose which caused B.'s vessel to swing with violence against A.'s vessel, whereby it was considerably damaged. In an action for the damage so caused, the learned judge who tried the cause told the jury that B. would not be responsible if the injury complained of resulted from a strict obedience on the part of the master to the orders of the officer in command of the steamer; but that, assuming that the master was justified by the orders he received in abstaining from anchoring in the first instance, it was for them to consider whether he had not been guilty of negligence and want of good seamanship in continuing to hold on by his warp under the altered state of circumstances,—there being some evidence to shew that the accident might have been averted if he had dropped his anchor when the storm came on:—Held, no misdirection.

This was an action for an injury to a vessel belonging to the plaintiff through a collision with a vessel of the defendants.

The declaration stated that the defendants, by their servants, so negligently and unskilfully navigated and managed a ship of the defendants called the "Courier," then being navigated and managed by their servants, that the said ship struck and came into collision with the plaintiff's ship the "Sultana," by which the said last-mentioned ship was greatly and permanently damaged, and the plaintiff was put to and incurred great expense in repairing her, and was deprived of the use of her a long time, and thereby lost great profits which he would otherwise have made by her. Claim 1000*l*.

The defendants pleaded,—first, not guilty,—secondly, that the said ship was not at the time of the collision navigated and managed by the servants of the defendants, in manner and form as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after Michaelmas Term, 1856. It appeared that the plaintiff's vessel, the "Sultana," and the defend **[416]** ants' vessel, the "Courier," were both chartered by government, and formed part of a fleet of transports employed on the 9th of September, 1855, in the conveyance of troops on an expedition of war from Varna to Eupatoria, in the Black Sea; that the fleet consisted of forty-two sailing and twenty one steam-vessels, each of the latter having two of the former in tow and subject to her orders and control, the whole being under the superior orders of the admiral; that the fleet started in seven divisions, each consisting of six sailing vessels and three steamers; that the defendants' vessel, the "Courier," and a vessel called the "Orient," under the guidance of a Queen's steamer called the "Fury," commanded by Captain Chambers, formed the rearmost vessels of the light or northernmost division, and the plaintiff's vessel, the "Sultana," together with the "Sir Robert Sale," under the guidance of the "Hydaspes," a hired steamer, commanded by her ordinary master, formed part of the third division; that the instructions issued to the fleet at starting, were, that, on arrival at the place where they were to anchor, the position of each division was to be at four cables' length from that next to it; that, when the fleet arrived within about twenty miles of Eupatoria, a signal was made from the flag ship for the fleet to anchor, whereupon most of the vessels, the transports as well as the tugs, dropped

their anchors; that the "Courier" and the "Orient," in obedience to positive directions from the commander of the "Fury," did not anchor, but held on by their warps or hawsers; that the "Hydaspes," with the "Sir Robert Sale" and the "Sultana" in tow, anchored somewhat within the prescribed distance from the division next to it, the two latter vessels, by order of the master of the "Hydaspes," dropping their anchors also; that, at the time the fleet so anchored, there was a light wind from the north and east, but that, in the course of the night, the wind freshened, changing to north-west, with a rather heavy **[417]** sea; and that, in consequence, the "Orient" and "Courier" swinging by their hawsers, the latter came into collision with the "Sultana," and caused her very considerable damage

The rest of the facts, and the arguments urged on the one side and on the other, will be best collected from the summing-up of the Lord Chief Justice, which was in substance as follows:—

After telling the jury that the questions for their consideration were, whether the damage complained of was the result of negligence on the part of those in charge of the "Courier," and whether that vessel was the defendants', his lordship proceeded,—

Before we enter into the inquiry, it becomes important to ascertain how the disaster arose. Two theories are suggested on the part of the plaintiff. He says the "Fury" and the two vessels she had in tow (the "Orient" and the "Courier") having to anchor for the night, the tug (the "Fury") alone let go her anchor, the others holding on by their warps or hawsers: the consequence of which was, that, although the anchor of the tug held well enough whilst the weather remained tranquil, yet, a breeze springing up, the strain upon the cable of the tug became too great, and she dragged her anchor, and, the position of the vessels becoming changed, the two vessels, the "Orient" and "Courier," swinging to the "Fury's" anchor, the latter vessel (the "Courier") came into collision with the plaintiff's vessel, the "Sultana." Setting aside all question of negligence, there is a difficulty in adopting this view of the case; for, you have the positive testimony of the captain, the lieutenant, and the master of the "Fury," that she did not drag her anchor at all. Further, the plaintiff says, that, whether the "Fury" dragged her anchor or not, when during the night the wind freshened, the effect was that the two transports, the "Orient" and "Courier," being attached by their hawsers only to the tug, without **[418]** having anchors to steady them, oscillated or swung backwards and forwards like a pendulum, in obedience to the impulse of the wind, and thus the "Courier" came in contact with the "Sultana," and occasioned the mischief. Probably, if you think you can with safety rely upon the evidence of the officers of the "Fury," inasmuch as the accident undoubtedly did happen from the "Courier" coming in contact with the "Sultana,"—you may be disposed to adopt the latter of these theories.

That brings us to the question whether or not that which was the immediate cause of the mischief did result from want of seamanship, or, in other words, from negligence, on the part of those who were navigating the "Courier." And here again the case for the plaintiff divides itself into two separate parts. In the first place, it is said that the "Courier" and the "Orient" ought to have anchored when the "Fury" anchored, the signals from the leading ship,—first, that the vessels should prepare to anchor, and afterwards that they should anchor in their respective stations according to the order of sailing,—being signals which the persons navigating the "Courier" were bound to obey. And I think it may be taken as a fact conceded on all hands, that, if the "Courier" and the "Orient" had anchored, the accident would not have occurred. It does not, however, follow, that, because the plaintiff has so sustained damage, he has sustained it wrongfully at the hands of the defendants so as to make them responsible: they are responsible only if that damage has been occasioned by their want of seamanship and of reasonable and proper care. In the second place, the plaintiff says, that, assuming that the persons having charge of the defendants' vessel were justified in abstaining from dropping her anchor when the "Fury" first took up her position, yet, when in the course of the night the breeze freshened, that which may have been justifiable in a perfectly tranquil state of the weather at the commencement of the **[419]** evening became unjustifiable and unseamanlike in the exigency which arose.

Now, as regards the first point, the defendants' answer is, that they were acting under the control of superior orders, and therefore are not responsible for the consequences. What are the facts? There can be no doubt that the signal made was a general signal, and not addressed solely to the steamers, though it appears to have

been variously interpreted throughout the fleet. In some instances, the officer in command of the steamer conceived he had authority to prescribe to the vessels he had in tow whether they should let go their anchors or not. In others, the commander seems to have considered the signal as a general one, and accordingly ordered the transports to anchor. The commander of the "Fury" adopted the former construction of the signal, and directed the persons in charge of the "Orient" and the "Courier" to hold on by their warps, and not to let go their anchors, but to have a small kedge ready to let go astern if necessary in order to prevent them from going too much ahead. Captain Chambers, who had the command of the "Fury," states in his evidence, that he considered that the signal to anchor applied to all the vessels of the fleet who were acting independently, that is, vessels having control over themselves, which he considered vessels in tow had not; and that, as a matter of seamanship, it was safer for the vessels to hold on by their warps than to anchor: and he adds, that, supposing they had occasion to let go the kedge, they would stand in a calm or light wind, and have kept the tow-ropes fast; and, if the breeze had freshened, they should have kept them fast as long as possible, and then seamanship would have dictated the rest. He further says, that, in his judgment, the proper thing to be done by the persons in command of the "Orient" and "Courier" was, to hold on to the "Fury" as long as possible, and to anchor **[420]** if they broke adrift: and, when he is asked whether, if it came on to blow, it would not have been prudent for the "Orient" and "Courier" to drop their anchors, he says, "If it had come on to blow to such an extent as to have rendered it prudent for the "Orient" and "Courier" to anchor, I should have considered it right for the masters of those vessels to come to an anchor, of course letting me know if possible before doing so." Thus, the three officers of the "Fury," the captain, the lieutenant, and the master, agree that, in their opinion, the exigencies of the service required, that, instead of letting go their anchors, the "Orient" and "Courier" should ride by their warps or hawsers, because they say, that, being off an enemy's coast, on an expedition of war, dispatch was of the utmost importance, and that, when the order for weighing anchor and sailing was given in the morning, considerable loss of time would have ensued if they had to wait until the vessels they were towing had detached themselves, weighed, and again attached themselves to the steamers. It is clear from the whole of the evidence that it never entered into the contemplation of these officers that the "Orient" and "Courier" should drop their anchors whilst attached to the "Fury"; and therefore it can hardly be said that there was negligence on the part of the commanders of the transports in omitting to do that which it never entered into the mind of the captain of the "Fury" to provide against. The first question, therefore, for you is, whether the master of the "Courier" had orders from the commander of the "Fury" not to let go her anchor, but to hold on by her hawser. Whether that order was right or wrong in point of judgment and seamanship is a matter which, if the order was one that the master of the "Courier" was bound to obey, it is clear it was not a matter for him to form any judgment about. His duty was, to obey orders, and not to take upon himself to criticize them, and to act upon his own judgment **[421]** as to their propriety and expediency. There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it.

If you are satisfied that the order was given, then comes the second question,—was Captain Chambers in a position to give such order? or, in other words, was it an authority which the master of the "Courier" was bound to obey? Captain Baker, who was called as a witness for the plaintiff, and who was the commander of the "Hydaspes," the steamer which had the plaintiff's vessel, the "Sultana," in tow, says, —"Tows are always under the orders of the tug: the signal is made to the remainder of the fleet: they (the tows) would wait the orders of the officer commanding the tug." And he adds, that, when they were at Varna, before sailing, the captain of the flag-ship met all the masters of the transports on board the "Emperor," and told them that the vessels being towed were to obey the orders of the commanders of the respective tugs. Thus you have unimpeachable testimony, that, not only is it the general rule that tows are under the immediate orders of the commanders of the tugs to which they are attached, but that, in this case, a special order to the same effect was issued by the admiral. If, then, this was the relative position in which the master of the transport would stand to the captain of the tug, and the latter gave

positive orders to the former not to anchor, but to hang on by her warp, what would have been the responsibility of the master of the "Courier," he being for the purpose of that expedition in Her Majesty's service, if he had taken upon himself to disobey that precise and positive order? In what position would he have placed himself or his owners, if any consequences injurious to a third person or detrimental to the public service had resulted from his act?

[422] If, upon the evidence, you are of opinion that Captain Chambers had authority to give and did give the order I have stated, then I am bound to tell you, that, in my judgment, the defendants are not in point of law responsible for any thing that happened whilst they were acting in obedience to the orders of their superior officers: and for this obvious reason. The plaintiff gives up his vessel for the purpose of this expedition to the service of the government, entering into a contract in which he of course takes care to stipulate for an amount of remuneration which will be a complete indemnity against the increased risk she will encounter beyond the perils she would have incurred if engaged in the ordinary merchant-service. The vessel is employed on a warlike expedition: and it is necessarily incident to such an employment that every thing so far as concerns the safety of ship and crew shall be made subservient to the purpose for which the expedition is undertaken. All this the owner knows when his ship is chartered: and he knows that she forms one of a fleet all of which are in common with herself at the absolute disposal of the person in supreme command, and bound implicitly to obey all such orders as they may receive in furtherance of the common object. If, therefore, the defendants in this case, in doing that which they did, and from which damage is said to have resulted to the plaintiff, were acting in obedience to orders given to them by an authority which they were bound to obey, I take upon myself to tell you,—subject to correction hereafter, if wrong,—that the defendants are not responsible.

But then comes the after part of the question,—did the defendants' servants, the master and crew of their vessel, act in an unseamanlike manner in not letting go their anchor when a state of circumstances arose different from that which existed when Captain Chambers gave his orders to them to hang on by their hawsers? **[423]** Now, it was admitted by Captain Chambers and the other officers of the "Fury," that if, by letting go the "Courier's" anchor, the collision with the "Sultana" might have been avoided, the master of the "Courier" ought if possible to have done so; for, that, although he was bound in the first instance to obey the order which he and the master of the "Orient" had received to hold on by their hawsers, yet that order was subject to a certain latitude of construction, and might properly have been departed from on a sudden emergency, such as a storm arising during the night, which might render it necessary to drop their anchors. Here we have a conflict of evidence upon which you will have to form your judgment. Captain Chambers and the other officers of the "Fury" have told you, that, in their judgment, it would have been better for the "Sultana" and the "Sir Robert Sale" to have held on by their hawsers to the "Hydaspes," than to have cast anchor, as they did. On the other hand, it is clear that the masters of the "Sultana" and the "Sir Robert Sale" were as much bound to obey the orders of the commander of the "Hydaspes," as were the masters of the "Courier" and "Orient" to obey those of the commander of the "Fury." They had no alternative but to let go their anchors when ordered so to do. But then comes the question whether, in the first place, the mischief would have been prevented by the "Courier's" dropping her anchor, and, in the next place, whether, assuming it would, the "Courier" was in a situation to be able to do so. The officers of the "Fury" state, that, in their opinion, the letting go the anchor would not have prevented the collision, but in all probability would have aggravated it. The witnesses for the plaintiff, on the other hand, affirm that it would have prevented it. And we have this further fact,—about which there seems but little dispute,—that the "Courier's" decks were crowded with soldiers whose safety would have been grievously jeopardized by **[424]** letting go the anchor at that moment. You must choose between the conflicting views thus presented.

There is also a third view, which may not be altogether unworthy of your attention, viz. whether this was not one of those cases which, in the helplessness of human intelligence, and the feebleness of human efforts struggling with the power of the elements, rather assumes the character of inevitable accident, which no one could avert, and for which no one is responsible.

In addition to what they urge upon this part of the case, the defendants further submit, that, even supposing that their servants were guilty of some want of seamanship and skill, the plaintiff, by his own negligence, or that of the commander of the "Hydaspes" under whose orders his vessel was, contributed to the mischief, by placing his vessel at a smaller distance from those forming the next division than was prescribed by the admiral's orders (*a*). Those orders directed that the several divisions of the fleet which formed the expedition should anchor four cables' lengths apart; whereas, the "Hydaspes" with the "Sultana" and "Sir Robert Sale" in tow, were, according to the plaintiff's witnesses, anchored within two cables' lengths, though some of the defendants' witnesses, and amongst them the officers of the "Fury," estimated the distance at three and a half cables. Now, it may very well be that that half-cable's length (assuming the esti-**[425]**-mate of the defendants' witnesses to be the more correct one) would have made all the difference. On the other hand, it is perfectly true that the "Sultana" was not responsible for the position which the "Hydaspes" took. Being in tow of the "Hydaspes," when that vessel took up her position, that of the "Sultana" and the "Sir Robert Sale" was dependent upon her's. But it must be observed, that, when the "Sultana" dropped her anchor, she cast off her hawser, and then, being liberated from the "Hydaspes," there was nothing to prevent her from taking up the position assigned to her by the regulations which had been issued.

It is further urged, on the part of the defendants, that the master of the "Sultana" did nothing to remove his vessel from the danger of a collision when that collision became imminent, and that possibly he might by letting out additional cable have swung clear of the "Courier." Are you of opinion, upon the evidence before you, that it was incumbent on the master of the "Sultana" to take all such means as he had at his command to avert the impending peril! Was it, under the circumstances, his duty to let out additional cable! That Captain Chambers thought so, is clear; for, he tells you, that, the moment he saw what was likely to take place, he sent an officer on board to direct the master to do so: and the master of the "Courier" had previously made the same request. The answer of the master of the "Sultana" was, "We have none on deck." Now, was it the duty of the master of the "Sultana," stationed in the midst of a fleet, in a sea peculiarly liable to sudden and violent storms, aware as he was (or ought to have been) that he was nearer to the adjoining division than the distance prescribed by the admiral's orders, aware (as he probably was) that the "Orient" and the "Courier" were not anchored, but merely attached to the "Fury" by their hawsers,—was it or was it not a matter of prudence, which, as an ordi-**[426]**-narily skilled seaman, he ought to have adopted, to have had on deck a sufficient quantity of cable to meet such an emergency! That is a matter for your consideration.

The question is, whether you think the defendants, by their servants, were guilty of negligence: and then comes the other question, did the plaintiff contribute to the damage by his own negligence in improperly taking up his station within the prescribed distance, and in omitting to have recourse to those means which he had or ought to have had at his command in order to assist in averting the impending danger.

The whole case substantially comes to this:—The plaintiff complains that the defendants were guilty of negligence in not anchoring when the "Courier" was first brought into her position; and of further negligence in not letting go her anchor when in the course of the night a sudden emergency arose. As to the first, the defendants answer that they were not free agents, so as to be able to obey the dictates of their own judgment and experience, but were acting under orders which they were bound to obey, orders emanating from an authority to which the plaintiff as well as themselves owed a common obedience; and therefore that they are not liable for the

(*a*) At common law, a party is not entitled to recover any damages for a collision, unless he himself has been wholly blameless. In the Admiralty Court, to entitle the plaintiff to recover the entire amount of damage he has sustained, he must in like manner prove himself to have been wholly blameless: but, if each vessel has by the negligence of the respective crews contributed to the injury, the practice is to add together the amount of damage done to each vessel, and adjudge each owner to pay half the aggregate amount. See Dr. Pratt's Essay on the Use of Ship's Lights, p. 4, n.

consequences resulting from their obedience to those orders. If you are of opinion that that is so, then, as I have already told you, I am of opinion that, in point of law, the defendants are not responsible. As regards the second point, viz. whether the defendants were not guilty of negligence in not letting go their anchor when the shift of wind occurred during the night, having before you the theories of the witnesses (and of the counsel) on the one side and on the other, and looking at all the surrounding circumstances, you will say whether or not there was negligence on the part of the defendants resulting in the damage of which the plaintiff complains. If you think there was negligence on the defendants' **[427]** part sufficient to make them responsible for the damage sustained by the plaintiff, then you will consider whether or not the plaintiff by any negligence or misconduct on his part contributed to the accident, by omitting to do his best under the circumstances to prevent the mischief.

His lordship concluded by observing upon the evidence of ownership, which had been made a point in the case.

The jury returned a verdict for the plaintiff (*a*)[1]; whereupon the Lord Chief Justice asked them "whether they were of opinion that there was negligence in one or both parts;" to which the foreman answered, "In one." His lordship again asked, "In the latter part?" Foreman: "Yes, on the defendants' part." Lord Chief Justice: "And you are of opinion that the ownership of the ship is sufficiently established?" Foreman: "We are."

Edward James, Q. C. (for the defendants) then asked his Lordship to put it to the jury, whether the defendants acted in obedience to orders.

COCKBURN, C. J. I understand them to have found that in your favour; because they find that the negligence had reference to the second part (*b*).

Edward James, Q. C., in Hilary Term last, obtained a rule nisi for a new trial, on the grounds,—first, that the verdict was against the evidence,—secondly, that the defendants were acting in obedience to orders of Her Majesty's officers in command, and that the question was one which could not be properly entertained in a court of common law.

[428] Byles, Serjt., and Needham, on a former day in this term, shewed cause. No reasonable ground of objection exists against the summing-up. The only question, therefore, is, whether the persons in command of the defendants' vessel, their own servants, were guilty of negligence in allowing the "Courier" to hang only by her hawser, instead of anchoring, in a place notoriously subject to such frequent and sudden and violent storms as the Black Sea. *Braddick* v. *Fletcher*, 2 N. R. 182, is a distinct authority to shew that the owners under the circumstances are liable. There, the ship was chartered to the commissioners of the navy as an armed vessel, and an injury was done to another vessel through the misconduct of the master and crew, while a commander of the navy and a King's pilot were on board: Sir J. Mansfield said: "The only ground on which it can be contended that the defendants are not liable is, that, although a master and crew in the pay of the owners were in the possession of the ship, yet there was a superior officer on board, whose orders the master was bound to obey. This brings the case to this point, whether the owners, by taking a man on board belonging to those to whom they have let their ship, can thereby exonerate themselves from their responsibility. It appears to me that they cannot. The officer is taken on board by an agreement which the owners make. It is doubtful whether by obeying the orders of the officer (*a*)[2], it was meant that the officer should see to the navigation and direct the motion of the ship, or only direct to what place the ship should be carried for the purpose of being employed against the enemy. The true justice **[429]** of the case is, that, if an injury happens through the misconduct of the master and crew, the owners should be liable; but, if by the misconduct of the officer, that the officer should be liable. But, how is a third person to ascertain the fact? There is a provision in the charterparty, that, if the injury does not happen by the fault of the master or crew, that the Crown shall make satis-

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(*a*)[1] It was agreed that the damages should be referred to Mr. Richards, the average stater.

(*b*) This not very intelligible "conversation" is from the short-hand notes.

(*a*)[2] It was a stipulation in the charterparty, that "the master should strictly observe and execute all such orders and instructions as he should from time to time receive from the officer who should be appointed to command the vessel."

faction (*a*): and this is very reasonable between the Crown and the owners. Referring the adjustment of the damage to the true cause, they can inquire into the matter between themselves; but it is impossible for any third person, who receives damage, to inquire whether it arose from the act of the master and crew or of the officer. On the whole, it appears to the court that this ship, notwithstanding it had an officer on board, is, with regard to third persons, to be considered as the ship of the owners; and that they are, therefore, answerable for damage done by their ship." [Willes, J. As to British subjects, the circumstance of the ship being under the command of a British officer can make no difference in the defendants' position: they have voluntarily placed their ship in that predicament. Cresswell, J. The alleged misdirection consists in my Lord's omitting to tell the jury that the matter could not be entertained in a court of law. Cockburn, C. J. The defendants insist that, the ship being in the Queen's service, the master and crew were not the master and crew of the owners, but of the Queen.] That is expressly opposed to the decision of this court in *Fletcher* v. *Braddick*.

Edward James, Q. C., and Quain, in support of the rule. Both the plaintiff's vessel and that of the defendants, being in the service of the Crown on an expedition **[430]** of war, were subject to the orders of the commander of the expedition, and liable to all the penalties of military or martial law for any disregard or disobedience of such orders: see Prendergast on Military Law: see also the Duke of Wellington's Dispatches, vol. 6, p. 46, and the speech of Sir James Mackintosh, in the House of Commons, in June, 1824, upon a motion respecting the trial of Missionary Smith,—Hansard's Debates, vol. ii., pp. 146, 147: and no remedy by civil action can be maintained by the owners of the one against the owners of the other for any injury sustained in consequence of obedience to lawful commands. In *Barwis* v. *Keppel*, 2 Wils. 314,—which was an action by a serjeant against his commanding officer for wrongfully, unlawfully, and maliciously, and without reasonable cause, under the false pretence of misbehaviour on his part, reducing him to the ranks, whilst serving abroad, —the court say: "Flagrante bello, the common law has never interfered with the army: Inter arma, silent leges." [Cockburn, C. J. Suppose the commander of the expedition had ordered two or three of these transports to attack an armed vessel of the enemy, would their refusal to do so subject them to punishment by military law?] Probably it would. This general subjection to the officer in command is further exemplified by the case of *Bonce* v. *Bayliffe*, 1 Camph. 58, which was an action by a passenger on board a vessel on a voyage to Bombay, against the captain, for assault and false imprisonment, where Lord Ellenborough said: "A captain of a ship had authority to do what was necessary for the safety of those on board. On the approach of an enemy, he had a right to assign them all a station, which it was their duty to accept. As the plaintiff had refused to obey the orders given him, perhaps his confinement might be necessary to the discipline of the crew and the security of the vessel, and, if so, would be justifiable in law." So, here, the success of **[431]** the expedition might depend upon the strict obedience by the masters of the several transports to the orders of its commander. [Willes, J. Lord Ellenborough, in the case last cited, is speaking of the general authority of the captain, which exists as well on board a merchant vessel as in a ship of war.] The observations of Lords Mansfield and Loughborough, in *Johnstone* v. *Sutton*, 1 T. R. 493, 510, 546, are also very much to the purpose here. That was an action against the commander of a fleet for maliciously and without reasonable or probable cause causing a captain to be tried by a court-martial, for alleged disobedience of orders, whereby the enemy escaped. "The flight," they say, "the signals, the attempt to pursue, the enemy sailing off, are all admitted by the declaration. That the orders were in fact not obeyed, seems to be admitted, too: for, the plaintiff only avers 'that he did not wilfully and willingly disobey:' but the sentence of the court martial shews clearly that the orders were disobeyed, and that the plaintiff justified himself by physical impossibility to obey. Nothing less could be a justification. A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey: nothing can excuse him but a physical impossibility. A forlorn hope is devoted, — many gallant officers have been devoted. Fleets have been saved, and victories

(*a*) This had reference, not to damage done to any other vessel, but to damage done by the enemy to the vessel chartered.

obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture. The question, then, tried by the court-martial was, whether the plaintiff was justified in not obeying, by physical impossibility." After observing upon the facts, the learned judges conclude,—"Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that, by not being obeyed, the enemy were enabled the better to sail off; that the defence was, an impossibility to obey,—a **[432]** most complicated point;—under all these circumstances, we have no difficulty to give our opinion, that, in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial." [Cockburn, C. J. There, the orders were given whilst the fleet was actually in action.] No doubt. In *Forbes* v. *Cochrane*, 2 B. & C. 448, where certain persons who had been slaves in a foreign country where slavery was tolerated by law, escaped thence, and got on board a British ship of war on the high seas,—it was held that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship, for harbouring the slaves after notice. At the end of his judgment, Holroyd, J., there says: "I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them: but I am by no means clear, that, even under such circumstances, any action would have been maintainable against them, by reason of their particular situation as officers acting in discharge of a public duty, in a place flagrante bello." The case of *The Master of the Trinity House* v. *Clark*, 4 M. & Selw. 288, is also an authority to shew that a vessel employed by government under circumstances like those under which the vessels in question were employed, are completely out of the possession and control of the owners, and in all respects subject to the orders of the commander of the expedition. [Cresswell, J. I have reason to believe that that decision was not acted upon. I was for many years counsel for the Trinity House, and I think the masters of transports always paid light-dues afterwards.] The case of *Fletcher* v. *Braddick* is thus observed upon in Abbott on Shipping, 8th edit. p. 56,—"This decision is not perfectly satisfactory. It was stipulated by the charterparty that the master and crew should obey the orders of the **[433]** naval commander who was appointed by the Crown, and who certainly was not the servant of the owners. Chief Justice Mansfield said 'it was doubtful whether, by obeying the orders of the officer, it was meant that the officer should see to the navigation and direct the motion of the ship, or only direct to what place the ship should be carried for the purpose of being employed against the enemy.' The case was hardly ripe for judgment until that doubt had been removed." The jury were clearly not warranted by the evidence before them in finding the defendants guilty of negligence; and the learned judge ought to have told them, that, the vessels being in the service of the Queen, and no longer subject to the control of their owners, the latter were not responsible for any damage resulting from obedience to orders which they were bound to obey, and the propriety of which could not be questioned in a court of law.

Cresswell, J. I am of opinion that this rule should be discharged. It was moved on two grounds,—first, that the verdict was against evidence,—secondly, misdirection. As to one part of my Lord's direction, viz. that, if that which was done by the persons who had the management of the defendants' vessel was done in obedience to a positive order of a superior whose orders they were bound to obey, the defendants would not be responsible for the consequences,—no objection has been made, at least by the party moving. It is unnecessary, therefore, to discuss that, although I may observe in passing that I think it was perfectly right. As to the main question which my Lord left to the jury, viz. whether the defendants were guilty of negligence in omitting to drop their anchor upon the occurrence of the change of circumstances spoken of by the plaintiff's witnesses, it seems to me that that also was perfectly right. If there had been evidence of a direct and positive order from the **[434]** captain of the "Fury" to the masters of the "Orient" and "Courier" to continue to hold on by their hawsers under all circumstances, then I think the Lord Chief Justice would not have been justified in leaving that to the jury as he did. But, when we come to look at the evidence of Captain Chambers, it appears that that was not the nature of the order which he gave. He says, that, although the signal from the flag-ship might be and generally was considered as a signal for the whole fleet to anchor, he considered it right to give the orders he did to the "Orient" and the "Courier" to hold on by their hawsers. But, when he says afterwards that it

would have been proper for those vessels to anchor when from a change in the weather in the course of the night a different state of circumstances arose, I construe that to mean, that his order was intended to apply only to the then existing state of circumstances, and not as a positive order which was not to be departed from under any circumstances. That being so, I think my Lord was quite right in leaving it to the jury as he did, to say whether or not the master and crew of the defendants' vessel acted in an unseamanlike manner in not letting go her anchor when a state of circumstances arose different from that which existed when Captain Chambers gave his original order to them to hang on by their hawser. As to the other branch of the rule, although possibly I might have been as well, or perhaps better, satisfied if the verdict had been the other way, still, as I do not find that the Lord Chief Justice expresses any dissatisfaction with it, I do not think we ought to interfere.

CROWDER, J. It does not appear to me that there has been any misdirection in this case. It is admitted that the Lord Chief Justice told the jury that the defendants would not be responsible if the damage resulted from their acting in obedience to a positive order of the officer **[435]** under whose command they were: and I am of opinion that that ruling was perfectly correct. But if, after that order was given, a state of circumstances arose which was not and could not be contemplated at the time of giving the order, and which rendered it necessary to do that which they had been ordered not to do, I think the defendants would be clearly guilty of negligence and want of seamanship in blindly adhering to the original order. It was insisted, on the part of the defendants, that it was their duty to obey the order of Captain Chambers at all hazards, and that they had no discretion, and consequently are not responsible for the consequences. But Captain Chambers himself puts a different construction upon the order. He says it was given only with reference to the state of circumstances existing at the time, and was never intended to apply when such an emergency arose as that which did afterwards arise. I think it is impossible to say that the matter was not properly presented to the jury. As to the evidence, I agree entirely with my Brother Cresswell.

WILLES, J. I also think there was no misdirection, and no ground for quarrelling with the conclusion to which the jury came. It is unnecessary to express any opinion as to whether or not the Lord Chief Justice was right in laying it down as matter of law that the defendants would not be responsible for the damage sustained by the plaintiff's vessel if it resulted from their having acted in obedience to the lawful orders of a superior officer. In my opinion, however, that would afford a justification, not on the ground of martial law, but upon the ground that obedience on the part of those in charge of a vessel forming one of a fleet of transports on a service of this sort, to those placed in command over them, is essential, not only to the success of the undertaking, but also to the safety of all engaged in it. As to whether the **[436]** order given by Captain Chambers when the "Fury" first took up her position, was to be considered one from which the persons on board the "Orient" and the "Courier" were not at liberty under any circumstances to deviate, I entirely agree in what has fallen from my two learned Brothers. Upon the evidence of Captain Chambers, it was clearly right and proper to leave it to the jury to say whether or not a discretion was left in the master of the "Courier" to drop her anchor when a state of circumstances arose which rendered it dangerous to herself or to any of the neighbouring vessels to continue to hang on as at first directed.

COCKBURN, C. J. I still entertain the opinion I expressed at the trial. Where two vessels are chartered by the government for an expedition such as that in question, one of the terms of the contract they enter into is, that they shall pay implicit obedience to the persons who command it: therefore, if one of them sustains damage from the other whilst acting in obedience to the orders of a superior officer, the owner of the vessel doing the damage cannot be held responsible in a court of law to the owner of the vessel to which the damage is done. Consequently, if it had appeared here that the damage complained of had resulted from the master of the defendants' vessel acting in obedience to a direct and positive order of the captain of the "Fury," I should have held that the defendants were not liable. But, when Captain Chambers, who gave the order, stated that he considered it not only left it open to the master of the "Courier," but made it incumbent on him, upon the emergency which arose, to adopt the course which seamanship dictated, it was not any part of my duty to put my construction upon the propriety of Captain Chambers's interpretation of his own

order. I could do no other than leave it to the jury to say whether under the circumstances the defend-**[437]**-ants' servants had exercised that skill and discretion which it was incumbent on them to exercise. There was considerable conflict of evidence upon the subject: and, although I should perhaps have been better pleased if a verdict had been found for the defendants upon that issue, still, the whole matter having been left to a very intelligent jury, who evidently bestowed great attention to the whole case, I cannot take upon myself to say that I am so far dissatisfied with the conclusion they have arrived at as to wish to have the case submitted to another jury. I think we ought not upon light grounds to interfere with the province of the jury, whom the law has made the constitutional judges in matters of fact.

Rule discharged.

James, for the defendants, prayed leave to appeal, pursuant to the 35th section of the Common Law Procedure Act, 1854 (*a*), against the decision of the court as to the direction.

COCKBURN, C. J. None of us entertain any doubt as to the propriety of the decision, and therefore I do not think it a proper case for appeal. The whole turned sub-**[438]**-stantially upon the evidence of Captain Chambers: it is not a question of law.

CRESSWELL, J. There is no general principle of law involved in this case, so as to induce us, in our discretion, to think it desirable that an appeal should be allowed.

The rest of the court concurring,

James took nothing.

SYERS *v.* CHAPMAN. June 1st, 1857.

In an action for an assault, it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of son assault demesne.

This was an action for an assault. Plea, not guilty.

The cause was tried before Crowder, J., at the first sitting at Westminster in this term, when a verdict was found for the plaintiff, damages one farthing.

Broun, for the plaintiff, moved for a new trial, on the ground of surprise. The alleged surprise consisted in this, that the learned judge, being asked by the defendant's counsel to amend the record by adding a plea of son assault demesne, declined to allow the amendment, saying that he must hear the evidence first; and that he received the evidence, although he ultimately refused to permit the plea to be added. [Willes, J. Was the reception of the evidence objected to on the part of the plaintiff?] It was not. [Cockburn, C. J. Could you have shut out the evidence if nothing had been said about adding the plea?] Probably not. [Cockburn, C. J. **[439]** It is quite clear that the evidence was properly received: it was all part of the transaction.]

Per Curiam. There is no ground for this application. What was said about the amendment, did not make the evidence inadmissible, which was clearly admissible without the amendment.

Rule refused.

End of Easter Term.

(*a*) That section enacts, that, "in all motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to shew cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged, or made absolute, as the case may be, or provided the court in its discretion think fit that an appeal should be allowed: provided, that, where the application for a new trial is upon a matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.

[440] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY TERM, IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in Banc in this term were,—Cockburn, C. J., Cresswell, J., Williams, J., and Willes, J.

COCKERELL *v.* AUCOMPTE. May 31st, 1857.

[S. C. 26 L. J. C. P. 194; 3 Jur. N. S. 844; 5 W. R. 633. Distinguished, *De Vries* v. *Corner*, 1865, 13 L. T. 638. See *Hawke* v. *Cole*, 1890, 62 L. T. 658.]

By the rules of a coal-club (duly certified), provision was made for the appointment of a chairman, secretary, and treasurer, the latter of whom was to receive all moneys taken by the secretary, and to pay the coal-merchant as soon after every delivery of coals as he should receive an order signed by the secretary and chairman. It was then provided that certain weekly payments should be made by the members to the secretary, who were to be entitled at the end of twelve weeks to receive half a ton of coals for each share held by them. It was further provided that the secretary should, on the requisition of the members present at a meeting, apply for tenders to such coal-merchants as they should direct; that, when a tender was accepted at the following meeting, the secretary should agree with the merchant for the required supply,—the coals to be paid for "on the next Thursday night after each delivery, by an order on the treasurer, signed by the secretary and chairman." The plaintiff having tendered to supply the club with about 100 tons of coals, at 23s. per ton, the secretary prepared an agreement for "100 tons, more or less," at that price, which was signed by himself and the plaintiff, but, through the default of the secretary, there were not sufficient funds in the treasurers' hands to pay for them:—Held, that the secretary was the mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals; that, as the club never parted with their control over the money in the hands of the treasurer, or authorised the secretary to expend it, but gave him authority to order the coals for them, and did not furnish him with funds to pay for them, but authorised a contract on credit, the contract so made must be taken to have been made on their credit, and consequently the defendant, as a member of the club, was liable.

This was an action for goods sold and delivered, with a count upon an account stated. Plea, never indebted.

[441] The cause was tried before Willes, J., at the second sitting in London in Michaelmas Term last. The facts which appeared in evidence were as follows:—The plaintiff was a coal-merchant. The defendant was the landlord of a public-house in St. Martin's Court, Westminster, called "The Round Table," at which a certain coal-club, of which the defendant was a member, and which was known by the name of "The Royal Westminster Coal Society," held its meetings. The club was governed by certain rules which had been duly certified by Mr. John Tidd Pratt, the proper officer in that behalf, to be in conformity to law and with the provisions of the statute 10 G. 4, c. 56, as amended by the 4 & 5 W. 4, c. 40.

The material articles of these rules were the following:—

"Art. 1. That this society is established for the economical supply of coals to its members, and shall be called or styled 'The Royal Westminster Coal Society;' shall hold its meetings at the sign of 'The Round Table,' St. Martin's Court, Westminster; shall consist of an unlimited number, and any person residing not beyond two miles shall be eligible to become a member; to meet for the payment of money and other business every Thursday throughout the year, from 8 to 10 o'clock in the evening (unless Christmas Day, then on the following evening); that, for taking money from the members at the bar, use of room, firing, lighting, &c., the landlord be allowed 20s. per quarter.

[442] "2. That a member present shall be chosen, by his own consent, every meeting night, to be chairman on the following one, for which he shall receive, if he attends, 1s., and be fined 1s. in case of neglect.

"3. That Messrs. Whitbread & Co. be appointed treasurers of this society, and will receive all moneys taken by the secretary, to whom they shall give a receipt for the same, pay the coal-merchant as soon after every delivery (and all other expenses of the society) as they shall receive an order signed by the secretary and chairman, and keep the balance in their possession till the end of every second quarter, when it must be given up to be divided, according to article 14.

"4. That Mr. John Kearns is appointed secretary, whose duty it will be to attend every Thursday night, from 8 to 10 o'clock, to receive the payments of the members, and insert in the books to be provided by the society for that purpose, the names, places of abode, the quantity of coals required, and the amount paid in by each member, which books are to be checked, and the money paid into the hands of the treasurers, by the secretary, before the next meeting night, who shall take a receipt for the amount, and each shall keep an entry book: he shall also make up his accounts and balance with the treasurers at the end of every quarter, and enter the same in the minute-book. The secretary to be paid 3d. for each member every twelfth night, for each half-ton share, 1s. per night, for refreshment, and 2d. each for all letters or summonses: he shall give security for cash, books, or other property intrusted to him, if required, and be fined 1s. for any neglect of duty, if so desired by a majority present.

"9. That, when necessary, the secretary shall write to such coal-merchants as a majority of the members present may require, for tenders to supply the society with as many tons of the best Wallsend coals (mentioning **[443]** name) as may be considered requisite for the following quarter or quarters, to be delivered in quarterly portions at the members' houses, free of expense. The tenders to be opened on the following meeting night, and finally determined by a majority of the members present which one shall be accepted. The secretary shall then draw up an agreement which the merchant must sign; and, if he does not perform it, the members to be at liberty to elect another merchant for the term of contract, and the party shall be sued for any loss that may be sustained by the non-performance of his contract. On the next Thursday night after each delivery, an order on the treasurer for payment, signed by the secretary and chairman, shall be given to the merchant.

"12. There shall be four quarterly deliveries or clubs every year, each to continue twelve weeks, and members will be allowed to enter or retire at any time, subject to the following terms: Every member to have as many shares as he may think proper, by paying 1s. per week for each share: after having paid twelve weeks, to be entitled to half a ton of the best Wallsend coals for each share, delivered at his house free of every other expense,—unless at any time the coals cannot be purchased at 23s. per ton, then a proportionate sum per share extra each quarter must be paid by the members.

"14. That all money received, in whatever shape, shall be carried to stock, out of which the coal-merchant, the secretary's salary, and every other legal demand, shall be paid; after which the balance remaining at the end of every second quarter shall be equally divided (in proportion to the number of shares each member possessed) amongst those persons only who have belonged to the society both those quarters.

"15. That any person, male or female, may become a shareholder of this society, for one, two, or more quarters, without personal attendance, risk, or inconvenience, **[444]**—it only being necessary to send the money in one sum, or, if paid by instalments, every three weeks."

In May, 1855, the plaintiff, having been applied to by one Kearns, the secretary of the club, for a tender for coals for the members, sent in the following:—

"May 10th, 1855.

"Gentlemen,—We hereby tender to supply you with about 100 tons of the best Sunderland Wallsend coals, screened, either Hetton's, Stewart's, or Lambton's, at 23s. per ton, net. "G. C. COCKERELL.

"To the Chairman and Members of the Royal Westminster Coal Society."

This tender having been accepted by the club at a meeting held the same night, the following agreement was drawn up by the secretary, and signed by him and by the plaintiff:—

"Memorandum of agreement between the Royal Westminster Coal Society, held at the Round Table tavern, St. Martin's Court, in the parish of St Martin-in-the Fields, on the one part, and George Joseph Cockerell, coal-merchant, Earl Street, Blackfriars, on the other part, both in the county of Middlesex: Whereas, the said George Joseph Cockerell agrees to supply the various members of the above-named society with about one hundred tons (more or less) of the best Wallsend coals, and free from dust, at the sum of 23s. per ton: to be delivered at the members' residences free from all extra charges. The delivery to be completed within ten days of the 19th day of May, 1855, unless altered or countermanded by the secretary, John Kearns, jun. As witness the hands of the secretary and others of the above society, and the said George Joseph Cockerell, this 11th day of May, 1855.

"JOHN KEARNS.
"G. J. COCKERELL.

"Witness, John Rogers."

[445] Orders were afterwards given by the secretary for the delivery of coals to several of the members of the club, and they were delivered accordingly to the extent of 127½ tons. But it turned out that the secretary had omitted to pay into the hands of the treasurers all the moneys which he had received from the members of the club; and the sum in the hands of the treasurers, 100*l.* (which was paid over to the plaintiff, by a cheque drawn upon Messrs. Whitbread, and signed by the defendant as chairman of the meeting), proving insufficient to satisfy the plaintiff's demand, this action was brought to recover the difference,—46*l.* 12*s.* 6*d.*

On the part of the defendant, it was insisted that Kearns, the secretary, had no authority to order coals on the credit of the members of the club.

The learned judge, however, ruled that there was evidence of such authority; and a verdict was accordingly entered for the plaintiff, damages 46*l.* 12*s.* 6*d.*, leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that there was no evidence of authority to deal on credit.

Udall, in Michaelmas Term, obtained a rule nisi accordingly; or for a new trial, on the ground that the verdict was against the evidence, unless the plaintiff would consent to the damages being reduced to 15*l.*

Knowles, Q. C., and Skinner, in Easter Term, shewed cause (*a*). By the rules of this society, the secretary is **[446]** made the agent of all its members for the purpose of ordering the coals; and, inasmuch as the coals were not to be paid for on delivery, but when the treasurers should receive an order signed by the secretary and chairman, it must be assumed that there was to be a credit given of some extent. Each member of the society, therefore, became responsible for the whole amount. In *Everett* v. *Tindall*, 5 Esp. N. P. C. 169, it was held, that, where several persons in a club joined to buy a quantity of coals, and afterwards subdivided their shares, and the coals were delivered to each member, each could not maintain an action for the penalty against the seller, for deficiency of measure, the contract of sale being joint. Lord Ellenborough said, "It was a joint contract with all the members. If an action had been brought for not delivering the coals, all the members must have joined in the action, for there was no separate contract with each." That case is precisely in point. [Cockburn, C. J. Do the rules import that all the members of the club are bound by a resolution to contract on credit, though not present?] From the very nature of the thing, it must be so. [Cresswell, J., referred to *Fleming* v. *Hector*, 2 M. & W. 172, where a club was formed, subject to the following among other rules, viz. that the

(*a*) The defendant's attorney having omitted to bespeak the judge's notes, the court refused to allow the case to proceed; Cresswell, J., observing that the fee payable under the scale of Michaelmas Term, 1852 (5*s.*), had to be accounted for to the Treasury, and therefore the court had no discretion.

Udall stated that the impression amongst attorneys was, that the fee alluded to was only payable where the notes to be produced were those of a judge of another court.

Cresswell, J. The fee is payable in all cases. I remember the late Lord Chief Justice to have so laid down and acted upon the rule not very long since.

The attorney being in court, the fee was handed to the master, and the notes were read.

entrance fee on admission should be ten guineas, and the annual subscription five guineas; that, if the subscription were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the **[447]** affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorised, in default of payment on request, to refuse to continue to supply them,—and it was held, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for, that the committee had no authority to pledge the personal credit of the members.] The 3rd rule in this case expressly shews that payment on delivery was not contemplated. [Cockburn, C. J. The distinction between *Flemyng* v. *Hector* and *Todd* v. *Emly*, 7 M. & W. 427, and the present case, is, that there the work was done and the goods supplied to the aggregate body: here, the coals were delivered to the individual members.] The difference is rather in the plaintiff's favour. [Cockburn, C. J. I think not.] The secretary clearly is the agent of the general body. If he has acted within the scope of the authority conferred upon him by the rules, the whole body are bound. The general scope of the rules makes the whole of the members responsible for resolutions by the majority present at each meeting. In *Southwaite* v. *Duckworth*, 12 East, 421, 426, Lord Ellenborough says: "If all agree to share in goods to be purchased, and, in consequence of that agreement, one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them." The same principle was laid down by Abbott, C. J., in *Keasley* v. *Cudd*, 2 C. & P. 408, and by Bayley, J., in *Maudsley* v. *Le Blanc*, 2 C. & P. 409. [Cresswell, J. There can be no doubt about that.] As to that part of the rule which seeks to reduce the damages there clearly is no pretence for it. The argument on the other side will be, that, inasmuch as the authority, if any, was, to contract for one hundred tons of coal **[448]** only, and twenty-seven tons and a half were delivered beyond that quantity, the members of the club cannot be liable for the excess. But, in the first place, the contract authorised by the resolution of the meeting was for one hundred tons, more or less: and, besides, it was proved that the secretary had received subscriptions enough to cover the whole amount delivered.

Udall, in support of the rule. The rules contemplate that no coals should be ordered until there was a fund in the hands of the treasurers sufficient to pay for them, and that no personal liability should be incurred by any member beyond the amount of his or her subscription. The 15th rule shews this. There was no authority in the secretary of the club to contract debts upon the responsibility of the members. The rule which governs all cases of this sort is that which is laid down in *Flemyng* v. *Hector*, 2 M. & W. 172, and *Todd* v. *Emly*, 7 M. & W. 427. In the former of these cases, Parke, B., says: "It appears to be quite clear that the club was formed upon ready-money principles: the committee did, however, enter into some contracts upon credit, and it is said that the defendant has sanctioned this,—of which there is no evidence at all: and the case could go to the jury only on the ground of there having been such sanction on the part of the defendant. First, as to the construction of the rules of this club. Referring to these rules, it appears to be clear that the intention of the club was, to provide a fund, to be administered by the committee, and to provide the means of the society's carrying on their concerns without the necessity of dealing on credit." After referring to several of the rules, his Lordship proceeded: "It is quite clear, from the provisions of these rules, that the society contemplated that there should be a fund in hand to meet the expenses. The 49th rule, which is relied upon as giving the committee **[449]** authority to bind the defendant, only provides that they should manage the affairs of the club. Now, I think it is impossible to come to any other conclusion on the true construction of those rules, than that all the committee was to do was, to manage the fund thus supplied: and, if they chose to enter into contracts upon credit when they had not sufficient funds, that is their own affair. There is no evidence in the case to warrant any conclusion that a society of this nature should have gone on dealing upon credit: all the committee had to do was, either to pay ready money, or not to enter into any contract until they had money in hand: or, if they chose to do so, it was mere matter of convenience, and they were not to suppose they were binding the members individually to pay, for they had the means of payment in their hands." This was not a

contract such as was contemplated by the rules at all. [Willes, J. What do you suggest should have been the form of the contract? It was intended that the coal-merchant should supply the coals at the price mentioned. There must be some consideration to bind him: and that I presume was the agreement of somebody that the coals should be paid for.] The contract was with Kearns: and the intention was, to bind the fund only. [Cockburn, C. J. The memorandum does not profess to bind anybody. The resolution at the meeting of the 10th of May authorised the secretary to make the contract.] Only to make a contract that should be consistent with the rules of the club, —that is, subject to payment by order on the treasurer, the funds being in hand, on the next Thursday night: rule 9 This contract was altogether ultra vires. In the case of *The St. James's Club*, 2 De Gex, M'N. & G. 383, where it was held that clubs are not "partnerships or associations" within the meaning of the provisions of the Joint-Stock Companies Winding-up Acts, Lord St. **[450]** Leonards says: "The law which was at one time uncertain, is now settled, that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen. The member pays on the spot, and, were he also liable to those supplying the articles, he would pay twice over." Those observations equally apply here: for, by the 12th rule, no member can be entitled to any coals until he has paid subscriptions to the full value. The cases cited on the other side are cases of trading partnerships, which stand upon a totally different footing. The 11th section of the "Industrial and Provident Societies Act, 1852," 15 & 16 Vict. c. 31, which enacts that "nothing in this or the recited act (13 & 14 Vict. c. 115) shall be construed to restrict in any wise the liability of the members of any society established under or by virtue of this act, or claiming the benefit thereof, to the lawful debts and engagements of such society: provided always that no person shall be liable for the debts or engagements of any such society after the expiration of two years from his ceasing to be a member of the same," seems to assume, that, but for some such enactment, such liability would exist. At all events, the contract only authorised the delivery of one hundred tons; consequently the defendant could not be made responsible for the 27½ tons delivered in excess. [Cresswell, J. There clearly is no ground for asking that the damages may be reduced.]

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action for goods sold and delivered. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in London in Michaelmas Term last, when it appeared in **[451]** evidence, that the plaintiff was a coal-merchant, and the defendant a member of a coal-club, governed by certain rules which had been certified by Mr. Tidd Pratt to be in conformity to law, and with the provisions of the statute 10 G. 4, c. 56, as amended by the 4 & 5 W. 4, c. 40.

The plaintiff made a tender to supply coals to the society, which was accepted by them, and a contract was entered into in these words: [His Lordship read it.] The secretary afterwards gave an order for the delivery of the coals, which were delivered to the several members of the club. When the time for payment arrived, it appeared that the secretary had not duly paid to the treasurers all the money received by him; and the sum in the treasurers' hands did not amount to the sum due to the plaintiff. The money in Whitbreads' hand was paid to him; and for the difference this action was brought against the defendant, a member of the club.

On the trial, it was contended on his behalf, that the secretary had no authority to order coals on the credit of the members of the club. The learned judge ruled that there was evidence of such authority; and the plaintiff thereupon had a verdict, the defendant having leave to move to enter a nonsuit. Another point was made, for the reduction of damages, because more than a 100 tons was supplied; but the court during the argument intimated that it could not be sustained; and it is not worthy of further notice.

On shewing cause, it was contended that the rules of the club made the secretary the agent of all the members of the club in ordering coals, and that, as it appeared that the coals were to be paid for, not on delivery, but on a future day, by an order on the treasurer signed by the secretary and the chairman of the next meeting held after the delivery of the coals, credit in the mean time must be given to the members of the club. On the other hand, it was contended that this club was as to **[452]** debts similar to other clubs, and that, according to the law laid down in *Flemyng* v. *Hector*,

2 M. & W. 172, the members of the club were not responsible for goods supplied by the order of the secretary, each member having previously made payments into his hands sufficient to pay for the coals supplied to him.

After a careful examination of the rules of the club, we are of opinion that this rule must be discharged.

The 3rd rule was in these terms,—"That Messrs. Whitbread & Co. be appointed treasurers of this society, and will receive all moneys taken by the secretary, to whom they shall give a receipt for the same, pay the coal-merchant as soon after every delivery (and all other expenses of the society) as they shall receive an order signed by the secretary and chairman, and keep the balance in their possession till the end of every second quarter, when it must be given up to be divided according to Article XIV."

The 14th rule was as follows:—[His lordship read it.] According to the third rule, then, the money placed in the hands of the treasurer was not to be paid out at the will of the secretary, but upon an order signed by him and the chairman of a meeting to be held after the debt was incurred, as appeared by the 9th rule, which is the most important. [His lordship read it.] This rule shews that the secretary had no general authority vested in him to administer the funds of the club, or to conduct the business, or provide coals for the club.

The members were to choose the party with whom a contract was to be made. That election having been made, the secretary was to draw up an agreement for the merchant to sign; but, if the latter did not fulfil it to the satisfaction of the members of the club, they, and not the secretary, were to elect another merchant; and, after the contract was performed, the secretary had no power to apply the funds of the club in satisfaction **[453]** of the debt contracted, but could only act in conjunction with the chairman elected at a subsequent meeting of the club. He was, therefore, throughout a mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals the price of which is sought to be recovered in this action. The club never parted with their control over the money in the hands of the treasurer. They never authorised the secretary to expend it. They cannot deny that they authorised him to order the coals for them; and, as they did not furnish him with funds to pay for them, but authorised a contract on credit, the contract so made must have been on their credit, and not on that of their servant.

We are therefore of opinion that this rule must be discharged, and, in so doing, we do not mean in the slightest degree to impugn the correctness of the decision of the court of Exchequer in *Fleming* v. *Hector*, 2 M. & W. 172, and *Todd* v. *Emly*, 7 M. & W. 427.

Rule discharged.

[454] FLORENCE *v.* JENINGS. June 12th, 1857.

[S. C. 26 L. J. C. P. 274; 3 Jur. N. S. 772. See *Ex parte Fewings*, 1883, 25 Ch. D. 350; *Usborne* v. *Limerick Market Trustees*, [1900] 1 I. R. 107; [1901] 1 I. R. 530; [1902] A. C. 147 (sub nom. *Economic Life Assurance Society* v. *Usborne*).]

The plaintiff discounted for the defendant a bill for 250l., drawn by the latter upon one A., the defendant and A. at the same time signing the following memorandum, addressed to the plaintiff:—"Sir,—In consideration of your discounting the undermentioned bill, we do hereby jointly and severally undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 20l. for each month any portion of which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written, "250l. Jenings on A., at three months."—The bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming by the particulars indorsed on the writ interest at the rate of 20l. per month, as per agreement, but declaring only on the bill, and obtained a verdict and judgment thereon.—The plaintiff afterwards brought another action against the defendant upon the agreement for the stipulated interest of 20l. per month:—Held, that the former judgment was no answer to the plaintiff's claim for interest accruing before the recovery of such judgment, but that the plaintiff was not entitled to recover in the second action interest accruing since.

This was an action upon a special agreement. The declaration stated that theretofore, to wit, on the 3rd of March, 1855, in consideration that the plaintiff, at the

request of the defendant, would discount for the defendant a certain bill of exchange for 250l. drawn by the defendant on and accepted by W. A. D'Arcy, and dated the 3rd of March, 1855, and payable three months after date, the defendant promised the plaintiff, if the said bill was not wholly paid at maturity, to pay the plaintiff, as interest thereon, the sum of 20l. for each month any portion of which should have elapsed after maturity of the said bill and until the same should be wholly paid and satisfied; that, relying on the said promise, the plaintiff did then discount for the defendant the said bill; that the said bill was not wholly paid at maturity, but was duly presented for payment and dishonoured,—whereof the defendant had due notice; that divers, to wit, twelve months and part of another month elapsed after the maturity of the said bill, and before the same was wholly paid, and before this suit; that all things on the plaintiff's part necessary to be done and to happen to entitle him to be paid by the defendant the said 20l. per month for the said months, were done and happened; and that the time for the defendant to pay the said 20l per month for the said months had elapsed **[455]** before this suit; yet that the defendant had not paid the said 20l. per month, or any part thereof, and the said 20l. per month for the said months, amounting to a large sum, to wit, 260l., still remained wholly due and unpaid to the plaintiff: and the plaintiff claimed 260l.

The defendant pleaded,—first, that the promise mentioned in the declaration is a promise contained in a memorandum in writing, signed by the defendant, and addressed to the plaintiff, as follows, that is to say,—"London, 3rd March, 1855. Mr. J. H. Florence. Sir,—In consideration of your discounting the under-mentioned bill, we do hereby jointly and severally undertake if the same is not wholly paid at maturity, to pay, as interest thereon, 20l. for each month any portion of which shall have elapsed after maturity of the said bill and until the same is wholly paid and satisfied. W. A. D'Arcy. G. B. Jenings. 250l. Jenings on D'Arcy, at 3 m.d.": That he, the defendant, never made any such promise as mentioned in the declaration, other than the promise contained in the said memorandum: That, after the making of the said contract, and after the breach thereof by the defendant, and before this suit, to wit on the 19th of June, 1855, the plaintiff caused to be issued out of this court a certain writ of summons against the now defendant, dated on the day and year last aforesaid, and in the form provided by the Common Law Procedure Act, 1852, and commanding the now defendant, within eight days after the service of that writ upon him, inclusive of the day of such service, to cause an appearance to be entered for him in this court in an action at the suit of the now plaintiff, which writ was specially indorsed pursuant to the said act; and the particulars of the plaintiff's claim in the said action indorsed on the said writ are as follows, that is to say,—"The following are the particulars of plaintiff's claim. 250l. on a bill of exchange for 250l., dated the 3rd of **[456]** March, 1855, drawn by the defendant. The plaintiff also claims interest on the above sum at the rate of 20l. per month, or for any part of a month, as per agreement:" That the bill of exchange mentioned in the said special indorsement was the same bill of exchange mentioned in the declaration herein, and was dated on the 3rd of March, 1855, and became due on the 6th of June, 1855, and that the sum of 250l. mentioned in the said special indorsement is the principal sum payable by virtue of the said bill of exchange, and that the agreement mentioned in the said special indorsement is the contract in writing above set forth and no other agreement and that the interest claimed on the said writ is all the interest then due on the said bill: That the plaintiff, on the 1st of August, 1855, declared upon the said writ of summons in the said action against the now defendant, as follows, that is to say, "In the Common Pleas. The 1st day of August, in the year of our Lord, 1855. London, to wit. John Henry Florence, by William Heath, his attorney, sues G. B. Jenings, for that the defendant, on the 3rd of March, 1855, by his bill of exchange, now overdue, directed to one W. A. D'Arcy, requested the said W. A. D'Arcy to pay to the order of the said defendant 250l. two months after date; and the said W. A. D'Arcy accepted the same, and the said bill was then indorsed by the defendant to the plaintiff; and the said bill was duly presented for payment, and dishonoured, of which the defendant had due notice, but did not pay the same; and the plaintiff claims 400l.:" That the bill of exchange mentioned in the said declaration is the same bill of exchange mentioned in the said special indorsement, and no other bill: That the defendant said nothing in bar or preclusion of the said action of the plaintiff; whereby the plaintiff remained therein undefended against the defendant: therefore it was on the 19th of November, 1855, and before this suit,

considered [457] by the said court that the plaintiff should, and he did then, by the said judgment, recover 265l. 9s. 6d. against the now defendant in the said action, for damages for the non-payment of the said bill, and for his the plaintiff's costs of the said suit: That the plaintiff could and might have signed judgment for and recovered in the said action, upon the defendant's said default in pleading, the amount of the said bill with interest thereon at the rate claimed in the said special indorsement, up to the date of such judgment: And that the plaintiff, from the time of recovering the said judgment, had ceased to forbear to the defendant the payment of the said bill.

Second plea,—as to the declaration so far as it claimed interest for the period of time since the time on the 19th of November, 1855, when the judgment thereinafter mentioned was recovered, the defendant thereby referred to the statements contained in the first plea which preceded the statement therein contained that the plaintiff recovered judgment as therein mentioned, and prayed that the same might be considered as incorporated or repeated in that plea: And he further said that the statements so referred to were true, and that the plaintiff, on the 1st day of August, 1855, declared upon the said writ of summons in the said action against the now defendant as follows, that is to say,—"In the Common Pleas. The first day of August, in the year of our Lord, 1855. London, to wit. John Henry Florence, by William Heath, his attorney, sues G. B. Jenings: For that the defendant, on the 30th of March, 1855, by his bill of exchange, now overdue, directed to one W. A. D'Arcy, requested the said W. A. D'Arcy to pay to the order of the said defendant 250l. two months after date; and the said W. A. D'Arcy accepted the same; and the said bill was then indorsed by the defendant to the plaintiff: and the said bill was duly presented for [458] payment, and dishonoured,—of which the defendant had due notice, but did not pay the same: and the plaintiff claimed 400l.: That the bill of exchange mentioned in the said declaration was the same bill of exchange mentioned in the said special indorsement, and no other bill: That, afterwards, to wit, on the 19th of November, 1855, the plaintiff, by the judgment of the said court, recovered in the said action against the now defendant, by default of the now defendant in pleading, 265l. 9s. 6d. upon, for, and in respect of the claim made in and by the said declaration as aforesaid, and upon, for, and in respect of the said bill, and damages by reason of the non-payment thereof, and for the plaintiff's costs of the said suit: And that the plaintiff, from the time of recovering the said judgment, had ceased to forbear to the defendant the payment of the said bill.

Replication to the first plea, and by way of distinct and separate replication as to the second plea, that the defendant duly appeared in this court to the said writ according to the exigency thereof, and before the said declaration, and thereupon the plaintiff declared as in the said pleas respectively mentioned; that the said judgment was a final judgment by default for a debt or liquidated demand in money according to the 93rd section of the Common Law procedure Act, 1852; that there was no writ of inquiry or reference to any master of the court to ascertain the amount of damages previous to the said judgment; and that the only sum recovered by the said judgment was 250l., the principal money mentioned in the said bill of exchange, which was then wholly due and unpaid, and 15l. 9s. 6d., the plaintiff's costs of suit, which were duly taxed and allowed to him by the said court.

The defendant demurred to this replication, the ground of demurrer being, "that the plaintiff having recovered damages for the non-payment of the bill, and having [459] voluntarily forborne to take judgment for interest at the agreed rate, cannot bring a second action for such interest."

Joinder in demurrer.

D. D. Keane (with whom was Temple, Q. C.), in support of the demurrer. This case is virtually disposed of by the recent decision of this court in *Florence* v. *Drayson*, ante, vol. i. p. 584, where it was held, in an action upon the same contract, for non-payment of the stipulated interest, that a plea shewing that the plaintiff had indorsed over the bill to a third person, was a good answer, inasmuch as the interest could only be claimed as accessory to the bill. The remedy on the bill is merged in the judgment; and there can be no claim to interest apart from the bill. The general principle is well stated by Parke, B., in *King* v. *Hoare*, 13 M. & W. 494, 504. "If," says that learned judge, "there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a

certainty, and the object of the suit attained, as far as it can be at that stage: and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two." The same principle is recognised in *Drake* v. *Mitchell*, 3 East, 251. **[460]** In *Robinson* v. *Bland*, 2 Burr. 1077, the plaintiff was held entitled to interest down to the time of giving judgment. In *Hollis* v. *Palmer*, 2 N. C. 713, 3 Scott, 265, where an attempt was made to separate the interest from the principal, for the purpose of taking the case out of the operation of the statute of limitations, Bosanquet, J., said: "The cause of action must be the principal money due: the interest is only accessary; and accessorium sequitur suum principale." So, in *Clark* v. *Alexander*, 8 Scott, N. R. 147, 165, Tindal, C. J., says: "It is scarcely necessary to say, that, if the plaintiff is barred from recovering the principal, he must be equally barred from recovering the interest, which is an accessory only, and must follow the nature of the principal." When the bill was sued on, the right to the interest existed: it was not discretionary with the jury whether they would give interest or not: they were bound to give it: *Laing* v. *Stone*, 2 M. & R. 561. [Cockburn, C. J. There was no express agreement for interest there.] Without any agreement, the plaintiff would be entitled to interest: with an agreement, he is by the rule of court (*a*)[1] entitled to interest at the rate agreed upon. [Willes, J. It may be a question whether the 20*l.* per month was not in the nature of a penalty.] It **[461]** is expressly reserved "as interest on the bill." [Crowder, J. Do you find any case where the jury have given more than 5 per cent. interest?] None. [Cockburn, C. J. It is difficult to see how interest secured by a collateral agreement could be recovered in a count upon the bill.] If stipulated for on the face of the bill, the interest is part of the debt: if not, it is recoverable as damages for the detention of the debt,—the rate agreed upon by the parties, if any, superseding the current rate of interest. This right is recognised by the 2 & 3 Vict. c. 37, s. 2, which provided that nothing in the act contained should be construed to enable any person or persons to claim in a court of law or equity more than 5 per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it should appear to the court that any different rate of interest was agreed to between the parties. The case of *Seddon* v. *Tutop*, 6 T. R. 607, at first sight, appears to be an authority against the defendant. The plaintiff had in a former action declared on a promissory note, and for goods sold, but, upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, and took damages for the amount of the promissory note only: and it was held that the judgment thereupon was no bar to his recovering in a subsequent action for the same goods. That case, however, is explained in *Lord Bagot* v. *Williams*, 3 B. & C. 235, 5 D. & R. 87 (*a*)[2], where Bayley, J., says: "The case of *Seddon* v. *Tutop* is distinguishable from the present: the ground of the decision in that case was, that no evidence had been given in the first action, on the count for goods sold and delivered, but that the plaintiff recovered a verdict merely on the count for the promissory note; and it was held, that **[462]** the judgment in that action was no bar to his recovering in a subsequent action for goods sold. In this case, Lord Bagot, at the time when the first action was commenced, had a demand on the defendant, not for one specific sum

(*a*)[1] Rule 76 of Hilary Term, 1853, 13 C. B. 20. "Every writ of execution shall be indorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per centum per annum from the time when the judgment was entered up, or, if it was entered up before the 1st of October, 1838, then from that day; provided that, in cases where there is an agreement between the parties that more than 4 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed."

(*a*)[2] And see *Dunn* v. *Murray*, 9 B. & C. 780, 4 M. & R. 57.

of money, but for different sums of money received by the defendant on his account from different persons and at different times. His agent knew that he had claims in respect of all the sums now claimed, except 46l.; and, having that knowledge, he formed an opinion that 3400l. was the whole sum which Lord Bagot ought to claim; and, if he acted upon that opinion, it is much the same thing as if a plaintiff in a cause at nisi prius, having a demand of 60l., consisting of three sums of 20l., which became due to him at different times, consented to take a verdict for 40l. If the jury in such a case, at the suggestion of the plaintiff, reduced the verdict to 40l., he would be bound by it, and could not afterwards bring a second action for the other 20l. It seems to me that he is equally bound by his own act in this case, as he would have been by the verdict of a jury in the other, and that, having chosen to abandon his claim once, he has done it for ever." The result of those two cases clearly supports the defendant's argument here. The plaintiff by his replication sets up the 93rd section of the Common Law Procedure Act, 1852, which enacts, that, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final," thereby meaning to suggest that he had no opportunity to obtain the interest in the shape of damages. But, having at his own election chosen to treat it as a liquidated demand, and so foregone his right to interest, he cannot now maintain a separate action for it. [Crowder, J. The agreement as to the 20l. per month for interest could not be gone into before the master.] There might have been an inquiry in the action on the bill.

[463] Manisty, contra (*a*). There were two separate and distinct contracts between these parties, giving rise to separate and distinct causes of action,—the one upon the bill drawn by the defendant upon and accepted by D'Arcy,—the other upon the agreement, by which the defendant and D'Arcy, in consideration of the plaintiff's discounting the bill, jointly and severally undertook, if the same was not wholly paid at maturity, to pay, as interest thereon, 20l. per month until the bill should be wholly satisfied. It was competent to the plaintiff, on default being made, to bring an action against the plaintiff and another against D'Arcy, or to bring an action against the two jointly. The plaintiff has brought an action against the defendant upon the bill, and has recovered judgment therein by default: and the question is, whether the recovery of that judgment is an answer to this action upon the collateral agreement. The principles relied on on the other side have no application here. *Seddon* v. *Tutop* is a distinct authority, and has **[464]** always been acted upon, and never overruled. Lord Kenyon's judgment in that case is very much to the purpose here. He says: "It is admitted that the plaintiffs had two demands against the defendant, the one on a promissory note, the other for goods sold, and that, on executing the writ of inquiry in the former action, evidence was only given on the first demand, that the plaintiffs recovered damages adapted to that demand, and that the other demand for the goods still remains unsatisfied. By attending to the pleadings in this action, it will also be found that the plaintiffs are right in point of form. The issue was, whether the damages demanded in this action have been already satisfied by the money in the former action: and most clearly they have not. The case of *Markham* v. *Middleton*, 2 Stra. 1259, is extremely different from the present. There, the plaintiffs had but one demand; and, though the jury gave inadequate damages for that demand on

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. The plaintiff by appearing resisted the plaintiff's claim indorsed on the writ, and the plaintiff by not declaring on the agreement to pay the 20l. per month was precluded from recovering in the former action any part of the present claim:

"2. The contract now sued on, and the indorsement by the defendant to the plaintiff of the bill of exchange sued on in the former action, are distinct contracts, and the 20l. per month now sued for was not confessed nor recoverable nor recovered in the former action, as the defendant did not by the contract then sued on agree to pay it:

"3. As the plaintiff did not in fact recover the 20l. per month in the former action, he is not estopped by the former judgment:

"4. If the judgment at all applies to the present claim, it is only so much of it as was due at the time of the judgment. This objection renders the first plea bad, as too extensive, and the second bad altogether, inasmuch as the interest to which the second plea is pleaded, is the very interest to which the judgment could not apply."

account of the plaintiff's not being prepared with proof of his whole bill, he would have been barred by that verdict if it had stood: but, in this case, there were two distinct demands, not in the least blended together; and, though the plaintiffs might in the first action have proved this demand, owing to inadvertence they did not, and the recovery of the note in that action is no bar to their demand in this, which is for goods sold. In truth, this is a question of great delicacy: we must take care not to tempt persons to try experiments in one action, and, when they fail, to suffer them to bring other actions for the same demand: the plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action be the same: he ought to shew beyond controversy that the second is a different cause of action from the first, in which he failed. In this case it is clearly shewn that this demand was not inquired into in the former action." The interest sought to be recovered [465] in this action is not, as suggested, accessory to the bill: the plaintiff's right to it arises altogether collaterally to the bill. [Crowder, J. Suppose the plaintiff had indorsed the bill away, what would have happened?] The indorsement of the bill, it is submitted, could not affect the contract now declared on. It is not a cause of action that would run with the bill. The holder of the bill could recover no more than ordinary interest. [Crowder, J. Could two persons at the same time recover interest on the bill?] Why not? The defendant and D'Arcy, by a contract quite distinct and collateral, have agreed to pay 20*l.* per month. [Cresswell, J. As interest on the bill.] The defendant is liable upon the bill, with all its legal consequences, in whose hands soever it may be: and he is also liable for the performance of the express contract he has collaterally entered into. The second plea, which is addressed to the interest accruing since the time of signing the judgment, is subject to the same observations.

Keane, in reply. If the 20*l.* per month is interest payable on the bill, it could only be recoverable as accessary to the principal debt. If it be a penalty, there should have been an assessment of damages upon a writ of inquiry. The plaintiff not having adopted that course, has foregone his remedy. The argument on the other side is clearly not consistent with the decision of this court in the case of *Florence* v. *Drayton*, ante, vol. 584.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

It appears to us, upon the authority of *Florence* v. *Drayton*, ante, vol. i. p. 584, that interest could be recovered upon the contract set out in the pleadings, if at [466] all, only for such period as ordinary interest could be recovered upon the bill, in the absence of any express agreement.

The interest due under the contract, though constituting a distinct debt, and properly declared for in a count upon the agreement, or for interest, is only a substitute for the interest ordinarily recoverable as damages upon a bill. Therefore, when judgment was recovered, and the claim upon the bill passed into res judicata (so that any further interest payable would be upon the judgment, under the statute, not upon the bill), the right to interest under the agreement ceased. As to the interest which accrued previously to the judgment, however, the judgment is no answer. It is clear that the plaintiff has not recovered the interest now claimed in the action upon the bill. And, looking at the declaration, which determined the scope of that action, the plaintiff could not have recovered such interest in that action, for want of a count upon the agreement, or for interest.

For these reasons, we give judgment for the plaintiff upon the first plea, which is pleaded in answer to the claim for interest, both before as well as after the judgment, and for the defendant upon the second plea, which is pleaded in answer to the claim for interest after the judgment only.

Judgment for the plaintiff on the demurrer to the first plea.

Judgment for the defendant on the demurrer to the second plea.

[467] JENINGS *v.* FLORENCE. June 12th, 1857.

[S. C. 26 L. J. C. P. 277 ; 3 Jur. N. S. 774 ; Adopted, *Gilding* v. *Eyre*, 1861, 10 C. B. N. S. 603. Referred to, *Allen* v. *Flood*, [1898] A. C. 85.]

In an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a ca. sa. issued upon a judgment obtained by the defendant against him, and upon which the defendant maliciously and without reasonable or probable cause indorsed a direction to levy the whole amount recovered by the judgment, whereas a portion of that amount had been previously satisfied,—the declaration alleged, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, the smaller sum ; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about obtaining his discharge :—Held, that the declaration sufficiently shewed special damage resulting to the plaintiff from the arrest,—inasmuch as, to entitle him to a verdict, the plaintiff must shew, not merely that he was arrested and kept in custody for a greater amount than was due, however improperly indorsed, but also that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

This was an action for maliciously and without reasonable or probable cause arresting the plaintiff for a larger sum than was due to the defendant.

The declaration stated that the defendant, on the 19th of November, 1855, by the judgment and consideration of the court of Common Pleas at Westminster, in a certain action in which the now defendant was the plaintiff and the now plaintiff was the defendant, recovered against the now plaintiff the sum of 265l. 9s. 6d. : that afterwards the now defendant, by means of certain proceedings had under and by virtue of the Common Law Procedure Act, 1854, obtained from certain then debtors of the plaintiff, as garnishees of a certain debt then owing from the said debtors to the plaintiff, the sum of 20l. 13s. 11d., in payment and satisfaction of so much of the said debt of 265l. 9s. 6d. : that the defendant afterwards wrongfully and maliciously sued and prosecuted out of the said court a certain writ of capias ad satisfaciendum founded on the said judgment, directed to the sheriff of Hampshire, commanding the said sheriff to take the plaintiff and keep him to satisfy the defendant the said debt of 265l. 9s. 6d., and afterwards wrongfully and maliciously, and without any reasonable or probable cause, indorsed the said writ with directions to levy the whole of the said debt of 265l. 9s. 6d., and after-**[468]**-wards wrongfully and maliciously, and without any reasonable or probable cause, delivered the said writ, so indorsed, to the said sheriff, who afterwards under the same, and within his bailiwick, took the plaintiff by his body, and imprisoned him ; and the plaintiff was imprisoned and detained in prison under the said writ to satisfy the defendant the whole of the said sum of 265l. 9s. 6d., for a long space of time, to wit, from thence until his discharge thereinafter mentioned ; whereas, at the several times of the said suing out, indorsing, delivering, taking, imprisoning, and detaining in prison, a much less sum than the said sum of 265l. 9s. 6d., to wit, the sum of 244l. 15s. 7d. and no more was due and owing from the plaintiff upon the said judgment, and the plaintiff, after the said taking, during the said detention, and long before his discharge thereinafter mentioned, was able and willing and offered to pay, and always afterwards during the said detention was able and willing to pay, and afterwards was discharged from imprisonment under the said writ on, and satisfied the said judgment by, payment of the said sum of 244l. 15s. 7d. and no more : and the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid : and the plaintiff claimed 500l.

The defendant demurred, on the ground that the declaration did not shew that the plaintiff sustained any damage in consequence of the arrest. Joinder.

Manisty, in support of the demurrer (*a*). The de-[469]-claration is bad in substance. It states the recovery of the judgment by the defendant against the now plaintiff, and avers that the defendant afterwards wrongfully and maliciously (not saying without reasonable or probable cause) sued out a ca. sa thereon. It then goes on to aver that the defendant wrongfully and maliciously, and without reasonable or probable cause, indorsed the writ with directions to levy the whole of the debt for which the judgment was signed. But there is no allegation shewing that any special damage resulted to the plaintiff from that act. If there were, then, possibly, according to the authority of *Churchill* v. *Siggers*, 3 Ellis & B. 929, the plaintiff might have had a good cause of action. The plaintiff, however, does not allege that he was at the time able to pay the smaller sum, but merely that, after the taking, and during his detention, he was able and offered to pay the sum actually due upon the judgment. [Cockburn, C. J. Surely, from the moment he was in a position to pay the amount which would entitle him to be discharged, he was damaged by the detention.] It is not suggested that the proper sum was not accepted as soon as tendered. If it had been so alleged, the fact might have been traversed.

D. D. Keane, contrà, was not called upon.

Cur. adv. vult.

Cockburn, C. J., now delivered the judgment of the court:—

[470] This was an action for maliciously and without reasonable or probable cause causing the defendant to be arrested under a writ of execution issued upon a judgment obtained by the defendant against the plaintiff, and upon which the defendant, as the declaration alleges, maliciously and without reasonable or probable cause indorsed a direction to levy the whole amount recovered by the judgment, whereas, a portion of that amount had been previously satisfied: and the declaration proceeds to allege, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, and discharged the judgment by paying, the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid. To this declaration the defendant demurred; and the case was argued on his behalf by Mr. Manisty, who admitted the authority of the case of *Churchill* v. *Siggers*, 3 Ellis & B. 929, where the court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause for more than remained due upon the judgment, as in the present case, special damage being shewn to have been sustained by the plaintiff in consequence of such arrest. He, however, insisted that such damage was not sufficiently shewn by the declaration in the present case.

We are, however, of opinion that special damage is sufficiently alleged. It would not be competent for the plaintiff at the trial to obtain a verdict by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly in-[471]-dorsed; but he must also prove, that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

Judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

(*a*) The points marked for argument on the part of the defendant were,

"1. That the act complained of, viz. causing the plaintiff to be arrested on a writ of ca. sa. indorsed for too much, was not necessarily and per se injurious to the plaintiff, and no ground of action, without special damage.

"2. That the declaration states no special damage: it appears thereby that the plaintiff paid no more than the amount really due: and it does not appear that his imprisonment was prolonged or expenses incurred by him increased by the excessive claim.

"3. That it is not alleged that the writ was issued without probable cause; and it is to be inferred that the defendant had probable cause for issuing it for the full amount of the judgment."

TALBOT *v.* FISHER. June 1st, 1857.

Quære, whether an award made upon a reference under the 3rd section of the Common Law Procedure Act, 1854, is enforceable by attachment or order under the 1 & 2 Vict. c. 110, s. 18?

The matters in dispute between the parties in this cause were by a judge's order, under the 3rd section of the Common Law Procedure Act, 1854, referred to the arbitration of a county-court judge, who made an award in favour of the plaintiff.

Streeten moved to make the order a rule of court. The 3rd section of the 17 & 18 Vict. c. 125, enacts, that, "if it be made to appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county-court, upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award **[472]** or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." [Cresswell, J. A verdict cannot be enforced by attachment. Cockburn, C. J. The language of the section is very precise.] No doubt the plaintiff may sign judgment: but the question is whether he may not also take the course pointed out by the 1 & 2 Vict. c. 110, s. 18.

CRESSWELL, J. There can be no objection to your taking the first step, by making the order a rule of court. But you must not assume that you receive any encouragement from the court as to the second.

WILLES, J. Before you draw up your rule, you had better look at the case of *Kendil* v. *Merrett*, 18 C. B. 173.

Rule absolute (*a*).

[477] THE VESTRY OF THE PARISH OF ST. PANCRAS *v.* BATTERBURY. June 2nd, 1857.

[S. C. 26 L. J. C. P. 243; 3 Jur. N. S. 1106. Distinguished, *New River Company* v. *Mather*, 1875, L. R. 10 C. P. 450. Explained, *Crystal Palace Gas Company* v. *Idris*, 1900, 82 L. T. 201. Referred to, *Horner* v. *Franklin*, [1905] 1 K. B. 483.]

Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted.—An action in a superior court will not lie against the owner or occupier of a house, for the recovery of his proportion of the expenses of paving a street, under the Metropolis Local Management Act, 18 & 19 Vict. c. 120; but recourse must be had to the remedy pointed out by the 225th section of the act, viz. by a proceeding before two justices.

The declaration stated, that the first election of vestry-men and auditors of accounts of the parish of St. Pancras, in the county of Middlesex, under the act of the session of parliament holden in the 18th and 19th years of the reign of Queen Victoria, intituled, "An act for the better local management of the metropolis," took place, to wit, on the 15th of November, 1855, according to the provisions of the said act, and the full number of elective vestrymen to be elected at such election according to the provisions of the said act were then elected, and all things necessary to be done and

(*a*) The 7th section enacts that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed thereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order."

performed for the due election of such full number according to the provisions of the said act then took place and were performed; and that afterwards, after the commencing and coming into operation of the said act, a certain street in the said parish, called the Prince of Wales's Road, Haverstock Hill, one part of which is called or known as Prince's Terrace, Prince of Wales's Road, and another part of which is called Roxburgh Terrace, Prince of Wales's Road, was a new street laid out or made, not paved to the satisfaction of the plaintiffs, and the owners of the houses forming the greater part of the said street were then desirous of having the same paved either throughout the whole breadth of the carriage-way and footpaths thereof, or some part of such breadth, and the plaintiffs deemed it necessary or expedient that the same should be paved in manner following, that is to say, that the road should be made of twelve inches of hard core or burnt ballast, four inches of pit ballast, and four inches of flints; that the channels should be paved with granite not less than [478] eighteen inches wide and seven inches deep; that the footways should be paved with 2½ inch York stone, and be kerbed with granite kerb twelve inches by eight inches, upon hard foundation; and that the amount of the estimated expenses of providing and laying such pavement was determined by the surveyor for the time being of the plaintiffs; and that the defendant then was and is the owner of some of the houses forming the said street, that is to say, of the houses known as and numbered Nos. 1, 2, 3, 4, 7, and 11, Prince's Terrace, Prince of Wales's Road, and the house known as and numbered 3 in Roxburgh Terrace aforesaid; and that other persons were and are owners respectively of the other houses forming the said street; and that, by virtue of the said act, the defendant and the said other owners were or might be directed by the plaintiffs to join in paying the sum of money determined by the said surveyor to be the amount of the estimated expenses of providing and laying such pavement; and that the plaintiffs considered it just and reasonable to apportion and did apportion the sum of money or expenses so to be paid between the defendant and the said other owners in manner following, that is to say, that the sum to be paid by each owner of the said houses should be the amount of the actual cost of providing and laying so much of such pavement as might be in front of his said house or houses up to the middle of the carriage-way so in front of the same inclusively, together with a sum bearing such a ratio to the whole cost of the intersections as the frontage of his property might bear to the whole length of frontage; and that the value of the materials found on the property of each owner should be allowed in payment of the sum to become due from him on such apportionment; and that, by such apportionment and allowance, which were made before the demand thereinafter mentioned, the sum of 1719*l.* 12*s.* 9*d.* became and was the [479] sum due to the plaintiffs, and the sum of 70*l.* 18*s.* 2*d.* became and was the sum which it was the duty of the defendant as owner of the said houses in Prince's Terrace, and the sum of 12*l.* 16*s.* 11*d.* became and was the sum which it was the duty of the defendant as owner of the said house in Roxburgh Terrace, to pay to the plaintiffs in respect of the said estimated expenses; and that, after the said apportionment and deduction had been made, the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.* were demanded of the defendant by the plaintiffs; and the defendant, by reason of the premises, and by force of the said statute, became indebted to the plaintiffs in the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.*; and that all things had happened and by the plaintiffs been done to entitle the plaintiffs to have the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.* paid to them by the defendant, and to maintain this action; yet that the defendant had not paid the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.*, or either of them: and the plaintiffs claimed 83*l.* 15*s.* 1*d.*

The defendant pleaded, that the said street was not a new street laid out or made as alleged. He also demurred, the ground of demurrer stated in the margin being, "that the action is for expenses by statute 18 & 19 Vict. c. 120, directed to be paid, and that a special remedy for enforcing payment thereof is provided by s. 225 of the said act, and therefore an action does not lie for them."

The plaintiffs joined in demurrer.

Lush (with whom was Shee, Serjt.) in support of the demurrer. The declaration in this case is founded upon the 105th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which enacts, that, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the

parish or district in which **[480]** such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and foot-paths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street, shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and, in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and, in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses." The 217th section enacts that "it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owners of any premises may be liable to pay under this act, from any person who then or at any time thereafter occupies such premises; and the owner shall allow every such occupier to deduct all sums of money which he so pays, or which are levied by distress, out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent." And s. 225 provides the mode of enforcing this obligation. It enacts, that, "in every case where the amount of any damage, costs, or expenses is by this act directed to be **[481]** ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by, and shall be recovered before, two justices." The question is, whether, in addition to that remedy, the occupier is also liable to an action. The inconvenience which would result from such a construction shews that this never could have been intended: if an action will lie, it might be brought at any time within six years, and long after the party had ceased to occupy; whereas, the proceeding before the justices is limited to six months: 11 & 12 Vict. c. 43, s. 11. This question was raised in the court of Queen's Bench, in the last term, in a case of *The Vestry of St. Pancras* v. *Morgan*, upon the local acts of this parish, and the court there held that an action would not lie.

Atherton (with whom was D. D. Keane), contrà (*a*). **[482]** That a duty is created by the 105th section of the 18 & 19 Vict. c. 120, cannot be doubted: and it has repeatedly been decided, that, wherever a statute imposes a duty upon a party to pay a sum of money, a debt is created which is recoverable by an action at law. The 32 G. 3, c. 74, s. 8, imposes certain rates and duties "to be paid by the master or

(*a*) The points which were marked for argument on the part of the plaintiffs were as follows:—

"1. That the 225th and 226th sections of the 18 & 19 Vict. c. 120, do not apply to estimated expenses.

"2. That the 18 & 19 Vict. c. 120, does not provide any remedy for estimated expenses.

"3. That the 18 & 19 Vict. c. 120, does not repeal the 57 G. 3, c. 29, and therefore that the vestries acting in the exercise of paving powers under the former act, may act under or upon all or any of the provisions, clauses, powers, and authorities contained in it.

"4. That the moneys sued for may also be recovered in this action by the plaintiffs under the 38th, 120th, and 137th sections of the 57 G. 3, c. 29, the powers, &c. of the commissioners acting under it being transferred to the plaintiffs:

"5. That the effect of the 57 G. 3 is, to enable the commissioners and vestry to recover moneys due to them, by the process which may in a given case seem to them the more expedient; that the 105th section of the 18 & 19 Vict. c. 120, creates a duty or obligation to pay money, and that therefore an action will lie for its recovery; and that the power of distress given by the 225th section is merely a cumulative remedy."

owners" for every ship or vessel of a certain burthen passing from, to, or by Ramsgate: s. 14 declares that "no coasting vessel or fisherman shall pay the duty charged by that act oftener than once in any year:" s. 15 impowers the collectors to distrain every ship and all the tackle, &c. for non-payment of the duties: by s. 16, it was enacted, that, if any master or owner of any ship or vessel should elude or avoid, or attempt to elude or avoid, payment of the duties, he should stand charged and be liable to the payment of the same, and that the same should be levied and recovered from such master or owner by the same method by which fines and penalties imposed by the act were levied and recovered; and by s. 72, penalties and forfeitures were to be levied by action or distress. In *Shepherd* v. *Hills*, 11 Exch. 55, the defendant, who was sued for duties under the above act, was the owner of a vessel which several times in the year sailed to Jersey, and brought from thence oysters which the defendant purchased from fishermen there, and which he deposited in beds at Milton: and it was held, that an action would lie on the statute for the recovery of the duties, and that the power of distress was merely a cumulative remedy. Parke, B., there says: "There is no doubt, that, wherever an act of parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the con-**[483]**-trary (*a*). It is true that this statute gives a power of distress, but that is clearly a cumulative remedy." [Willes, J. The ground of the decision there was, that the distress was not a perfect remedy.] The question here is, whether the language of the 225th section of the 18 & 19 Vict. c. 120, is sufficient to preclude an action. It is submitted that that section does not confer jurisdiction at all upon the justices in this case. The words "in case of dispute" override everything that follows in that part of the section. To oust the jurisdiction of the superior courts, the language must be clear. The sum made payable by s. 105 is not properly described in s. 225 as "expenses": the 105th section relates not to "expenses" merely, but "estimated expenses." [Cockburn, C. J. They become ascertained by s. 225.] If "expenses" would of itself include expenses to be incurred as well as already incurred, the provisions contained in the 158th and 170th sections would have been unnecessary. It cannot be said that the construction here contended for would render the 225th section inoperative; for, there would still remain cases to which it would apply,—the case of carelessly or accidentally breaking lamps, &c.,—s. 207. [Willes, J., referred to *Stevens* v. *Jeacocke*, 11 Q. B. 731. By the St. Ives Bay Pilchard Fishery Act, 4 & 5 Vict. c. lvii., it is enacted that certain stems or stations shall be bounded as there defined, and that, in cases of interference by one boat with another under specified circumstances, the fish taken by the party interfering shall be forfeited to the party interfered with, and the interfering party shall forfeit 50*l*. The plaintiff declared in case, setting forth, that, after the statute passed, he was proceeding to take fish in his proper turn and station, and would have taken them, but **[484]** the defendant prevented him from so doing, by unlawfully and wrongfully throwing a net; and the declaration described the proceeding so as to bring it within the statutory prohibition. On motion in arrest of judgment, it was held that the declaration shewed no cause of action, the plaintiff stating no interference with any common law right, and the statute having only imposed a particular penalty for the act done, and having therefore given no general right of action.] It is not sufficient to deprive a party of his common law right to have recourse to a court of law, that the statute has provided another remedy. [Cockburn, C. J. Here you have the new duty created by the statute which provides the remedy.] In *The Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666, 3 D. & R. 84, the 33rd section of the 43 G. 3, c. 99, enacting, that, "if any question or difference shall arise upon taking any distress (for assessed taxes), the same shall be determined by the commissioners of taxes," it was held, that, as the jurisdiction of the superior courts was not expressly taken away, an action at common law was maintainable for a wrongful distress. [Williams, J. The question is, whether the remedy is cumulative where the remedy is given by the statute which creates the debt or duty.] A railway act, 5 Vict. sess. 2, c. lxxx., s. 264, imposed a penalty on the company for the interruption of any road, and, in the case of a private road, made the penalty "payable to the owner thereof:" the same act (s. 357) enacted that any penalty imposed thereby, the recovery of which was not otherwise

(*a*) See *Anonymous*, 6 Mod. 27; *The Mayor of Swansea* v. *Hopkins*, 8 M. & W. 901; *Goody* v. *Penny*, 9 M. & W. 687.

provided for, might be recovered by summary proceeding, upon complaint before two or more justices: and it was held,—in *Collinson* v. *The Newcastle and Darlington Railway Company*, 1 Car. & K. 546,—that this did not bar the party entitled from his remedy by action at law. [Cresswell, J. The words in s. 225 of the act under consideration are "shall be recovered," not "recoverable."] So, in **[485]** the 5 & 6 Vict c. lxxx., s. 357, the words were "may be recovered by summary proceeding," &c.

Lush, in reply. There are many cases where "may" in a statute, has been construed "shall"; but "shall" has never been held to give an option. This is of all others a case in which it is least likely that the legislature would intend to give a cumulative remedy. There may be fifty owners assessed,—are there to be fifty actions to recover the estimated expenses? And, should the estimate be too large, are there to be fifty actions to recover back the excess? Again, the liability is imposed upon every occupier at the time, or who may come in afterwards: it clearly could not have been the intention of the legislature to let in such a flood of litigation. In *Shepherd* v. *Hills*, 11 Exch. 55, it is difficult to see how any question could have arisen, seeing that the very same section (s. 72) which gave the power to distrain also gave the deputy master a right to bring an action. A public local act,—1 Vict. c. xcvi.,—for making a railway in Ireland, provided that, if any proprietor of shares should refuse to pay a call, it should be lawful for the company to sue for it in any of the Queen's courts of record in Dublin, and gave a general form of declaration: and it was held, that, the debt and the remedy being created by the statute, the company were bound to pursue the remedy pointed out by it, and could not bring an action for a call, and declare, in the general form, in an English court: *The Dundalk Western Railway Company* v. *Tapster*, 1 Q. B. 667. [Willes, J. I think that case has been somewhat doubted.] It is not necessary to rely upon it here. The 216th section throws some light upon the construction of the 225th, if any were wanted. By that section it is enacted, that, in all cases where any vestry or district board is authorized to order any costs, charges, or expenses to be paid by private parties, it **[486]** shall be lawful for such vestry or district board to order and accept payment of such costs, charges, and expenses, together with interest thereon after a rate not exceeding 5l. for the hundred by the year, by instalments, within such period, not exceeding twenty years in each case, as they may determine, the amount thereof to be recoverable in the same manner as other expenses are to be recovered under this act." It is said that the sum sought to be recovered in this action is not "expenses," within the meaning of the 225th section: but the language of the clause is as large as possible.

Cockburn, C. J. I am of opinion, that, under the circumstances here stated, no action will lie, but that the proper remedy for the recovery of the expenses in question is, by the mode pointed out in the 225th section of the statute. Where an act of parliament creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative. But here the language of the 225th section of the statute is very peremptory: it enacts, that, in every case where the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, the amount shall, in case of dispute, be ascertained and determined by, and shall be recovered before, two justices." The words are "shall be recovered." The act having created the pecuniary obligation, points out in the most positive and peremptory language the mode in which it shall be enforced. I think it is clear that the legislature intended that the summary proceedings thus pointed out should be the only one. And one can readily understand why this should be so. It may be that there are a hundred houses the owners or occupiers of which are **[487]** called upon to contribute to the expenses of paving a street, and there might be numerous disputes among the individuals interested. No legal question of any nicety or difficulty, could well arise to call for the intervention of a court and jury: the only disputes which could arise, would be as to the amount to be contributed by each. I cannot conceive a tribunal better qualified to deal with such matters than the one chosen by the legislature. I think we shall best give effect to the intention of the act by holding that the expenses in question are not recoverable by action.

Cresswell, J. I also am of opinion that the pecuniary obligation and the mode of enforcing it are indissolubly united by the statute, and cannot be severed.

Williams, J. I am of the same opinion, and for the same reasons. This belongs

to that class of cases where the act at once imposes the duty and directs the remedy. The case of *Shepherd* v. *Hills*, 11 Exch. 55, at first sight seems to be at variance: but, in that case, the remedy did not cover the whole right.

WILLES, J., concurred.

Judgment for the defendant.

[488] WICKENS *v.* GEORGE STEEL AND ALEXANDER STEEL. May 22nd, 1857.

The 37th section of the Common Law Procedure Act, 1852, which enables the court or a judge, in the case of the misjoinder of a defendant in an action on contract, to amend such misjoinder "as a variance at the trial," does not apply to a case where the party whose name is sought to be expunged has been joined, not by mistake or inadvertence, but designedly for the purpose of seeking to fix him with liability: and an application to amend under that section cannot be entertained after the verdict has been returned.—The 222nd section does not apply to the case of a misjoinder of parties.

This was an action for work and labour, &c. as an attorney in the conduct of a suit upon the alleged retainer of both defendants, against the South Eastern Railway Company, in which the plaintiffs were nonsuited: see 16 C. B. 550.

The cause was tried before Cresswell, J., at the sittings after last Michaelmas Term. The evidence shewed a retainer by the defendant Alexander only, and the jury found that George,—who was a man of substance, and who had been held to bail by the plaintiff when about to proceed to Australia,—had been improperly made a party to the action against the railway company, and accordingly returned a verdict for him and against Alexander only; whereupon the learned judge said that that was in point of law a verdict for both defendants, and he directed it to be so entered.

Before the entry of the verdict, however, the plaintiff's counsel asked the learned judge to amend the record by striking out the name of George Steel. The learned judge thought he had no power to do so, but he reserved leave to the plaintiff to move to enter the verdict against Alexander Steel, if the court should be of opinion that the amendment ought to have been allowed.

Hawkins, accordingly, in Hilary Term last, obtained a rule calling upon the defendants to shew cause why the record and all other necessary proceedings in this cause should not be amended by striking out the name of George Steel as a defendant, and why the verdict found for the defendants should not be set aside, and instead thereof a verdict entered for the plaintiff against [489] the defendant Alexander Steel for 132l. 19s. 10d.; or why there should not be a new trial, on the ground that the defendant Alexander Steel was liable, and to enable the plaintiff to amend the record and other necessary proceedings as aforesaid, by which the plaintiff might recover against him; and why the said record and other proceedings should not be amended accordingly.

W. G. Harrison now shewed cause. The learned judge had no power to make the amendment proposed, or to reserve the point. The amendment could only have been made under the 37th or the 222nd section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. The latter section is clearly inapplicable here; for, there is no "defect or error" in the proceeding, nor was the amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties." And, in *Robson* v. *Doyle*, 3 Ellis & B. 396, it was distinctly held, that, where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under the Common Law Procedure Act, 1852, is to apply at the trial for an amendment under s. 37, and that the misjoinder is not such a defect or error as can be amended after the trial by the court in banc, under s. 222. The 37th section enacts that "it shall and may be lawful for the court or a judge, in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment: and the amendment shall be made upon such terms as the court or judge by whom such amendment is made shall think proper; and, in case it shall appear at the trial of any action on contract that there has [490] been a misjoinder of defendants, such misjoinder may be amended as

a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore (s. 35) directed to be amended, and upon such terms as the court, or judge, or other presiding officer by whom such amendment is made, shall think proper." Under the former statute, 3 & 4 W. 4, c. 42, s. 23, no amendment could be made except during the trial and before verdict: *Brashier* v. *Jackson*, 6 M. & W. 549 (*a*)[1]. The policy of the statutes was, to leave the whole matter to be disposed of by the judge on the spot, seeing that he would be best able to judge of the propriety of allowing or withholding the amendment. Where the judge refuses to allow an amendment, the court clearly will not interfere (*b*). [Cockburn, C. J. The course here adopted is the more convenient one. It is in effect the same as if the learned judge allows the amendment at the trial, leaving the other side to move.] At all events, the amendment here sought could not be granted after verdict. The judge had no power to divest the defendants of the right which the verdict had given them. The plaintiff took his chance with the jury; and, having lost the verdict as against both defendants, cannot be permitted afterwards to insist upon the separate liability of one of them. [Cockburn, C. J. The "trial" is, from the swearing of the jury to the finding of the verdict. The amendment here was not asked for until the trial was over.]

Hawkins, in support of the rule. The application was early enough if made before the verdict was recorded. The statute 22 & 23 Car. 2, c. 9, s. 136, enacted, that, "in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the **[491]** cause should not find and certify under his hand upon the back of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury should find the damages to be under the value of 40s., should not recover or obtain more costs of suit than the damages so found should amount unto," &c. Under that statute, the certificate must of necessity be given after the trial is over. The same words in the 37th section of the Common Law Procedure Act, 1852, must receive the same interpretation. [Cresswell, J. If I had made the amendment as prayed, what would have happened next?] The verdict would have been recorded against Alexander Steel. [Cresswell, J. The jury had found no verdict against Alexander.] Before the application for the amendment, there had been no perfect finding. [Cresswell, J. The jury had found that which I told them amounted to a verdict for both defendants.] Substantial justice will be done by the amendment prayed. [Cresswell, J. The allowance of the amendment would have worked injustice. The defendant Alexander had nothing: George was a man of some substance, and, as he was about to sail for Australia, the plaintiff caused him to be arrested; and now the plaintiff wants to relieve himself from the consequences of his hasty proceeding.] The plaintiff failed to obtain a verdict against George merely because he was not in a condition to prove a joint retainer by the two. [Cockburn, C. J. I do not think this is a case for an amendment. Throughout the trial, the plaintiff persisted in his attempt to obtain a verdict against both defendants; and it was only when he failed in that attempt that he sought to shift his ground. In *Robson* v. *Doyle*, there was no application to amend at the trial. In *Johnson* v. *Goslett*, 18 C. B. 728, A. sued **[492]** B., C., D., E., F., G., and H., in an action of contract; H. suffered judgment by default; and the evidence failed as against F. and G.: and it was held that it was competent to the judge at nisi prius to amend the record, under s. 37 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, by striking out the names of F. and G., and a proper case for the exercise of his discretion. [Cockburn, C. J. The 37th section makes the misjoinder amendable as a variance at the trial. Who ever heard of an amendment of a variance after verdict? Have you any authority for it?] There is no case precisely in point: but it is submitted that the proposed amendment was warranted by the statute, and in truth is no more than was done in *Johnson* v. *Goslett*. [Cockburn, C. J. There, the amendment was asked at the proper time; and, though the report in 18 C. B. 728, does not in terms state so, the question of amendment must have been reserved for the court (*a*)[2]. Here, the case went to the jury upon the very issue the parties went down to try, viz. whether there was a joint

(*a*)[1] And see *Doe d. Bennett* v. *Long*, 9 Car. & P. 773.
(*b*) See *Jenkins* v. *Phillips*, 9 Car. & P. 766; *Lucas* v. *Beale*, 10 C. B. 730.
(*a*)[2] The report in 25 Law Journ., C. P. 274, does contain such a statement.

retainer by the two defendants.] At all events, assuming that the application for the amendment was too late, the court will permit the rule to be made absolute in the other alternative, in order that substantial justice may be done between the parties.

Cockburn, C. J. I am of opinion that this rule should be discharged. I think the 222nd section of the Common Law Procedure Act, 1852, has no application whatever to this case, and that the whole question turns upon the 37th section, which enacts, that, "in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such **[493]** misjoinder may be amended (by striking out the name or names of one or more of such defendants) as a variance at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore (in s. 35) directed to be amended, and upon such terms as the court, or judge, or other presiding officer by whom such amendment is made, shall think proper." This the judge is to do, "if it shall appear to him that injustice will not be done by such amendment." This section evidently is designed to meet the case of a defendant who has been erroneously joined; and such erroneous misjoinder is put upon the footing of a variance: but I think it clearly was not intended to apply to a case where a party has been joined as a defendant, not by mistake, but intentionally and with the deliberate purpose of trying to fix him with liability, as was done here. Down to the very last moment, the plaintiff's counsel insisted that George was properly made a defendant; and, the jury having, by their verdict, negatived his liability, he then sought to have his name expunged from the record. I am clearly of opinion that the 37th section was never intended to apply to a case where the question of the party's liability has been left to the jury, and the verdict has passed for him. But, assuming that that section did apply to such a case, I think this is not an occasion in which the discretion of the judge to allow the amendment could properly be exercised. To allow an amendment under such circumstances would, I think, lead to very dangerous consequences: it would be the means of causing parties to be improperly made defendants in the hope of their being fixed with a liability for which there was no foundation. Where a man has been made a defendant through inadvertence or misconception, and in the course of the trial the evidence against him turns out to be insufficient, and the plaintiff's counsel makes a **[494]** bonâ fide application to the judge to strike out his name on that account, that may be a very fit case for the exercise of the judge's discretion under the statute. But, where the plaintiff's counsel deliberately goes to the jury with a view to obtaining a verdict against all the defendants, and fails as against one, I think the case is not one in which he has a right to ask for the exercise of the judge's discretionary power in his favour. Independently, therefore, of the question as to the power of the court to allow this amendment, I think this was not a case for it.

As to the other branch of the rule, I must confess I see no ground for a new trial. The verdict as it stands is perfectly right. The defendant George Steel is entitled to that verdict. By declining to grant a new trial, we shall not put the plaintiff into a situation in which he will be deprived of the opportunity of obtaining justice against the other defendant, Alexander Steel. But, if we were to make the rule absolute, we might be putting George Steel in a worse position than that in which he now stands.

The rest of the court concurring,

Rule discharged.

[495] Sarah Emma Dunston *v.* Paterson. June 5th, 1857.

[S. C. 26 L. J. C. P. 267; 3 Jur. N. S. 982. For subsequent proceedings see 4 C. B. N. S. 267.]

The sheriff having a writ commanding him to arrest A., took B., who represented herself to be the person named in the writ: Held, that, though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party.

The declaration stated that the defendant assaulted the plaintiff, and arrested her, and caused her to be conveyed in custody along certain highways a distance of forty miles to gaol, and kept her in custody in such gaol for the space of eight weeks then next following; and, the plaintiff then being kept and detained in custody in the said

gaol by the defendant, and certain persons, to wit, John Dunston and others to the plaintiff unknown, being desirous of examining the plaintiff in certain suits then pending in the high court of Chancery, and having issued a writ of habeas corpus ad testificandum, the defendant thereupon caused the plaintiff to be removed in custody from the said gaol, and conveyed in such custody from the said gaol to the examiner's office of the said high court of Chancery, a distance of forty miles, and there to be detained for the space of two days; and the defendant thereupon caused her to be conveyed from the said examiner's office back to the said gaol, and thereupon again detained her in custody in such gaol for a further period of ten days; and, during the several times aforesaid, the plaintiff was prevented from obtaining her means of, and was removed from her home and livelihood; and, during the times of her imprisonment in the said gaol, she was kept upon weak, improper, and insufficient food; and, by means of all the premises aforesaid, the plaintiff was greatly disordered and weakened in body and mind, and underwent great pain, and was otherwise injured in her credit and circumstances: and the plaintiff claimed 500l.

The defendant pleaded,—first, not guilty.

[496] Secondly,—to so much of the declaration as charged him with assaulting and arresting the plaintiff, and keeping her in custody in the said gaol as above mentioned,—that, before the committing of either of the alleged trespasses, a certain writ of our Lady the Queen, of capias ad satisfaciendum, directed to the sheriff of the county of Kent, to wit, the defendant, was issued out of the court of Exchequer at Westminster, by which said writ our Lady the Queen commanded the said sheriff to take the body of the plaintiff, if she should be found in his bailiwick, and her safely keep, so that he might have her body before the barons of Her Majesty's said Exchequer at Westminster immediately after the execution thereof, to satisfy one Hugh Hill the sum of 37l. 19s. 4d., which he had lately in the said court recovered against the plaintiff, together with interest, as in the said writ was mentioned; which said writ was afterwards, and before the said committing of either of the trespasses, duly indorsed and delivered to the defendant as and then being such sheriff as aforesaid, for execution in due form of law; and thereupon afterwards, and whilst the said writ was in full force, and before the return of the said writ, and within the said bailiwick of the said sheriff, the defendant, so being and as such sheriff as aforesaid, did by virtue of and under the said writ, and in all respects according to the exigency thereof, take and arrest the plaintiff by her body, and did convey her in custody to gaol, and did keep her in custody in such gaol, and in the said county, the said gaol being the fit and proper place to which to convey and in which to detain the plaintiff under the said writ,—which were the trespasses by that plea pleaded to.

Thirdly,—to so much of the declaration as was not by the second plea pleaded to,—that theretofore, and before the committing of the trespasses by that plea **[497]** pleaded to, or any part thereof, the plaintiff was in the lawful custody of the defendant under the writ in the said second plea mentioned; and thereupon, and whilst she so lawfully remained in such custody, a writ of our Lady the Queen, called a habeas corpus ad testificandum, was duly issued out and by the authority of the high court of Chancery, to wit, in the suits in the declaration mentioned, and directed to the sheriff of Kent, to wit, the defendant, whereby our said Lady the Queen commanded the said sheriff, the defendant then being such sheriff as aforesaid, that he should on Tuesday the 3rd day of February, 1857, at twelve of the clock at noon, bring before Kenyon Stevens Parker, Esq., one of the examiners of the said court of Chancery, the body of the plaintiff, to be examined as a witness in such suits, and afterwards, if necessary, from time to time, until her said examination had been completed; and thereof he the said sheriff should fail not, and that he should take the said writ with him: and afterwards, and before the committing of the said trespasses by that plea pleaded to, or any part thereof, the said last-mentioned writ was duly delivered to the sheriff, that is to say, the defendant, he then being such sheriff as aforesaid; and the defendant afterwards, and whilst the plaintiff was in the lawful custody of the defendant, as and being such sheriff as aforesaid, in obedience thereto, did cause the plaintiff to be removed in custody from the said gaol to the said examiners' office of the said high court of Chancery, and there for the purpose aforesaid to be necessarily detained as in the declaration mentioned, in all respects according to the exigency of the same writ, and not otherwise, and did afterwards necessarily cause her to be conveyed from the examiners' office back to the said gaol,

in all respects as aforesaid, according to such exigency and his duty as such sheriff as aforesaid, and not otherwise,—which were the trespasses by that plea pleaded to.

[498] Fourth plea, to so much of the declaration as was by the second plea pleaded to,—that, before either of the said trespasses, a certain writ of our Lady the Queen, called a capias ad satisfaciendum, directed to the sheriff of the county of Kent, to wit, the defendant, was issued out of Her Majesty's court of Exchequer at Westminster, by which writ our Lady the Queen commanded the defendant, as and being such sheriff as aforesaid, to take the body of one Emily M. Dunston, if she should be found in his bailiwick, and her safely keep, so that he might have her body before the barons of Her Majesty's Exchequer at Westminster immediately after the execution thereof, to satisfy one Hugh Hill 37*l.* 19*s.* 4*d.*, which he had lately in the said court recovered against the said Emily M. Dunston, together with interest as in that writ mentioned; and thereupon, afterwards, and whilst the said writ was in full force, and before the return thereof, and within the said bailiwick of the said sheriff, the plaintiff having notice of all the premises aforesaid, and especially that the defendant, as and being such sheriff, was seeking to arrest the said Emily M. Dunston under and by virtue and according to the exigency of the said writ, asserted, represented, and stated to the defendant, so then being such sheriff as aforesaid, and with the view and intention of procuring him then and there, as such sheriff, to arrest the plaintiff under and by virtue of the said writ, as and for and being, and she then asserting, representing, and stating that she the plaintiff was, the said Emily M. Dunston, and the person against whom the said writ had so issued; and she, the plaintiff, then and there, by the aforesaid assertions, representations, and statements (the defendant then and still believing them to be true), caused and procured the defendant, as and so being such sheriff, then and there, under and by virtue of the said writ, to, and he did accordingly, according to law, thereunder take **[499]** and arrest the plaintiff by her body, and convey her in custody to gaol, and did keep her in custody in such gaol and in the said county, the said gaol being the fit and proper place to which to convey and in which to detain the plaintiff under the said writ,—which were the trespasses by that plea pleaded to.

Fifthly, to so much of the declaration as was not pleaded to by the fourth plea,—that theretofore, and before the committing of the grievances by that plea pleaded to, or any part thereof, the plaintiff was in the lawful custody of the defendant under the writ and circumstances in the said fourth plea mentioned, and not otherwise; and thereupon, and whilst she so lawfully remained in such custody, the writ of habeas corpus of our Lady the Queen in the third plea mentioned was duly issued out of and by the authority of the said court of Chancery, to wit, in the suits therein mentioned, and directed to the sheriff of Kent, to wit, the defendant, in all respects as in the third plea in that behalf mentioned, whereby he was commanded as in the said third plea mentioned; and thereupon, afterwards, the defendant, under and by virtue of such writ, did commit the trespasses by that plea pleaded to, as and in manner in the said third plea mentioned, and not otherwise,—which were the trespasses by that plea pleaded to.

The plaintiff joined issue on the defendant's pleas.

And, for a second replication to the fourth and fifth pleas, the plaintiff said, that, after the assertions, representations, and statements in the said fourth and fifth pleas mentioned, the plaintiff informed the defendant, and he then had knowledge and notice, that the plaintiff was not the said Emily M. Dunston mentioned in the said writ in the said fourth and fifth pleas mentioned; and that the plaintiff sued the defendant for the trespasses in the declaration mentioned, and which were committed after the defendant had such knowledge and notice as aforesaid.

[500] Rejoinder to the second replication to the fourth and fifth pleas,—that the plaintiff did not inform the defendant, nor had he knowledge and notice, nor was he guilty as in such replication mentioned.

Second rejoinder to the second replication,—that, at the time of the alleged knowledge and notice, the plaintiff was lawfully in the defendant's custody in manner and under the circumstances in the said fourth and fifth pleas mentioned; and that the trespasses alleged to have been committed after the said alleged knowledge and notice, were and are the continued keeping of the plaintiff in custody under the said writ of capias ad satisfaciendum, and other acts lawfully committed by the defendant under

and by virtue of the writ of habeas corpus in the fifth plea mentioned, in manner and form as in the said fifth and sixth pleas mentioned, and not otherwise.

The plaintiff joined issue on the rejoinders to the second replication; and he demurred to the second rejoinder, the ground stated in the margin being, "that the defendant was not excused nor justified in keeping the plaintiff in custody under the alleged writ, after he knew that she was not the defendant named therein." Joinder.

Woollett, in support of the demurrer (*a*)[1]. The plea is clearly bad; the original taking was unlawful. The sheriff is bound at his peril to know that he arrests the right party: *Coote* v. *Lighworth*, F. Moore, 457. In *Thurbane's case*, Hardres, 323, a commission of rebellion issued against one Thurbane, of Gowtherst, in Kent, and **[501]** one Green appeared before the commissioners and affirmed himself to be the person, whereupon they apprehended him by virtue of their commission; but he made resistance, and snatched the commission from them, and tore it in pieces. Upon affidavit made of this matter, an attachment was prayed against Green: and Hale, C. B., said: "If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet, the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment; as hath been held upon the execution of a capias." These cases have never been overruled: on the contrary, in *Freeman* v. *Cooke*, 18 Law Journ., Exch. 114, Parke, B., referring to the last-mentioned case, says, —"The case in Moore, is sanctioned by Com. Dig. Imprisonment (L. 2), and it always has been the opinion of the profession that it is law" (*b*). It may be that the plaintiff, having once admitted herself to be the party against whom the writ was issued, would be estopped from saying that she was wrongfully arrested in the first instance; but the new-assignment shews that the sheriff detained her in custody after he had notice and knowledge that she was not the right party: and *Smith* v. *Eggington*, 7 Ad. & E. 167, 2 N. & P. 143, 6 Dowl. P. C. 38, shews that a new-assignment was the proper way of raising the question. [Cockburn, C. J. In order to insure the escape of the person named in the writ, the now plaintiff represents to the officer that she is that person; and now she turns round and says that she has been wrongfully arrested. Is the sheriff, under the circumstances, bound to receive her assertion?] The new-assignment distinctly avers that the sheriff had knowledge that she was not the person named in the writ. [Williams, J. How do you get **[502]** over the doctrine of *Pickard* v. *Sears*, 6 Ad. & E. 469, 2 N. & P. 488, *Gregg* v. *Wells*, 10 Ad. & E. 90, 2 P. & D. 296, and *Freeman* v. *Cooke*, 2 Exch. 654?] The doctrine of those cases does not apply here. [Willes, J. Those estoppels only justify the acts which the conduct of the party induces.] That is the true distinction. The sheriff can have no lawful right to detain the plaintiff; for, if he has, he may justify imprisoning her for life.

The court called on

Raymond, for the defendant (*a*)[2]. The plaintiff has been guilty of a gross contempt

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(*a*)[1] The points marked for argument on the part of the plaintiff, were,—

"1. That the defendant's second rejoinder is bad in substance:

"2. That the defendant was not justified in keeping the plaintiff in custody under the writ after he knew that she was not the defendant named in the writ."

(*b*) See 2 Exch. 654, 656.

(*a*)[2] The points marked for argument on the part of the defendant, were,—

"1. That, under the circumstances appearing on the record, he was justified in taking and detaining the plaintiff in the manner there shewn:

"2. That, at all events, for everything that was done under the authority of the writ of habeas corpus, he was protected:

"3. That the plaintiff was estopped from disputing her identity with the real defendant in the action of *Hill* v. *Dunston*:

"4. That the second replication was bad in substance, for not shewing when for the first time the plaintiff gave the defendant the information therein alleged:

"5. That the information stated in the said replication was not to be relied on, and could impart no knowledge:

"6. That the second replication ought to have shewn by averment, and did not, that the plaintiff's false representations did not operate to prevent the capture of Emily M. Dunston, and to have negatived all other damage capable of arising out of

of the process of the court, and has no right to complain of the inconvenience **[503]** which her own misconduct has brought upon her. Upon the record it does not appear that she is the wrong person. The fourth plea states that a writ was delivered to the sheriff, commanding him to take the body of one Emily M. Dunston; that the plaintiff asserted, represented, and stated to the defendant, with the view and intention of procuring him to arrest her under the writ as and for Emily M. Dunston, that she was the said Emily M. Dunston, and the person against whom the writ had so issued; and that she by such assertions, representations, and statements (the defendant then and still believing them to be true), caused and procured the defendant to arrest her. To this the plaintiff replies, that, after the assertions, representations, and statements in the plea mentioned, she informed the defendant, and he then had knowledge and notice, that the plaintiff was not the said Emily M. Dunston mentioned in the writ in the said fourth plea. That is quite consistent with her being the person against whom the writ issued. [Cresswell, J. Who, then, is "the said Emily M. Dunston in the plea mentioned?"] It is not distinctly alleged that the defendant had knowledge or notice that the plaintiff was not the Emily M. Dunston mentioned in the writ. If it had been, that might do: but all the knowledge and notice alleged here is, that which was derived from her statement. That clearly is not enough. [Cresswell, J. Suppose issue had been taken upon that allegation, and it was proved at the trial that the plaintiff had told the defendant after the arrest that she was not the right person, and he had answered,—"Oh, yes: I know that very well; but, as you tricked me, I will not let you go,'—would not that be very good evidence of knowledge and notice?] Possibly it might. But the main point is this,—that, as between these parties, the plaintiff has conclusively estopped herself from saying that she is not the Emily M. Dunston mentioned in the writ. The case **[504]** of *Coote* v. *Lighworth*, F. Moore, 457, does not amount to much: there, there was a mere acknowledgment by the party that his name was the same. Here, that which was done by the plaintiff was done with the intention of inducing the sheriff to take her. *Thurbane's case*, Hardr. 323, is a mere dictum, which is not much advanced by the observation of Parke, B., in *Freeman* v. *Cooke*. [Cockburn, C. J. Do you insist, that, because the plaintiff has misled the defendant, he is entitled to keep her in custody until she pays Emily M. Dunston's debt?] The argument certainly must go that length. [Willes, J. Suppose the real Emily M. Dunston were now taken, would the sheriff be entitled to detain both?] Yes. [Willes, J. Or, if the real party were taken and paid the amount, might the sheriff still hold the present plaintiff?] Not after the debt was paid. But she is absolutely and perpetually estopped from denying her identity. [Cockburn, C. J. The sheriff does not appear to have sustained any prejudice by what has been done.] He was induced to relax his efforts to capture the real party. Suppose he had been ruled to return the writ. [Cockburn, C. J. It may be that the sheriff would have a remedy against the plaintiff for any injury he may have sustained through the misrepresentation: but surely he can have no right to detain her in custody indefinitely.] The rule laid down by the court of Queen's Bench in *Pickard* v. *Sears* and *Gregg* v. *Wells*, and substantially adopted by the court of Exchequer in *Freeman* v. *Cooke*,—that, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time," is precisely applicable here. In *Fisher* v. *Magnay*, 6 Scott, N. R. 588, 5 M. & G. 778, where a party was sued by a wrong name, **[505]** and suffered judgment to go against him, without attempting to rectify the mistake, it was held that he could not afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name. In

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such false representations to the defendant and the plaintiff in the action of *Hill* v. *Dunston*.

"7. That, in the absence of such averment, damage to the defendant and the plaintiff Hill was to be assumed:

"8. That it was consistent with such replication that the plaintiff was the real defendant:

"9. That, at all events, such replication afforded no answer to the fifth plea, inasmuch as the writ of habeas corpus was a clear justification of all to which the plea was pleaded."

giving judgment, the court there put it upon the ground of estoppel. In *Morgans* v. *Bridges*, 1 B. & Ald. 647, the sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.: and it was held that the sheriff, having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him. Lord Ellenborough there said: where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it: for a mistake induced by his own affirmation cannot give him a right of action. If, therefore, the sheriff had in this case detained Maurice Barnett, it appears to me that he might have justified it, in case that person had brought an action for the false imprisonment against him. I remember a case to this effect before Lord Loughborough, where a person had obtruded himself instead of another on the sheriff's officers, and afterwards, having been arrested, brought an action against them; and Lord Loughborough held that it would not lie. I dissented at that time from the decision: but, on fuller consideration, I have been satisfied that that case was rightly determined." And Abbott, J., said: "The question made at the trial was, whether the sheriff might not under this warrant lawfully have arrested and detained Maurice Barnett. I then thought that he might, and I think so still; and that he might have justified in an action for the false imprisonment, by averring that the party arrested was called Godfrey: for, the name by **[506]** which he has designated himself cannot as against him be considered other than his true name; and so the arrest would not be by a mistaken name, as in the case cited from Foster, 312." [Cockburn, C. J. That would go to the original arrest.] It is admitted here that the original arrest was lawful: the only thing to make it, on the subsequent detention, unlawful, is the counter-statement of the plaintiff. [Cockburn, C. J. It is impossible to say that the custody was lawful: but it may be that the plaintiff is by her conduct precluded from setting up its illegality as a ground of action.] Erle, J., in delivering the judgment of the court in *Walley* v. *M'Connell*, 13 Q. B. 903, 912, says, that, if a defendant so acts as to be concluded from denying that he is the defendant, final process against him may be valid, although not against him by his real name, but by the name that he must be taken to have adopted." [Cockburn, C. J. In that case, the process went against the individual intended, and was executed upon the plaintiff in the mistaken belief that he was that person.] The only difference between that case and the present is, that there the estoppel begins a little earlier. *Crawford* v. *Satchwell*, 2 Stra. 1218, is also a strong authority in favour of the defendant. In *Howard* v. *Hudson*, 2 Ellis & B. 1, 10, Lord Campbell says: "I accede to the rule laid down in *Pickard* v. *Sears* and in *Freeman* v. *Cooke*. If a party wilfully makes a misrepresentation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called: but it operates as a bar to receiving evidence contrary to that representation as between those parties." [Cresswell, J. The party making the representation is estopped with reference to the act done upon the faith of the representation. So, here, the plaintiff is estopped as to the original taking. But it must be confined to that; otherwise, you must **[507]** contend that the succeeding sheriff would be bound to keep the plaintiff in custody.] In *Ex parte Leslie*, 27 Law Times, 225, a bankrupt having contracted debts upon a false representation of his being a trader, was held to be afterwards estopped from denying that he was at the time a trader. In *Tyerman* v. *Smith*, 6 Ellis & B. 719, it was held, that, on a compulsory reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is no objection to entering up judgment on the award, under s. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference named no time, and no written consent for enlarging the time had been given by the parties, if it appeared that the parties had, within a month before the making of the award, acted upon the reference as still subsisting, —such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. So, in *Andrews* v. *Elliott*, 5 Ellis & B. 502, a cause was tried without a jury, before a commissioner of nisi prius, not a judge of the superior courts. The parties had consented; and the judge in open court sanctioned this course: but there was neither a judge's order nor a consent in writing. The unsuccessful party having moved for a new trial, it was held that the commissioner having general jurisdiction to try, the parties were precluded by their conduct from

questioning the verdict on account of the absence of those preliminaries. And in *Cox* v. *Cannon*, 4 N. C. 453, 6 Scott, 347, it was held, that, if a prisoner who executes a warrant of attorney, introduces a person as his attorney, he cannot afterwards set aside the warrant of attorney, on the ground that such attorney was uncertificated. Upon the whole, therefore, it is submitted that there is nothing upon the record to shew that the imprisonment complained of is illegal, and the plaintiff has by her conduct estopped [508] herself from denying that she was properly arrested and properly detained.

Woollett was not called on to reply.

Cresswell, J.(*a*). The first and second points were disposed of in the course of the discussion. The plaintiff might have been estopped by her conduct from denying that she was properly arrested in the first instance. But that which is now complained of is, that the sheriff detained her in custody, and still detains her, after he has had notice and knowledge that she was not the person named in the writ. How can the doctrine of estoppel apply to that? The cases which have been cited are all beside the question.

The rest of the court concurring,

Judgment for the plaintiff (*b*).

[509] In the Matter of the Complaint of Thomas Beadell *v.* The Eastern Counties Railway Company. June 1st, 1857.

[S. C. 26 L. J. C. P. 250; 5 W. R. 650. See *Ex parte Painter*, 1857, 2 C. B. N. S. 704; *Case* v. *Storey*, 1869, L. R. 4 Ex. 326; *West London and North Western Railway*, 1870, L. R. 5 C. P. 633.]

A railway company agreed with a cab-proprietor, in consideration of his paying them 60*l*. per annum to allow him the exclusive liberty of plying for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of another cab-proprietor,—no inconvenience to the public being shewn to have arisen from the arrangement.

Prentice moved for a writ of injunction against the Eastern Counties Railway Company, under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 2, to restrain them from giving an undue preference to one Clark, and imposing an undue and unreasonable prejudice on the applicant, under the following circumstances:—The complainant was the proprietor of two cabs which were duly licensed as hackney-carriages; and he complained that the Eastern Counties Railway Company refused to permit him to ply for passengers at their station at Shoreditch, they having, for a consideration of 60*l*. per annum paid to them by Clark, granted him the exclusive privilege of taking up passengers within their station. It appeared from the affidavits upon which the motion was founded, that the company allowed all cabs to enter the station for the purpose of setting down passengers at the booking-office, but that, having set down the persons they brought to the station, they were compelled to leave the yard. The learned counsel referred to *In re Marriott*, ante, vol. i. p. 499, as a case very nearly in point. There, the London and South Western Railway Company made arrangements at one of their stations, with the proprietor of an omnibus running between the station and Kingston, to provide omnibus accommodation for all passengers by any of their trains to and from Kingston, and allowed him the exclusive privilege of driving his vehicle into the station yard for the purpose of taking up and setting down passengers [510] at the door of the booking office: and it was held, that, in the absence of special circumstances shewing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to the applicant, who also brought passengers from Kingston as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences, contained in the statute. [Cresswell, J. That case is very far from being an authority in your favour. Williams, J. There is no suggestion here, as there was

(*a*) Cockburn, C. J., was absent.

(*b*) The cause was tried at the sittings in London after this term, and the plaintiff obtained a verdict with 5*l*. damages.

in that case, that there is not ample accommodation for the public.] There is not: but it is submitted that it is contrary to the spirit of the act, to give such an exclusive privilege to one cab-proprietor, to the prejudice of all others. [Williams, J. In *Marriott's case*, the decision rests expressly upon the inconvenience inflicted upon the public, not upon the particular grievance to the applicant. Cresswell, J. Besides, there the applicant was prevented by the company from setting down his passengers at the door of the booking-office. Here, the only complaint is, that the applicant is not permitted to ply for hire in the station-yard.] That which is complained of is clearly an undue and unreasonable privilege given to Clark. [Williams, J. I think it is by no means an unreasonable thing, but, on the contrary, very important to the interests of the public, that the vehicles which ply for hire in the station-yard should be kept upon their good behaviour, by being under the control of the company. Cresswell, J. The case of *Barker* v. *The Midland Railway Company*, 18 C. B. 46, has some bearing upon this. The court there held that an omnibus proprietor who carried passengers and their luggage for hire to and from a railway-station, could not maintain an action against the company for refusing to allow him to drive his vehicle into the station-[511]-yard.] There is nothing in the decision there that is inconsistent with the right sought to be enforced here.

Cresswell, J.(*a*). I am of opinion that the applicant has made out no case for the exercise of our jurisdiction under the statute.

Williams, J. The affidavits upon which this motion is founded do not shew that the agreement with Clark is not highly beneficial to the public as well as to the company. And it has been expressly laid down, in a case which has not been cited,—*In re Barret*, ante, vol. i. 423,—that the statute in question was passed for the benefit of the public, and not for that of individuals.

Willes, J., concurring,

Rule refused.

[512] Frazer *v.* Hatton and Another. May 23rd, 1857.

[S. C. 26 L. J. C. P. 226; 3 Jur. N. S. 694; 5 W. R. 632.]

The plaintiff, a seaman, in March, 1854, shipped on board a vessel of the defendants, called the "Custos," to serve as steward, and signed articles, as required by the statute 13 & 14 Vict. c. 93,—which professed to be an agreement between the master and the several persons whose names were thereto subscribed,—at 3l. per month wages, for a voyage "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years." The articles contained, amongst others, the following provision,—"The crew, if required, to be transferred to any other ship in the same employ." After the "Custos" had remained some time on the African coast, the plaintiff, at the request of the captain, was transferred to another and a larger vessel of the defendants' engaged in the same trade, called the "Dauntless," entering into fresh articles with the master, under which he was to receive wages at the rate of 4l. per month. The "Dauntless" arrived in Liverpool on her return voyage in June, 1856, when the plaintiff claimed wages at 4l. per month for the period during which he had served on board the "Dauntless." The defendants refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship "in the same employ:" and the plaintiff declined to accept the sum mentioned in the original articles:—Held,—First, that the articles were not invalid for being in the alternative,—"from Liverpool to the west coast of Africa and back, or for a term not to exceed three years:"—Secondly, that the provision for the transfer of the crew to another vessel in the same employ, was not in contravention of the statute:—Thirdly, that the provision for transfer was not limited to a transfer of the whole crew collectively, but that the articles constituted an agreement between the owners and each of the crew for himself, and consequently that the plaintiff was bound to serve under the original articles, and there was therefore no consideration for the master's promise to pay the increased wages:—Fourthly, that there was no neglect or refusal by the defendants, without

(*a*) Cockburn, C. J., for private reasons, took no part in the discussion.

sufficient cause, to pay the plaintiff the wages really due, so as to render them liable to the penalty imposed by the statute.—Held also, that the circumstance of the fresh articles not having been executed in the presence of a consular agent, was not an objection to their validity, provided they could have been set up.

This was an action brought by the plaintiff to recover from the defendants, the owners of two vessels named respectively the "Custos" and the "Dauntless," 87l. 1s. 9d., the balance of a sum of 100l. alleged to be due from the defendants to the plaintiff for wages as a hired mariner and steward, and for double pay, under the 187th section of the Merchant Shipping Act, 1854, for neglect or refusal to make payment of wages within the time prescribed by the act, without sufficient cause. In the first count the plaintiff claimed certain wages due to him as steward of the "Custos," and in the second wages as steward of the "Dauntless." The declaration also contained counts for work and services and for **[513]** money alleged to be due from the defendants to the plaintiff upon accounts stated between them. The defendants paid into court 67l. 6s. 9d., and, as to the residue of the demand, pleaded never indebted.

The cause was tried before Bramwell, B., at the last Summer Assizes at Liverpool. It appeared that the defendants were merchants trading to the west coast of Africa; and that the plaintiff, on the 27th of March, 1854, shipped on board the "Custos" (of 277 tons burthen), then lying at Liverpool, as steward for a voyage thence to the west coast of Africa and back, or for a term not exceeding three years, at the wages of 3l. per month. The articles which the plaintiff signed, and which were in the form sanctioned by the Board of Trade, as required by the Mercantile Marine Act, 13 & 14 Vict. c. 93, contained amongst other terms the following:—

"The several persons whose names are hereto subscribed hereby agree to serve on board the said ship, in the several capacities expressed against their respective names, on a voyage from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years: and the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in every thing relating to the said ship and the stores and cargo thereof, whether on board, in boats, or on shore: in consideration of which services to be duly performed, the said master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale: And it is hereby agreed that any em-**[514]**-bezzlement or wilful or negligent destruction of any part of the ship's cargo or stores, shall be made good to the owner out of the wages of the person guilty of the same; and, if any person enters himself as qualified for a duty which he proves incompetent to perform, his wages shall be reduced in proportion to his incompetency: And it is also agreed that the regulations authorised by the board of trade, which in the paper annexed hereto are numbered 1 to 22 inclusive, are adopted by the parties hereto, and shall be considered as embodied in this agreement: And it is also agreed, that, if any member of the crew considers himself to be aggrieved by any breach of the agreement, or otherwise, he shall represent the same to the master or officer in charge of the ship, in a quiet and orderly manner, who shall thereupon take such steps as the case may require: And it is also agreed that no grog will be allowed: The crew, if required, to be transferred to any other ship in the same employ, and not to trade on their own account."

The plaintiff sailed in the "Custos," and remained on board of her for some months. On the 12th of January, 1855, the plaintiff left the "Custos," and, together with the master, entered on board the "Dauntless" (of 800 tons burthen), another vessel also belonging to the defendants, under fresh articles, with an advance of wages, viz. to 4l. per month; the new articles, however, not being signed in the presence of a consular agent, there being no constantly resident consular agent at the place where the transfer occurred. The plaintiff remained on board the "Dauntless," doing duty as steward, until her arrival in England on the 22nd of June, 1856. The plaintiff proved that he served in the capacity mentioned on board the "Census," and that he was induced by the captain's offer of the increased pay to transfer himself to the "Dauntless."

[515] It appeared, that, on the arrival of the "Dauntless" at Liverpool, the plaintiff

claimed to be paid wages at the rate of 4l. per month for the period during which he had served on board the "Dauntless." The defendants, however, refused to pay him more than at the rate mentioned in the articles under which he shipped on board the "Custos"; insisting that he was by those articles bound to give his services, if required, on board the "Dauntless," that being a vessel "in the same employ" as the "Custos"; and they declined to pay him even at the lower rate, unless he would agree to accept it as payment in full.

On the part of the defendants, it was objected that the captain had no authority to stipulate with the plaintiff for an increased rate of wages, and that there was no consideration for his promise to that effect, the plaintiff being already bound by the terms of the original articles.

The learned judge directed that a verdict be entered for the plaintiff for 19l. 15s., being the difference between the 3l. and 4l. per month for the time he served on board the "Dauntless," and 2l. 13s. 4d., being the penalty under the 17 & 18 Vict. c. 104, s. 87, for the defendants' neglect or refusal without sufficient cause to make payment of the wages due,—reserving leave to the defendants to move to enter a nonsuit or a verdict for them, if the court should think that the plaintiff was not entitled to the increased pay, and that the penalty had not been incurred.

Brett, in Michaelmas Term last, obtained a rule nisi accordingly. He submitted that the contract under the articles was a separate contract between the owners and each seaman who signed them; that the plaintiff was bound by the articles he signed on shipping on board the "Custos" to serve for the stipulated period on **[516]** board any other vessel in the same employ, and consequently that the master had no authority to make, nor was there any consideration for the making of, the subsequent articles,—citing *Stilk* v. *Meyrick*, 2 Camp. 317, and *Harris* v. *Carter*, 3 Ellis & B. 559. He also urged, that, inasmuch as the second articles were not signed in the presence of a consular agent, as required by the 160th section of the 17 & 18 Vict. c. 104 (*a*), they were void: but upon this point no rule was granted, the court observing that the omission of that formality would not avoid the agreement, assuming that the master had authority to make it.

Edward James, Q. C., and Milward, on a subsequent day in the same term shewed cause. The plaintiff is entitled to retain his verdict for the full amount, or, if not, at all events, for the sum due to him for double wages for the ten days during which the wages legally due were withheld. The contract was for a voyage **[517]** from Liverpool to the west coast of Africa and back to a final port of discharge in the united kingdom, or for a term not to exceed three years; and it contains the following stipulation,—"The crew, if required, to be transferred to any other ship in the same employ." The "Custos" being on the coast of Africa, the captain was transferred to the "Dauntless"; and, desiring to have the plaintiff's services on board that vessel, he offered to increase his wages to 4l. per month, in consideration of the increased duty which from the larger size of the vessel would be cast upon him; and the new articles were accordingly signed. It is clear that the service on board the "Dauntless" was not required of the plaintiff as a duty, otherwise no new articles would have been entered into. The main question here is, whether there is anything in the former articles to preclude the defendant from entering into this new engagement. It is submitted that there is not; for, the stipulation as to the transference of the plaintiff's

(*a*) Which enacts that "every master of a British ship who engages any seaman at any place out of Her Majesty's dominions in which there is a British consular officer, shall, before carrying such seaman to sea, procure the sanction of such officer, and shall engage such seaman before such officer; and the same rules as are hereinbefore (s. 159) contained with respect to the engagement of seamen before shipping masters in the united kingdom shall apply to such engagements made before consular officers; and, upon every such engagement, the consular officer shall indorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise made as hereby required; and every master who engages any seaman in any place in which there is a consular officer, otherwise than as hereinbefore required, shall incur a penalty not exceeding 20l.; and if in any case the indorsement and attestation hereby required is not made upon the agreement, the burden of proving the engagement to have been made as hereinbefore required shall lie upon the master."

services to another vessel, is inconsistent with the provisions of the 17 & 18 Vict. c. 104, and void as against the sea-men; and, further, it applies not to individual seamen, but to a transhipment of the entire crew. The 149th section of the 17 & 18 Vict. c. 104, enacts that "the master of every ship, except, &c., shall enter into an agreement with every seaman whom he carries to sea from any port in the united kingdom as one of his crew, in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the board of trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof, that is to say,—1. The nature, and, as far as practicable, the duration of the intended voyage or engagement: 2. The number and description of the crew, specifying how many are [518] engaged as sailors: 3. The time at which each seaman is to be on board or to begin work: 4. The capacity in which each seaman is to serve: 5 The amount of wages which each seaman is to receive: 6. A scale of the provisions which are to be furnished to each seaman: 7. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct, which have been sanctioned by the board of trade as regulations proper to be adopted, and which the parties agree to adopt: and every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the master and seamen in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law: provided, that, if the master of any ship belonging to any British possession has an agreement with his crew made in due form according to the law of the possession to which such ship belongs or in which her crew we e engaged, and engages single seamen in the united kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the board of trade." The 182nd section, which was obviously introduced for the protection of seamen against improvident agreements, enacts that every stipulation in any agreement, inconsistent with any provision of the act, shall be wholly inoperative. It is true, that, as regards the voyage originally contemplated, these terms were complied with; but the articles were manifestly inconsistent with the 149th section, and more especially with the second stipulation contained therein, as to the number and description of the crew. The transfer might be to a vessel for a totally different voyage; and the words "any other ship in the same employ" do not necessarily confine it to a vessel belonging to the same owners. The 150th [519] section, art. 4, contains a provision as to transfer of services to another ship. The 156th section shews that the construction now contended for is the correct one: it enacts, that, "in cases where several home trade ships belong to the same owner, the agreement with the seamen may, notwithstanding anything herein contained, be made by the owner, instead of by the master, and the seamen may be engaged to serve in any two or more of such ships provided that the names of the ships and the nature of the service are specified in the agreement; but, with the foregoing exception, all provisions herein contained which relate to ordinary agreements for home-trade ships shall be applicable to agreements made in pursuance of this section." Here, the agreement contains neither the name of the ship to which the transfer is to be made, nor the nature of the service which is to be substituted. The 160th section, which provides for the engaging of seamen in foreign ports, contains the same requirements as under s. 149. But, assuming that the plaintiff is not entitled to recover the larger amount claimed, he is at all events entitled to double wages the period during which the defendants withheld the pay stipulated by the articles for the service on board the "Custos," under the 187th section, which enacts that "the master or owner of every ship shall pay to every seaman his wages within the respective periods following, that is to say, in the case of a home-trade ship, within two days after the termination of the agreement, or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the southern whale fishery, or on other voyages for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's dis-[520] charge, whichever first happens; and, in all cases, the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause,

shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages." The mere fact of the plaintiff's claiming too much, did not absolve the owners from paying or tendering what was really due: and here there was no evidence of any tender.

Brett, in support of his rule. There was no neglect or refusal "without sufficient cause" to pay what was really due: the plaintiff demanded to be paid at the rate of 4l. per month. [Williams, J. It was not absolutely necessary that a tender should be made; but at least there should have been an offer to pay what was due.] The plaintiff's excessive demand prevented the settlement. Where there is a bonâ fide dispute, it cannot be said that the withholding payment was wilful. The defendants could not have obtained a discharge pursuant to the 175th section (*a*). In construing **[521]** such an agreement as this, regard must be had to the voyage with respect to which it is made. The voyage here was in the African trade,—which consists in cruising about among the rivers and bays to barter with the natives. To carry on this sort of trade, two or more vessels are necessary,—one loading the produce for home, while the others are engaged in collecting it [Williams, J. If that had been specified in the agreement, one of the objections which have been made to it would have been obviated. The statute requires that the vessel and the voyage shall be specified. Here, the agreement is general in its terms.] The intention of the parties is manifest. The vessel coming home would necessarily require a full crew; the others would not. The deadly nature of the climate also would require provision to be made for transferring seamen from one vessel to another. The wages are calculated with a due regard to these circumstances: and the provisions of the act, which are designed to guard the seaman from being entrapped into an improvident bargain, are sufficiently complied with. The suggestion that the stipulation in question applies only to the crew collec-**[522]**-tively, is of no weight; for, the whole scope of the articles shews that they constitute a bargain between the master or owners and each individual seaman, each stipulating for his own acts and conduct only. [Crowder, J. Some owners may trade to the coast of Africa and to Hudson's Bay: under this agreement, the plaintiff might have been transferred to a vessel bound for the latter place.] The same objection would arise whatever might be the construction put upon the agreement. [Willes, J. The form of articles sanctioned by the board of trade requires the ship to be named, and the 1st article of s. 149 requires the voyage to be defined: have these been complied with?] The statute is only directory in those respects; and that section provides that the agreement may contain any other stipulations which are not contrary to law. There is nothing illegal in the stipulation for the transfer; and, if there were, it is not pleaded. [Willes, J. You set up the agreement, and insist that the plaintiff is bound by it. How could he plead its illegality?] The directions in the statute are complied with as far as is practicable in these cases; it was

(*a*) "The following rules shall be observed with respect to the settlement of wages, that is to say,—1. Upon the completion before a shipping-master of any discharge and settlement, the master or owner, and each seaman, shall respectively, in the presence of the shipping-master, sign, in a form sanctioned by the board of trade, a mutual release of all claims in respect of the past voyage or engagement, and the shipping-master shall also sign and attest it, and shall retain and transmit it as herein directed,—2. Such release so signed and attested, shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement,—3. A copy of such release, certified under the hand of such shipping-master to be a true copy, shall be given by him to any party thereto requiring the same; and such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy,—4. In cases in which discharge and settlement before a shipping-master are hereby required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim,—5. Upon any payment being made by a master before a shipping-master, the shipping-master shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned."

impossible to name by anticipation the substituted ship, or to refer to it with more particularity. The whole course of this extensive and important trade will be upset by a construction of the articles adverse to that now contended for. [Willes, J. The 160th section seems to give some colour to your argument: it would seem to apply to the engagement of seamen at starting on the voyage.] To arrive at any other construction, the court must hold that this agreement was illegal in its inception.

Williams, J. This case involves a point of very general importance, and therefore we will take time to consider our judgment.

Cur. adv. vult.

[523] Williams, J. now delivered the judgment of the court:—

This was an action brought to recover 87l. 1s. 9d., the balance of a sum of 100l. alleged to be due from the defendants to the plaintiff for wages earned by him as steward of their vessels the "Custos" and "Dauntless," and for double pay under the statute for neglect or refusal to make payment of wages, without reasonable cause. The defendants paid into court the sum of 67l. 6s. 9d., and, as to the residue of the demand, pleaded never indebted.

At the trial it was proved as follows:—The defendants were merchants at Liverpool, and owners of the "Custos," the "Dauntless," and other vessels engaged in a trade between this country and the west coast of Africa. In the month of March, 1854, the "Custos" was lying at Liverpool, bound for the west coast of Africa. Upon the 27th of that month the plaintiff signed the ship's articles in the statutory form, agreeing thereby to serve as steward, at 3l. per month, upon a voyage described as being "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years." The articles also contained the following provision, viz. "The crew (if required) to be transferred to any other ship in the same employ." The plaintiff sailed in the "Custos" to a port on the west coast of Africa, and served on board her pursuant to the articles until the 12th of January, 1855. On that day, the master of the "Custos" left that vessel, and transferred himself and the plaintiff to the "Dauntless," a vessel of the defendants' in the same employ as the "Custos," within the meaning of the articles of the latter.

The plaintiff stated that he accompanied the master into the "Dauntless" at his request, and that articles were **[524]** thereupon signed, by which he was to receive 4l. per month, instead of 3l. per month, for completing the voyage in the "Dauntless" instead of the "Custos"; and that he served as steward of the "Dauntless" from the 12th of January, 1855, to the 22nd of June, 1856, when she completed her voyage, and arrived in England. The plaintiff thereupon claimed to be paid at the rate of 4l. per month for the period of his service aboard the "Dauntless" pursuant to the articles. The defendants, however, insisted that the plaintiff was only entitled to the sum of 3l. per month for the whole time of service, inasmuch as the original articles signed at Liverpool bound him to transfer himself to and serve aboard the "Dauntless," being a ship in the same employ as the "Custos," at the same rate as if had continued his voyage aboard the "Custos." The learned judge directed a verdict for the plaintiff for the sum of 19l. 15s., being the difference between 3l. and 4l. per month during the period of service on board the "Dauntless," and 2l. 13s. 4d., being the penalty imposed by the 17 & 18 Vict. c. 104, s. 187, for neglect or refusal to make payment, without sufficient cause: but reserved leave for the defendants to move to enter a nonsuit or a verdict for them, in case the court should be of opinion that the plaintiff was only entitled to 3l. per month during the whole period, and that the penalty had not been incurred.

A rule was accordingly obtained, which was argued before my brothers Crowder, Willes, and myself.

Upon the argument, it was scarcely denied by the learned counsel for the plaintiff, and could not have been so with success, that, if the articles signed at Liverpool were in compliance with the statute, and in terms obligatory upon the plaintiff to transfer himself to the "Dauntless," and complete his voyage in her at the original wages of 3l. per month, there was no considera-**[525]**tion for the agreement in the second articles to pay 4l. per month, nor any authority in the master to make such agreement: see *Thompson* v. *Hardock*, 1 Camph. 527; *Harris* v. *Watson*, Peake's N. P. C. 72; *Stell* v. *Meyrick*, 2 Camph. 317.

It was, however, argued that the first articles were void for non-compliance with

the Mercantile Marine Act, which for this purpose is the 13 & 14 Vict. c. 93; the 17 & 18 Vict. c. 104, to which reference was made in the course of the argument, not having been passed till the 10th of August, 1854, long after the first articles were entered into, and not having come into force till the 1st of May, 1855. The section applicable to the case is the 46th, which enacts "that every master of a ship shall, on carrying any seaman to sea as one of his crew, enter into an agreement with him in the manner hereinafter mentioned; and every such agreement shall be in a form to be sanctioned and issued by the board of trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof,—1. The nature, and, as far as practicable, the length of the voyage or engagement on which the ship is to be employed.—2. The time at which each seaman is to be on board or to begin work.—3. The capacity in which each seaman is to serve,—4. The amount of wages which each seaman is to receive.—5. A scale of the provisions which are to be furnished to each seaman.—6. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the board of trade as regulations to be adopted, and which the parties agree to adopt; and shall be so framed as to admit of stipulations, to be adopted at the will of the master and seaman in each [526] case, as to advance and allotment of wages; and may contain any other stipulations which are not contrary to law."

The first objection to the articles, that it was in the alternative for "a voyage from Liverpool to the west coast of Africa, and back, or for a term not to exceed three years," seems not maintainable, when it is considered that the alternative may be construed with the rest of the description of the voyage, as limiting to three years the time during which the seaman was obliged to serve even upon such a voyage, and disentitling the owners to his services beyond that time. This construction makes the agreement valid.

Another objection was, that the provision for transferring the crew to any other ship was inconsistent with the statute, and therefore void. We are, however, unable to find in the statute anything which made it unlawful for persons engaged in a trade of this description to stipulate for the services of a seaman for a specified voyage not exceeding a fixed period out and home, to be rendered either on board the vessel in which he left this country or any other vessel of the same owner engaged in a similar adventure; and the statute (s. 46) provides for an insertion in the articles of any stipulation which is not contrary to law.

It was further contended on the part of the plaintiff, that, assuming the articles to be valid, the provision for transferring "the crew" into any other ship applied only to a case where the whole crew were transferred together, and did not apply to the transfer of less than the whole. The articles constitute in all other respects an agreement between the owners and each of the crew for himself; and the expression "the crew" is used in other parts of the agreement to express the crew respectively; and in the clause under consideration it governs the stipulation "not to trade on their own account," [527] which is clearly several as to each of the crew, and not merely joint as to all. The plaintiff was, therefore, bound by the first articles, and entitled under them to 3l. per month only for the whole period of service.

It was finally contended on the part of the plaintiff, that, assuming him not to have been entitled to recover more than the 3l. per month for which he originally agreed to serve, still that he was entitled to recover ten days' double pay under the 17 & 18 Vict. c. 104, s. 187, as a penalty for neglect or refusal without sufficient cause to pay the amount due at 3l. per month, being the amount paid into court. This was upon the supposition that, the plaintiff being entitled to 3l. per month only, the defendants neglected or refused to pay that amount without sufficient cause. It appears, however, that the defendants were always ready to pay that sum, if the plaintiff would receive it in settlement; and that the plaintiff never was willing to receive it or give a discharge under s. 175, but insisted upon payment of the larger amount, to which we hold him not to be entitled. The defendants, therefore, cannot be said to have neglected or refused to make payment of the amount which they were liable to pay, or to have done so without sufficient cause.

The rule to enter a nonsuit must, therefore, be made absolute.

Rule absolute.

[528] SIMMONS *v.* TAYLOR, Public Officer of the London Joint-Stock Bank. Dec. 8th, 1857.

[Affirmed in Exchequer Chamber, 4 C. B. N. S. 463.]

The statute 19 & 20 Vict. c. 25, which makes a "crossed cheque" payable only to or through a banker, applies to the state of the instrument at the time of its presentment: and therefore the banker upon whom a cheque is drawn is justified in paying it otherwise than through another banker, if, when presented, it does not bear any crossing on the face of it.—The crossing forms no part of the cheque itself, and consequently its erasure does not amount to a forgery.

This was an action against the defendant as the registered public officer of the London Joint-Stock Bank, to recover the balance of a customer's account. The declaration contained a count for money lent, and a count for money found due upon an account stated.

Plea payment.

The cause was tried before Cockburn, C. J., at the sittings in London after last Hilary Term, when the following facts appeared in evidence:—The plaintiff, who had an account with the London Joint-Stock Bank, on the 28th of August, 1856, drew upon it a cheque for 126*l*., payable to "George Master, Esq., or bearer," crossed it in the usual way by writing across it "& Co.," between two parallel lines, and inclosed the cheque so crossed in an envelope addressed to "George Master, Esq., 22 Duke Street, Manchester Square," and on the same day caused it to be posted. The true address of Mr. Master was, No. 22 Duke Street, Grosvenor Square, and the postman proved the delivery of the letter at the house to which it was addressed, and which appeared at the time to have been uninhabited and under repair; but it never reached the hands of Mr. Master. Shortly after its date, the cheque was presented by a stranger at the bank, and paid across the counter as an ordinary cheque, there being nothing then upon the face of it to indicate that it was a "crossed cheque," the lines and the words "& Co." having been so ingeniously obliterated from it as to leave no trace, except on a close inspection against a strong light, of their ever having been there.

[529] On the part of the plaintiff it was insisted that the payment of the cheque so altered,—such alteration amounting in point of law to a forgery,—was not a payment authorized by him; and that the bankers had been guilty of negligence, for that they were bound to see that the cheque when paid by them was unaltered, and that they might, by having their cheques printed upon paper of a description that could not be tampered with, have prevented the fraud.

On the other hand, it was insisted that no negligence was imputable to the defendant, but that the plaintiff himself had been guilty of negligence in the mode of sending the cheque.

The jury found that there had been no negligence on either side: and his Lordship thereupon directed the verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for the amount of the cheque, if the court should be of opinion that the payment of the cheque "otherwise than through some banker," was a payment unauthorized by the plaintiff.

Byles, Serjt., in Easter Term last, obtained a rule nisi accordingly, "on the ground that the payment of the cheque by the defendant was not authorized, the cheque having been crossed."

Bovill, Q. C., and Archibald, in Trinity Term, shewed cause. The arguments upon which the rule will be attempted to be supported, will be, first, that the bank were not justified in paying the cheque, because it was a forged instrument,—secondly, that, by virtue of the recent statute 19 & 20 Vict. c. 25, the cheque was only payable through some banker. There can be no doubt an alteration of a bill or cheque in a material part amounts to forgery; but no case has held that the obliteration of the crossing of a cheque constitutes a **[530]** forgery. On the contrary, it has been expressly decided that the crossing forms no part of the instrument, but is a mere memorandum indicating that the holder is to present it for payment through some banker. This was held by the court of Exchequer in *Bellamy* v. *Marjoribanks*, 7 Exch. 389. That was an action against a banker for money lent, to which the

defendant pleaded payment. It appeared that the plaintiff had drawn a cheque on the defendant, and crossed it thus,—"Bank of England, for account of the Accountant-General." A party to whom this cheque was given struck out the crossing by running a pen through it, leaving it however perfectly legible, and crossed the cheque a second time with the name of his own bankers, G. & Co., and paid it into their bank, to the credit of his own account. The cheque, being presented by them for payment, was paid by the defendant, who charged it to the debit of the plaintiff's account. The money was placed by G. & Co. to the credit of their principal in his account with them, and he converted the money to his own use. It was found that the Accountant-General would not receive payment by cheque, unless drawn on the Bank of England: and it was held that the circumstance of the cheque being thus doubly crossed afforded no additional evidence of negligence against the defendant. Parke, B., in delivering the judgment of the court, there said: "The crossing a cheque cannot operate as an indorsement to the banker whose name is used, because it was not written with any intent to transfer the property in the cheque to him, and it wants the essential part of an indorsement, the delivery of the instrument to the indorsee. And we think it cannot well be supposed that the usage is to be considered as equivalent to a direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only; for, **[531]** then the cheque would be altered in a manner which would take it out of the exemption of the stamp-act, 55 G. 3, c. 184, sched. part 1, which applies to cheques payable to bearer only: and the bankers to whom it was addressed would not be bound to pay the person named. We are, therefore, of opinion that a crossing the cheque with the name of a banker cannot have the effect of restricting its negotiability to such banker alone. To hold it to have this effect, would be to render the instrument no longer a cheque." That case was confirmed by the court of Queen's Bench in *Carlon* v. *Ireland*, 5 Ellis & B. 765. Independently, therefore, of the recent statute, it may be assumed as clear law, that the crossing formed no part of the instrument, and that the banker might lawfully pay the amount to the bearer, notwithstanding such crossing. Such being the state of the law, an act is passed "to amend the law relating to drafts on bankers." It begins with reciting that "doubts have arisen as to the obligations of bankers with respect to cross-written drafts; and that it would conduce to the case of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order, on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker;" and then it proceeds, in s. 1, to enact, that, "in every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." The crossing contemplated by the statute is still no part of the instrument: it is something which is or may be **[532]** done by the person receiving the cheque. To what period of time does the statute refer? How is the banker to know whether the cheque is a crossed cheque or not, but by the appearance it bears at the time of its presentment? [Cresswell, J. Suppose a cheque were issued without crossing, and the payee, or one to whom he passes it, crosses it with the name of a banking firm or the words "& Co.," and a subsequent holder erases the crossing so skilfully as to leave no trace of it, and the banker upon whom it is drawn pays it, does he not pay it according to the direction of his customer?] Undoubtedly he does. [Cockburn, C. J. What would be the consequence if the drawer of the cheque, after crossing the cheque, himself erased the crossing?] If it is immaterial by whom the cheque is crossed, it must be equally immaterial by whom the crossing is erased. Suppose the words "& Co." were written with a black-lead pencil, and afterwards rubbed out (*a*)? [Cresswell, J. That would be precisely the same as the case I put. Cockburn, C. J. Suppose the statute, instead of authorizing the crossing of a cheque with the name of a banker or the words "& Co.," had authorized the writing across it a direction, in extenso, for its payment to or through

(*a*) An indorsement written on a promissory note with a black-lead pencil, instead of ink, is a writing in law, and entitles the indorsee to sue upon the note: *Geary* v. *Physic*, 7 D. & R. 653.

some banker, and had then enacted that the cheque should not be paid in contravention of that direction, and that direction were obliterated by artificial means, and the cheque paid as an uncrossed cheque, what would have been the result?] In such a case, it would have been difficult to say that the alteration did not amount to a forgery, and that the payment was not unauthorized. [Cockburn, C. J. Is not this the same thing, the words "& Co." being declared by the **[533]** statute to be equivalent to such a direction?] The direction is no part of the instrument: and the question is to be determined by that which appears upon the face of the cheque at the time of its presentment. How can that be a direction to the banker which does not appear upon the cheque when presented? The object of the statute was merely to settle a doubt which had existed in Westminster Hall as to what the crossing really imported, and not to impose any additional liability upon the banker. [Williams, J. May a bonâ fide holder of a crossed cheque lawfully erase the crossing?] It is submitted that he may. [Williams, J. Suppose a party (not representing a banker) presents a crossed cheque over the counter, and the banker upon whom it is drawn refuses to pay it, and the person presenting it at once erases the crossing, either with a knife or by drawing a pen through it, and again presents it, would the banker be justified in paying it?] He would. The whole question undoubtedly is involved in difficulty: the only proper course is, to see what was the object of the legislature; and this is best discovered from the preamble. Looking at the whole statute, it is clear that the crossing of the cheque no more forms part of the instrument now than it did before the passing of the statute. And, to amount to a direction to the banker, it clearly must appear upon the instrument when presented. The language of the 19th section of the 16 & 17 Vict. c. 59, which is in pari materiâ, supports this construction: that section provides "that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker **[534]** to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." The rule for the construction of statutes is thus propounded by Coleridge, J., in *The King* v. *The Poor Law Commissioners, In the Matter of the Parish of St. Pancras*, 6 Ad. & E. 1, 7; 1 N. & P. 371, "It is, in my opinion, so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section, which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the court may properly act upon it; for, the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other." *Hall* v *Fuller*, 5 B. & C. 750, 8 D. & R. 464, will probably be relied on for the plaintiff; but there the decision proceeded upon the ground that the payment was good to the extent of the original order, but unauthorized as to the excess. Here, the erasure of the crossing leaves the original order intact.

Byles, Serjt., and C. G. Addison, in support of the rule. Upon the strictest and most literal construction **[535]** of the statute, the plaintiff is entitled to the verdict. The first object of the statute, as appears from the preamble, was the ease of commerce, by encouraging the practice of making large payments by cheques upon bankers; the second, the security of property, by (amongst other things) rendering the sending of cheques by the post more safe; and the third, the prevention of crime, by making it more difficult for persons dishonestly possessing themselves of such instruments to dispose of them: and the mode by which the legislature contemplate attaining these objects is, by enabling the drawers or holders of drafts on bankers payable to bearer or to order, on demand, "effectually to direct the payment of the same to be made to or through some banker,"—that is, to put such a direction upon

the cheque that it shall be paid only through some banker, and that such direction shall not be evaded except by means of a forgery. It must be borne in mind that cheques payable "to order" never were crossed before. The enacting words are plain and simple, "In every case where a draft on any banker made payable to bearer or to order on demand, bears across its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." According to the construction contended for on the other side, the crossing has no force at all. There is no reason why the word "bears" should be restricted to the time of the presentment of the instrument. [Cresswell, J. When is a cheque a direction to the banker?] When it is issued. When is it a draft? [Cresswell, J. It is a draft when issued, a direction to the banker when presented. **[536]** Cockburn, C. J. It must be taken as an entire transaction,—inchoate at the time of the issuing of the cheque, complete when the presentment takes place.] Suppose a bill were made payable to John Smith or order, and he indorses it in blank, the holder may restrict the negotiability of the instrument by writing above the name of John Smith, "pay Thomas Jones." [Cresswell, J. That would only effectuate the intention of the indorser, by pointing out more particularly the intended indorsee. Do you contend that this cheque is no longer a cheque payable to bearer?] *Bellamy* v. *Marjoribanks*, 7 Exch. 389, and *Carlon* v. *Ireland*, 5 Ellis & B. 765, have decided that a crossed cheque is still a cheque payable to bearer: but now it must be presented by or through some banker. [Cresswell, J. Then it is not a cheque payable to bearer.] The bearer must present it through a particular channel. [Cresswell, J. That is a contradiction in terms: it must cease to be payable "to bearer," when the bearer is not entitled personally to demand it. Williams, J. The substance of the enactment is, that, if the cheque bears across its face certain words, the drawee's authority to pay it is abridged: and your argument is, that, if it ever had those words across it, the nature of the instrument is altered, and the authority abridged?] Precisely so. The statute in effect makes the crossing a part of the cheque,—though it is unnecessary for the present purpose to carry the argument so far. The relation of banker and customer is thus treated by Lord Langdale, M. R., in *Watts* v. *Christie*, 11 Beavan, 543, 551,—"In the ordinary relation between banker and customer, the customer is a mere common creditor of the banker. A debt is owing to the customer, which he may at any time call on the banker to pay, and which it is the duty of the banker to pay upon his order or cheque. The customer may order it to be paid to himself or any body **[537]** else, or he may order it to be carried over or transferred from his own account to the account of any other person, as he pleases. He may do so by a written instrument; and I know nothing to prevent his doing so by a verbal direction, except this,—that the bank may require some written evidence of this order to transfer: and I believe there is no necessity for giving a written instrument, except for the purpose of evidence." A debt due from a banker to his customer is barred by the statute of limitations: *Pott* v. *Clegg*, 16 M. & W. 321. The effect of the crossing of a cheque was considered in the case of *Stewart* v. *Lee*, M. & M. 158. There, C. drew a cheque on his bankers payable to A. & B., assignees of E., or bearer, and wrote the names of their bankers across it. B., who had another (private) account with the bankers, paid the cheque into that account: and it was held that the bankers were justified in applying it to that account; the drawer's writing the names of the bankers of the payees of the cheque across it not being, according to the custom of trade, information to the bankers that the money was that of the payees. Further, it is submitted that the effect of the erasure of the crossing, was to make the cheque an entirely new instrument: the cheque which the bank paid, was not the cheque which the plaintiff drew. Any unauthorized alteration of a bill or a cheque after acceptance or issuing, is a forgery: *Master* v. *Miller*, 4 T. R. 320; *Hall* v. *Fuller*, 5 B. & C. 750, 8 D. & R. 464; *Young* v. *Grote*, 4 Bingh. 253, 12 J. B. Moore, 484; and a banker cannot debit his customer with a payment made to one who claims through a forged instrument: *Robarts* v. *Tucker*, 16 Q. B. 560.

Cur. adv. vult.

Cresswell, J., now delivered the joint opinion of Williams, J., Willes, J., and himself:—

[538] This case depends upon the effect to be given to the statute 19 & 20 Vict. c. 25, an act to amend the law relating to drafts on bankers. Before the statute was passed, a customer of a banker, by drawing a cheque and writing across it the name of another banker, did not limit the authority of the drawee to paying the party or firm whose name was so written across it. It did not amount to a direction to the drawee, but had the effect of calling for vigilance on his part; and, where a banker had paid otherwise than to the party so designated, it was held that the question was, not whether he had acted contrary to orders, but whether he had been guilty of negligence. It formed no part of the instrument itself, and in no way altered its effect: see the judgment of Parke, B., in *Bellamy* v. *Marjoribanks*, 7 Exch. 403.

This statute was passed for the purpose of making such matter written across a cheque, whether written by a drawer or payee, operate as a direction to the banker to pay in that mode, and to render the cheque payable in that mode only. The words of the statute are,—"Whereas doubts have arisen as to the obligations of bankers with respect to cross-written drafts: and whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker:" be it therefore enacted, that, "in every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same [539] is to be paid only to or through some banker, and the same shall be payable only to or through some banker."

Now, this, I apprehend, does not apply to the time when the cheque is issued; for, the preamble contemplates the crossing of a cheque, not by the drawer only, but also by the holder, whoever he may be. Nor can it be construed as if the words had been "If a cheque, &c., at any time bears;" for, if after it is issued uncrossed, a holder may have the benefit of the enactment by crossing it, why should not another holder have a right to erase that, and restore it to the condition in which it was issued? Considering this and also the difficulty of holding that anything can operate as a direction to the banker which is not exhibited to him, I think the statute must mean that the cheque is to bear the crossing when presented. If so, the cheque in question did not bear it, and the banker was not prohibited from paying it otherwise than to or through a banker.

But it is further to be considered whether the crossing was part of the cheque, so that the erasure of it would amount to a forgery of another and different cheque from that which the plaintiff drew; for, if it had that effect, the plaintiff never drew the cheque that was paid, and the banker cannot claim credit for it.

In the first place, it does not appear that the legislature contemplated making the crossing a part of the cheque. The statute says that it shall have the force of a direction, not that it shall alter the instrument. If it were to have that effect, it would be a strange thing to give to the payee or any subsequent holder power to alter a cheque without avoiding it, and would have the effect of creating a new sort of instrument, hitherto unknown to the law, viz. a cheque payable to bearer, or conditionally, that is, if presented by or through a banker. Again, it seems strange to enact that one [540] holder may cross a cheque, and a subsequent holder may not erase that crossing, and restore it to the condition in which it was issued. If he may, then, at all events, the crossing can only be part of the cheque as long as it remains upon it.

Another reason for holding it not to be a part of the cheque, so as to make the erasure operate as a forgery of a new cheque, is this, that, in such case, if a cheque once crossed with a banker's name, afterwards erased, were presented by or through a banker, and paid (which is all that is required in the case of a cheque bearing the crossing when presented), the banker could not claim credit for the payment so made,—a result which the legislature does not appear to have contemplated or intended.

Cockburn, C. J. I think it right to say that it is not until after considerable hesitation that I have brought myself to concur in the view taken by the rest of the court in this case: not that I entertain any doubt that the direct and immediate operation of the act of parliament was to make bankers responsible for the payment

of cheques when crossed in the manner which the act of parliament has pointed out, only where a cheque, when presented, has a crossing upon the face of it: but it occurred to me, on the view I at first took of this case, that, although the legislature had not contemplated making the banker responsible in a case like the present, yet such would nevertheless be the indirect effect of the statute, inasmuch as, the legislature having now made this crossing of the cheque equivalent to a direction contained in the cheque to the banker not to pay except the cheque be presented through another banker, any alteration of the cheque when once so made by the drawer would be a forgery, and therefore the payment by the banker of the instrument,—it having now [541] become a forged instrument,—would not be available to him to credit himself against the drawer. Upon more mature deliberation, however, I am led to think there is a fallacy in this view, and that my learned Brothers are right in holding that the crossing of the cheque is not any part of the cheque itself: and, although it is true that while, before the statute, the crossing merely had the effect of making it incumbent on the banker to use greater caution in the payment of the cheque, it now operates as a positive and peremptory direction to him not to pay except under given circumstances: and, therefore, it might perhaps be said that the crossing is to be taken as though the drawer had drawn the cheque in this form, —"Pay to A. B. or bearer, provided the bearer be a banker, or the cheque is presented through a banker." Although that might appear, at first sight, to be the effect of the enactment in the statute, still it is, after all, only an addition, in the shape of a direction in the cheque, having no greater operation than a separate written direction would have, if, after having drawn the cheque, the drawer had written to the banker desiring him not to pay, except the cheque were presented through a banker. I think, therefore, that it is the more correct view to hold that the crossing is a direction made in addition to the cheque,—which is the language also of the statute;—that it is not an integral portion of the cheque (as I was originally inclined to think), but an addition to the cheque, and independent of the cheque, and, consequently, that any alteration in that respect would not amount to a forgery, and that it cannot, therefore, be said that the banker is still liable as having paid a forged cheque. I think, therefore, after a good deal of hesitation and doubt, that my learned Brothers are right in the view they take; and I concur in their judgment.

Rule discharged.

[542] DIMMACK AND ANOTHER *v.* BOWLEY AND ANOTHER. June 5th, 1857.

The 137th section of the 12 & 13 Vict. c. 106, enacts that every judge's order made by consent given by a trader defendant, authorizing the plaintiff to sign judgment and issue execution, shall be filed with the clerk of the docquets and judgments in the court of Queen's Bench within twenty-one days, otherwise the order, and any judgment or execution thereon, shall be null and void to all intents and purposes whatever.—A., a trader, gave B. a judge's order for payment of a certain debt and costs to be taxed: the costs were duly taxed, and the amount of debt and costs paid; and afterwards, and within twenty-one days from the date of the order, B. caused it to be filed:—Held, that he had a right to do so.—Held, also, that, whether the statute made the filing of the order under the circumstances imperative or not, no action would lie against B. for filing it, inasmuch as it could not be said to have been done without reasonable or probable cause.—If the filing had been an unauthorized act,—semble (per Williams, J.), that the declaration would be sufficient without an allegation of want of reasonable or probable cause.

The declaration stated, that, before the committing of the grievances thereinafter mentioned, and after the commencement of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), by a certain order called a judge's order, dated the 2nd of January, 1857, made by consent, given by the now plaintiffs, then being traders and iron-manufacturers, in a certain personal action then pending in the court of Exchequer of Pleas at Westminster, wherein the now defendant Samuel Bowley was plaintiff, and the now plaintiffs were defendants, by the Right Hon. Sir F. Pollock, the Chief Baron of the said court, the said Chief Baron did order that all further proceedings in that case should be stayed, on payment of 67*l.* 6*s.* 3*d.* the debt, and costs to be taxed, and that, in default of payment of the said debt and costs, or any

part thereof respectively, as aforesaid, the now defendant Samuel Bowley should be at liberty to sign final judgment and issue execution for the whole amount remaining unpaid at the time of such default, with the costs of judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses, whether by fi. fa. or ca. sa. or both; which said costs of the said cause due to the now defendant Samuel Bowley were afterwards duly taxed by one of the masters of the said court at the sum of 10l. 14s. 6d.; which sum was thereupon inserted and written by the said master in and upon the said judge's order as the amount of the [543] said costs: that thereupon the now plaintiffs afterwards, to wit, on the 5th of January aforesaid, paid the said two sums of 67l. 6s. 3d. and 10l. 14s. 6d. mentioned in the said judge's order as the amounts of the said debt and costs respectively, to the now defendant Samuel Bowley, in one sum of 78l. 0s. 9d., who then accepted and received the said last-mentioned sum of the now plaintiff in payment and full satisfaction and discharge of the said debt and costs in the said judge's order mentioned and ordered to be paid as aforesaid; yet the now defendants, although they and each of them, before and at the time of the committing of the grievances thereinafter mentioned, had notice of the said judge's order, and of the amounts of the said debt and costs therein mentioned, and of the said payment and acceptance of the said sum of 78l. 0s. 9d. in full satisfaction and discharge of the said debt and costs in the said judge's order mentioned, but intending to injure the now plaintiffs in their credit and trade as iron-masters, notwithstanding the said payment of the said debt and costs in the said judge's order mentioned, and to cause it to appear that the said judge's order still remained unsatisfied, and that the said debt and costs therein mentioned and ordered to be paid as aforesaid still remained wholly unpaid, and that the estate and property of the now plaintiffs was charged the amount thereof, and in order to put the now plaintiffs to costs, inconvenience, and expense, after the said payment of the said debt and costs, and after the said notice to the now defendant of the payment thereof as aforesaid, and within twenty one days after the said making of the said judge's order, to wit, on the 19th of January aforesaid, wrongfully, unjustly, and maliciously, under colour and pretence of the Bankrupt Law Consolidation Act, 1849," filed a true copy of the said judge's order, together with an affidavit of the time of the consent be-[544]-ing given by the now plaintiffs to the said judge's order, and a description of the residence and occupation of the now plaintiffs, with the officer then acting as clerk of the docquets and judgments in the court of Queen's Bench, without informing the said officer, or giving him any notice whatever, that the said debt and costs in the said judge's order mentioned, or either of them, or any part thereof, had been paid, or that the said judge's order had been in any wise satisfied; whereby the said officer of the court of Queen's Bench was induced to and did forthwith cause the said copy of the said judge's order so filed as aforesaid to be numbered, and the names and additions and descriptions of the now plaintiffs, as the persons giving the said order, and also the name, addition, and description of the now defendant Samuel Bowley as the person in whose favour the said judge's order had been given, together with the date of the making of the said judge's order, and of the filing of the said copy of the said judge's order, and the sum for which judgment was, pursuant to the said judge's order, to be entered up, to be respectively entered in an alphabetical list in a book in his said office, pursuant to the statutes in such case made and provided; whereby, upon such filing of the said copy of the said judge's order, and such entry in the said book, as aforesaid, it did then appear from, in, and by the said copy of the said judge's order so filed as aforesaid, and the said entry in the said book, that the said debt and costs in the said judge's order mentioned, and therein ordered to be paid as aforesaid, were still due and unpaid by the now plaintiffs to the now defendant Samuel Bowley, and that the said judge's order was an existing unsatisfied charge against the estate and property of the now plaintiffs in favour of the now defendant Samuel Bowley, to the amount of the debt and costs in the said judge's order mentioned: by means of [545] which said several premises, and by reason of its appearing from the said copy of the said judge's order so filed as aforesaid, and from the said entry in the said book so induced to be made as aforesaid, that the debt and costs mentioned in the said judge's order were due and unpaid by the now plaintiffs to the now defendant Samuel Bowley, and that the said judge's order was an existing unsatisfied charge against the estate and property of the now plaintiffs in favour of the now defendant Samuel Bowley, to the amount of the debt and costs in the said judge's order mentioned, the credit and trade

of the now plaintiffs, as iron-manufacturers as aforesaid, had been and were greatly injured; and the now plaintiffs had been put to great inconvenience, costs, charges, and expenses in and about causing it to appear to Channell, B., one of the Barons of the said court, that the said debt and costs for which the said judge's order given as a security as aforesaid had been paid and satisfied as aforesaid, and in thereupon obtaining from the said Baron an order that a memorandum of satisfaction should be written upon the said copy of the said judge's order so filed as aforesaid, and in and about procuring the said officer of the court of Queen's Bench, in pursuance of the said Baron's order, to write a memorandum of satisfaction upon the said copy of the said judge's order so filed as aforesaid: claim, 500*l*.

To this declaration the defendants demurred,—the grounds of demurrer stated in the margin, being, "that the declaration does not allege that the defendants knew that the judge's order need not be filed, nor aver any want of reasonable or probable cause for filing the order; and that, the costs having been taxed and paid under the order, it was necessary to file the order, to prevent its being avoided by the bankruptcy of the plaintiffs." Joinder.

[546] Honyman, in support of the demurrer. The declaration discloses no cause of action. The order, in substance, was that, upon payment of the debt, and costs to be taxed, the proceedings should be stayed. The 137th section of the 12 & 13 Vict. c. 106, expressly enacts "that every judge's order, made by consent, given, after the commencement of this act, by any such trader, defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeazance or condition or not, in case the action in which such order shall be made shall be in the court of Queen's Bench,—or, in case the action wherein the same is made shall be in any other court, a true copy of such order,—shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action, and a cognovit actionem given by any defendant in any personal action, or copies thereof, and affidavits of the execution thereof, respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or cognovit actionem shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever." If the want of filing makes the order a nullity, the taxation would be without justification, and the plaintiff in the action might be called upon to refund the amount of the allocatur. [Williams, **[547]** J. Might you not have filed the order specially, with a memorandum shewing that it had been satisfied?] The 137th section goes on to provide for the mode of entering satisfaction,—in the manner pointed out in the 3 G. 4, c. 39. It is submitted that the defendants have done all that was incumbent on them towards compliance with the act. Assuming, however, that the defendants were not bound to file the order, the question is whether they have incurred any legal liability by so doing. There is no averment here that the defendants were actuated by malicious motives, or that they acted without reasonable or probable cause, which, according to the opinion of Lord Mansfield and Lord Loughborough in *Johnstone* v. *Sutton*, 1 T. R. 544, is essential. Those learned judges say: "The essential ground of this action (*a*) is, that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action" (*b*). And in *Musgrove* v. *Newell*, 1 M. & W. 582, 587, Lord Abinger says: "There is no

(*a*) For a malicious prosecution.
(*b*) See *Warren* v. *Matthews*, 6 Mod. 73.

doubt as to the principles of law by which such cases are governed: and they cannot be better laid down than in the case of *Johnstone* v. *Sutton*. To support **[548]** an action of this kind, there must be both malice in the defendant, and a want of reasonable and probable cause." *Flight* v. *Leman*, 4 Q. B. 883, 1 Dav. & M. 67, still further illustrates this principle. In *De Medina* v. *Groves*, 10 Q. B. 152, it was held that no action lies against an execution-creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved: and this was affirmed by the Exchequer Chamber, on error, —10 Q. B. 172,—where Wilde, C. J., in delivering the judgment of the court, says: "The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause. The question arising upon this record is, whether the action is maintainable without the usual averments of malice and want of probable cause. Even if there be a sufficient statement of malice in this declaration, there is no sufficient statement of the want of probable cause." The absence of an averment of the want of reasonable and probable cause, was also held fatal in *Roret* v. *Lewis*, 17 Law Journ., Exch. 99. The case of *Gibbs* v. *Pike*, 9 M. & W. 351, comes very near to the present case. There, in a suit in equity, an order was made that one G. should pay in to the name of the Accountant-General, in trust in the cause, a certain sum admitted by his answer to have been the amount of the sale of a trust-fund; and the solicitor for the plaintiff in the suit registered it under the 1 & 2 Vict. c. 110, s. 19, and G. was in consequence prevented from disposing of his lands: and it was held that the registering of the order was not of itself a wrongful act, and that no action could be maintained for it without proof of malice. Lord Abinger there says: "No doubt the plaintiff in this case has suffered great prejudice; **[549]** but he has done so in common with all others who are unfortunately placed in the same predicament with himself: and I cannot see, that, in registering this order, the defendant Pike did more than it was proper for him to do as an attorney acting for the benefit of his client in a suit in equity. If he were guilty of a mistake in unnecessarily registering this order, I do not see how it could operate to the injury of the plaintiff; for, the register refers to the order, which would speak for itself, and which any one is at liberty to inspect: and therefore, even assuming the argument to be well founded, that this was an order not proper to be registered, no one could make a mistake, or be misled by that circumstance; since, unless supported by the order, the registry is a nullity as to any effect it might have on the property of any person, and therefore cannot work any injury. On the other hand, if it is a matter of doubt whether or not a particular order of this kind ought to effect the benefit conferred by the late act, of binding the estate of the party, this would be a proper case to register it; for, here we have a trustee who admits, by his answer in Chancery, that the trust-funds were remaining in his hands, and the attorney had good reason to think that his real estate would be subject to the order of the court: but, even supposing him to be wrong in this view, still, if there were a reasonable doubt on the subject, there was a probable cause for his registering the order." So, here, the plaintiffs might have caused satisfaction to be entered on the order, and then any person inspecting the register would see that it no longer remained a charge against him: and, if there were any reasonable doubt whether the order ought to have been filed or not, there was probable cause for filing it. *Churchill* v. *Siggers*, 3 Ellis & B. 929, is also an authority to shew that malice and want of probable cause were essential to the maintenance of this action.

[550] Winston, contrà (*a*). The order in question clearly ought not to have been

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"That it sufficiently appears from the declaration that the defendants must have known that the judge's order need not be filed, and that they had no reasonable or probable cause for filing it:

"And that it was unnecessary to file the order after the payment of the debt and costs, because, in case of the bankruptcy of the plaintiffs, the validity of either payment would not depend on the order or be avoided by the avoidance of the order, but would be good irrespective of any judge's order at all; and because the statute 12 & 13 Vict. c. 106, s. 137, which was intended to prevent the mischief of secret judges'

registered after the debt and costs had been paid. The preamble of the 3 G. 4, c. 39, —which statute is to be taken in pari materia with the 137th section of the 12 & 13 Vict. c. 106, shews that the sole object of the legislature in requiring these orders to be filed was, to prevent a bankrupt's property from being swept away by means of a secret execution. It is said that it was necessary to file this order, because the statute declares that the order unless filed shall be "null and void to all intents and purposes whatever;" and, inasmuch as the order was the only authority for the taxation of the costs, if that were void, the party might have been called upon to refund the money. There clearly is no foundation for that; for the transaction would be protected by the 133rd section. The words "null and void to all intents and purposes whatever" are to receive a reasonable construction. In *Brown* v. *Child*, 5 Exch. 368, they were held to mean that the order shall be null and void, not as against the trader himself, but only as against his assignees: and there is nothing in the 137th section to take away the protection given by the 133rd. In *Farrow* v. *Mayes*, 18 Q. B. 516, an order which had **[551]** not been duly filed pursuant to the 12 & 13 Vict. c. 106, s. 137, was held void as against the assignees of the party giving it, and they recovered back the amount paid under the execution, as money had and received to their use. The rules of Hilary Term, 1853, were made after the decision of that case; and the 28th of those rules provides that "the costs of filing a judge's order for judgment against a trader defendant, under the bankrupt act, shall not be allowed unless specially ordered by the judge,"—shewing that the filing is by no means a matter of course. [Cockburn, C. J. Why is a party to run the risk of the order being avoided for want of filing? Or, why should he be held liable to an action for being perhaps over-cautious?] The gist of this action is malice: *Reynolds* v. *Kennedy*, 1 Wils. 232; *Heath* v. *Heape*, 26 Law J., M. C. 49. Here, the declaration sufficiently shews malice; and it was not necessary also to aver want of probable cause. In *Saxon* v. *Castle*, 6 Ad. & E. 653, 1 N. & P. 661, which was an action for a malicious arrest,—the judgment was arrested, not because the declaration omitted to aver the absence of probable cause, but because it alleged only that the defendant had "wrongfully and injuriously" delivered the writ to the sheriff, not adding "maliciously." [Willes, J. If you choose to deviate from the customary form of pleading, and to set out the facts of the case, you must take care that they necessarily shew want of reasonable and probable cause.] If the court are not of opinion that the judge's order ought to have been filed, the plaintiff would pray leave to amend. [Cresswell, J. It is enough to say that it is not clear that the order should not have been filed.]

Honyman, in reply, was stopped by the court.

Cockburn, C. J. I am of opinion that the judgment of the court upon this demurrer should be for the de-**[552]**-fendants. The 137th section of the 12 & 13 Vict. c. 106, provides that every judge's order made by consent given by a trader defendant, authorizing the plaintiff to sign or enter up judgment, or to issue or take out execution, shall be filed with the clerk of the docquets and judgments in the court of Queen's Bench, within twenty-one days, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever. It seems to me to be unnecessary to decide whether the filing of the order in question was essential to the protection of the defendants against liability to refund the money in the event of the bankruptcy of the debtors: for, I think, that, at all events, where an act of parliament prescribes that a certain thing shall be done, although it may be contended that under particular circumstances it might be unnecessary to comply with the requisition of the act, the party whose rights may be put in peril by its omission has a perfect right to do the thing prescribed, for his own protection: and that, where he does only what the act prescribes, his so doing cannot be made a ground of action of this kind. Therefore, though I am far from saying that the enactment in question does not make the filing of the order an act of imperative necessity, yet, assuming that it was not necessary to file it, I still think the defendants had a perfect right to do so for their protection against any demand that might have been made upon them, in the event of a bankruptcy, to refund the money, on the ground of its being an unauthorized payment. It is contended, that, if it was unnecessary to file the order,

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orders for signing judgment or issuing execution, does not render it necessary to file any such order which has been already satisfied."

and it was filed vexatiously and maliciously, the person filing it would be liable to an action. Still it would be incumbent on the plaintiff in such an action to aver the want of reasonable and probable cause for filing it; [553] and there is no such averment here. Probably that defect might be cured by an amendment. But the question is whether that averment could be proved. The whole argument proceeds upon this, that it is matter of considerable doubt whether the statute does not require the order to be filed, to give it permanent efficacy, and to protect the party from being called upon to refund the money paid under it. The very existence of the doubt would be a clear answer to the charge that the act of filing was without reasonable and probable cause. I am therefore of opinion that there is no ground of action.

CRESSWELL, J. I am of the same opinion. The statute imposes it as a duty upon the person obtaining the order, to cause it to be filed, and it inflicts upon him a penalty for a neglect to perform that duty, by declaring that the consequence of its non-performance shall be that the order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever. Even supposing that no such penal consequences were to ensue, still, inasmuch as the statute expressly says that the order shall be filed, I think the defendants had a right to file it, and that no action will lie against them for so doing.

WILLIAMS, J. I am of the same opinion. I think the defendants had a right to file the order, to protect themselves from the consequences which might have resulted from an omission to do so. Having that right, does it make any difference that they did it maliciously? One who has a right to prefer an indictment, is not liable to an action for preferring it, even although in so doing he is actuated by malicious motives. If, however, the statute gave the defendants no right to file a [554] paid order, in declaring against them for so doing I think it would not have been necessary to aver the want of reasonable and probable cause. It would be enough to shew that the filing it was an unauthorized act, and malicious (*a*).

WILLES, J. I also am of opinion that the defendants are entitled to judgment. If the 137th section be closely looked at, I think it will clearly appear that the order must be filed within the prescribed time, to give it any efficacy. Seeing that the judge's order must be filed even if execution is issued upon it, I do not see why it should not be filed where the amount is paid without execution, inasmuch as the order might be necessary to sustain the payment: *Reynolds* v. *Weld*, 4 N. C. 694, 6 Scott, 699. The defendants had a right to preserve the order as a valid order, although paid; and they could only do that by causing it to be filed under the 137th section of the Bankrupt Law Consolidation Act.

Judgment for the defendants.

[555] THE LONDON AND NORTH WESTERN RAILWAY COMPANY, *Appellants*; GRACE, *Respondent*. June 5th, 1857.

[On point as to costs see *Schroder* v. *Ward*, 1863, 13 C. B. N. S. 416.]

A county-court judge having stated a case (upon appeal) in so confused a manner that the court could not discover whether or not he meant to present a question of law for their decision, the case was remitted to him for amendment in this respect. – Upon the case coming back, it clearly appeared to involve no question of law. The court, under the circumstances, dismissed the appeal, without costs.

The following case was stated by way of appeal against a decision of the judge of the county-court of Cheshire:—

The plaintiff was an engine-driver, in the employ of the defendants; and the action was brought to recover three months' wages from the defendants. The particulars attached to the summons were as follows:—

"This action is brought for the recovery of 27*l.* 6*s.* The plaintiff, on or before the 29th of December last, was a servant of the said railway company, and was on that day, without previous notice, and without just cause, discharged from the said

(*a*) See the authorities collected in the note (*c*) to the case of *Skinner* v. *Gunton*, 1 Wms. Saund. 230 a.

service by the company. The company ought to have given three months' notice the plaintiff before discharging him; therefore the plaintiff claims three months' wages, that is to say, 42s. a week for thirteen weeks; the aggregate amount being the 27l. 6s. for which this action is brought."

The following is a copy of the agreement entered into by the plaintiff with the company, being the usual agreement on hiring engine-drivers:—

"London and North Western Railway.

"I, the undersigned, agree to subscribe to, obey, and be bound by the rules and regulations of the London and North Western Railway Company, and also to comply with the orders of the company's superior officers, and to submit to any fine not exceeding 20s., or dismissal, for a fault, under the authority or with the sanction of the directors, by the superintendent of the locomotive engine department. And I agree to give or **[556]** to receive a three months' notice before leaving the employ, with the understanding that I be allowed to leave with a fortnight's notice, if I can shew the superintendent that I have an offer of better pay elsewhere, or am going to leave Great Britain. The rate of wages is to be 7s. per day. Dated, &c."

(Signed) "JOHN GRACE.

"I, John Bolas, on behalf of the company, hereby agree to the above terms"

(Signed) "J. BOLAS."

It was proved on the trial that the plaintiff was dismissed, with the sanction of the directors, for having, as they alleged, on the night of the 23rd of December last, failed to see a danger-signal, and run into a goods train, which had been brought to a stand by want of water, on the line between Chester and Crewe. It was admitted, on the one hand, that the plaintiff had been fined two months before for a similar offence, and, on the other hand, that he had been eighteen years in the service of the company, and had risen through every grade in that department of the service.

On the part of the plaintiff, it was proved, that he left Holyhead, in charge of the mail-train to Crewe, shortly after 8 o'clock in the evening; that the journey, before reaching Chester, had been one of extreme difficulty, on account of frost and the slippery state of the rails, a sudden fall of snow and sleet, and the inclemency of the night; that, between Rhyl and Chester, the snow was so deep that the train could not proceed, and the plaintiff and a fellow-servant had been obliged to leave the engine, and clear away the snow from the rails; that it was two hours (within five minutes) behind time on arriving at Chester, in consequence of which the Chester section of the train to London had already started in charge of the guard who usually accompanied both sections of the train when united at **[557]** Chester, and the person who acted as guard of the plaintiff's train from Chester on the night in question was a railway porter, who occasionally acted as a supernumerary guard; that, at the time the collision took place, which was near 2 o'clock in the morning, the plaintiff was going at his proper and accustomed speed of thirty-five miles an hour; and that the moment he saw the lights of the goods train, he did all that was possible to stop his own train; but that the trains were then less than eight hundred yards apart, and it was too late to prevent the collision.

On the part of the defendants, it was proved that the danger-signal in the rear of the goods train into which the plaintiff ran, might have been seen by him at a very considerable distance, -at least twelve hundred yards,—and in ample time to enable him to pull up his train, if he had seen it; and it was contended that not seeing the lights and stopping in time was a sufficient "fault" to warrant the dismissal without notice.

The judge held, that, to constitute a "fault" within the meaning of the plaintiff's engagement, there must at least be culpable negligence; that, admitting all that had been proved by the defendants as above stated, and that the plaintiff had failed to see the lights for from 15 to 25 seconds after they might have been descried, still that was not a "fault," to warrant his dismissal at a moment's notice.

If the ruling of the learned judge was wrong, the verdict was to be entered for the defendants.

Bovill, Q. C. (with whom was Phipson), for the appellants. The substance of the case is, that the plaintiff, an engine-driver, omitted to see a danger signal, which it is

found as a fact he ought to have seen: and that is the ground of dismissal. [Cresswell, J. I doubt whether the case is so stated as to enable us to say that **[558]** that is the finding. Although the light might be discernable, the plaintiff may have been guilty of no default. But if, through a negligent want of look out, the plaintiff caused the accident, as at present advised, I should say that that would be a fault that would justify instant dismissal.] The judge finds that the plaintiff failed to keep a look out, and that there is no excuse for his neglect. [Cresswell, J. No doubt there is evidence of negligence: but I doubt whether there is a sufficient finding of negligence. Would this statement amount to a sufficient finding in a special verdict?] Possibly not. [Cockburn, C. J. The judge seems to draw a distinction between culpable and pardonable negligence. Suppose we are prepared to say that any negligence would justify a dismissal, that minor degree of negligence has not been found.] The judge construes the agreement as matter of law. [Cresswell, J. He has evidently adopted the word "culpable" from some recent cases of manslaughter.] He has clearly found a failure on the part of the plaintiff in the performance of an important duty.

Knowles, Q. C. (with whom was Macnamara), for the respondent. The court has no jurisdiction to entertain this appeal, the judge, sitting as a jury, having disposed of the matter. The 13 & 14 Vict. c. 61, s. 14, only gives jurisdiction to the superior court where "either party is dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence." [Cresswell, J. What the judge finds is, not that the plaintiff was guilty of no negligence, but that nothing in the shape of negligence amounts to a "fault" but culpable negligence: and that is matter of law. Williams, J. Upon what point do you understand the county-court judge to ask the opinion of this court?] Upon the question of negli-**[559]**-gence. The facts set out do not shew negligence; and the judge has not found it. [Cresswell, J. Was it not negligence on the plaintiff's part not to see the lights when he might and ought to have seen them?] The court has no jurisdiction, unless it can see that the county-court judge made a mistake in construing the word "fault." [Cockburn, C. J. If he means to say, that, to amount to a fault, there must be something more than negligence in the ordinary acceptation of the term, I do not agree with him. Williams, J. The true criterion is in the statement of the degree of duty, not of negligence. An engine-driver may be bound to use extraordinary care; and, if he omits that, he is guilty of negligence. What is the duty of an engine-driver? Cresswell, J. In substance, the county-court judge finds that the plaintiff might have seen the lights, but did not; and he finds that does not amount to a "fault."] Giving effect to all the other circumstances stated in the case, it really amounts to a finding of culpable negligence. [Cockburn, C. J. It is negligence, with mitigating circumstances. Cresswell, J. If the county-court judge means to find that a certain state of circumstances does not in point of law amount to a fault within the meaning of the agreement of hiring, we may entertain the appeal: but I think he ought to state what he finds to have been the facts. Cockburn, C. J. If the judge means to say that "negligence" in an engine-driver is not a fault, I do not agree with him. He uses a term which implies something more than negligence. If he means to say, that, under the circumstances, the man was not guilty of any negligence at all, it is better that he should so state. The case must be remitted to him for amendment in this respect.]

The case having been accordingly remitted to the **[560]** learned judge for amendment, was returned by him with the following supplemental remarks:—

"The plaintiff did everything in his power to prevent the accident, the moment he saw the light. The means he had recourse to would probably have stopped his train in 800 yards, as was ascertained by experiments subsequently made. The night had been most inclement, with much snow and sleet: but the state of the atmosphere at the moment of the collision did not precisely appear, beyond the fact that there was no fog. On a fine night, such a light might generally be perceived at a distance of 1200 yards or upwards. The stoker was engaged in putting coals on the fire when the plaintiff first saw the light, and could give no opinion as to whether he might not have seen it sooner. It was not stated that the plaintiff was short sighted: but stress was laid upon his extraordinary and protracted exertions on the night in question, upon the state of the weather, and upon the fact that the luggage train had no business upon the line at all until the mail-train had passed.

"There was no direct evidence of misconduct or neglect of duty: but I was called

upon, on behalf of the defendants, to infer from the foregoing facts that the plaintiff could not have kept such a look-out as he was bound to do, and had been properly dismissed.

"Acting in the place of a jury, I was of opinion that there was not sufficient proof of negligence to warrant a dismissal, in the ordinary relation of master and servant: but, by binding the plaintiff 'to submit to any fine not exceeding 20s., or dismissal, for a fault, under the authority or with the sanction of the directors, by the superintendent,' the defendants, no doubt, intended to reserve to themselves a more extensive power than the law alone would give them; and, if they are at liberty to say to their servants, 'The **[561]** meaning of our agreement is, that every complaint will be investigated, and, if the superintendent reports you guilty of a fault, and his finding shall be sanctioned and confirmed by the directors, you will be liable to be fined or dismissed, as the case may be, and without appeal,'—then I had no jurisdiction, and the verdict cannot be sustained: but, if, to constitute a 'fault' within the meaning of the agreement, misconduct or negligence is necessary, and such proof as would satisfy a jury that the plaintiff was guilty either of misconduct or of negligence, then the verdict ought to stand."

Bovill, Q. C., for the appellants. On the former occasion, the county-court judge submitted to the court a question of law. [Cockburn, C. J. We sent the case back to him because we thought he was mistaken in supposing it to involve any question of law.] He now presents it as a mere question of fact,—stating a conclusion at which he does not seem to have arrived at the trial. [Cresswell, J. He finds, as a matter of fact, that there was no evidence to satisfy him that the plaintiff had been guilty of misconduct or of negligence.] He has not found a single fact to justify the plaintiff in failing to see the lights in time. The proper course, it is submitted, under the circumstances, would be to send the case down to a new trial.

Knowles, Q. C., contrà, was stopped by the court.

Cockburn, C. J. Upon the facts as now found by the county-court judge, the case presents no difficulty. Our decision must be for the respondent: but, under the circumstances, I do not think it would be right to dismiss the appeal with costs. The fault was in the judge so inartificially stating the case in the first instance. The probability is, that, if it had originally **[562]** been stated as it now is, the case would not have been resisted.

Knowles. It was not the respondent's fault that the judge mistook his duty in stating the case.

Cresswell, J. The county-court judge has now deprived the defendants of the right of appeal, by placing his decision upon the fact. I agree with the Lord Chief Justice in thinking that there should be no costs.

The rest of the court concurring,

Appeal dismissed, without costs (*a*).

[563] Barrick and Others *v.* Buba and Another. June 5th, 1857.

[S. C. 26 L. J. C. P. 280; 5 W. R. 665. See *Frost* v. *Knight*, 1872, L. R. 7 Ex. 112; *Roper* v. *Johnson*, 1873, L. R. 8 C. P. 177; *Johnstone* v. *Milling*, 1886, 16 Q. B. D. 470.]

A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power.—Held, therefore, that a plea to an action upon a charterparty made between a subject of this country and a Russian subject for loading a cargo at Odessa, a Russian port,—that, at the time of making the contract, the plaintiff was a subject of Great Britain and the vessel a British vessel, and the defendant a subject of Russia residing and carrying on trade there, and that, before the expiration of the time for the defendant to load the vessel according to the charterparty, and before any breach thereof, a state of war existed, and had ever since continued, between the two countries,—was a good answer.—Held also, that a mere intimation by the agent of the charterer at Odessa

(*a*) As to costs, see *Gibbon, App., Gibbon, Resp.*, 13 C. B. 205, 219; *Liedemann, App., Schultz, Resp.*, 14 C. B. 38, 52; *Foster, App., Smith, Resp.*, 18 C. B. 161. And see *Fothergill, App., Walton, Resp.*, 14 C. B. 295.

to the master, before the time for loading had expired, that "he had ceded the charterparty, with all its rights and obligations," to a third person, and that he must address himself to such third person for a cargo, did not amount to a renunciation of the charterparty, so as to entitle the owner to sue as for a breach at that time.

This was an action for breach of a charterparty.

The declaration stated, that, by a charterparty dated the 1st of November, 1853, it was mutually agreed between the plaintiffs, owners of the ship "Lavinia," and the defendants, merchants, that the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, should with all convenient speed after discharge of her outward cargo at Odessa, or so near thereto as she might safely get, there load from the factors of the defendants a full and complete cargo of tallow, wheat, seed, or other stowage goods, or grain, at the option of the defendants, and, being so loaded, should therewith proceed to a safe port in the united kingdom, or so near thereto as she might safely get, and deliver the same afloat, on being paid freight; the cargo to have been brought to and taken from alongside at charterers' expense and risk; the ship's boats and crew to have rendered all customary assistance in towing the lighters, &c.: forty running days to have been allowed the said merchants (if the ship was not sooner dispatched) for loading and unloading; and, if half or more of the cargo consisted of wool, ten additional lay days were to have been allowed; and ten days on demurrage over and above the said laying [564] days, at 5*l.* per day; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, always excepted: and it was thereby further agreed, that, in the event of hostilities breaking out which would prevent the said vessel from loading at Calcutta, the said charterparty was to be null and void: Averment, that, within a reasonable time after the making of the said charterparty, the said ship arrived at Odessa, and there discharged her outward cargo, and was then, to wit, on the 15th of March, 1854, there ready to load from the factors of the defendants a full and complete cargo according to the terms of the said charterparty, of which the defendants had due notice: Breach, that, although the plaintiffs fulfilled and performed all conditions precedent necessary to entitle them, and they became and were entitled, and demanded of the defendants, to have the said ship or vessel loaded as aforesaid, and were always up to and at the time of the refusal of the defendants thereinafter mentioned, ready and willing to receive a cargo on board of the said vessel, and to keep and detain their said vessel at Odessa aforesaid, for the purpose of being loaded, for the said lay days, and, if half or more of the cargo had consisted of wool, for the said ten additional lay days in the charterparty mentioned, and, if thereunto requested, for the said demurrage days, or any of them, and to do and perform all things on their part according to the said charterparty, of which the defendants had notice,—yet the defendants did not nor would, at any time during the lay days mentioned in the said charterparty (which had expired before the commencement of this suit), or since, load the said vessel according to the said charterparty, but, on the contrary thereof, wholly refused so to do, and before the expira-[565]-tion of the lay days discharged the plaintiffs from further keeping or detaining the said vessel for the purpose of being so loaded; by reason whereof the plaintiffs not only lost and were deprived of the freight that they would otherwise have earned according to the said charterparty, but were put to great expense and cost in and about attempting to procure another cargo for the said ship or vessel, and were otherwise greatly damaged, &c.

The defendants pleaded, — first, that it was not agreed as alleged in the declaration.

Secondly, that the said ship was not and did not continue ready to load, and that the plaintiffs were not and did not continue ready and willing to receive and load in and on board of such ship a full and complete cargo, and to keep and detain the said vessel at Odessa, according to the true intent and meaning of the said charterparty.

Thirdly, that the defendants had no notice that the said ship was and continued ready, and that the plaintiffs were and continued ready and willing to load or receive a cargo according to the said charterparty in and on board of the said ship, as alleged, and to keep and detain the said vessel at Odessa for that purpose.

Fourthly, that, after the making of the said agreement, and before the time had elapsed for the defendants to load the said vessel, according to the said charterparty, and before any breach thereof by the defendants, hostilities broke out, within the

true intent and meaning of the said agreement, which would have prevented the loading of the said vessel at Odessa according to the charterparty, and which did, according to the true intent and meaning of the charterparty, prevent the defendants loading the said vessel at Odessa aforesaid; and that such hostilities had ever since continued; whereby the said charterparty became void.

[566] Fifthly, that one of the provisions contained in the said charterparty was, that the act of God, the Queen's enemies, *restraint of princes and rulers* (*a*), fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, were and should be always *mutually* (*a*) excepted; and that, before any breach by the defendants of the said charterparty, and thence hitherto, the defendants were hindered and prevented loading the said ship according to the charterparty, by the Queen's enemies *and the restraint of princes and rulers* (*a*), within the true intent and meaning of the charterparty in that behalf.

Sixthly, that Odessa, in the said agreement mentioned, at the time of the making of the said agreement was, and ever since had been, and still was, part of the dominions of the Emperor of all the Russias, and that, at the time of making the said agreement, the plaintiffs were and still are subjects of Her Majesty Queen Victoria, and that the said ship "Lavinia" was, and thence hitherto had been and was, a British vessel belonging to the plaintiffs, being such British subjects as aforesaid; and that the defendants were not British subjects, and were during all the time aforesaid residents in Russia, and carrying on trade and commerce there, subjects of the said Emperor, and enemies of Her said Majesty Queen Victoria; and that, before the time had elapsed for the defendants to load the said vessel according to the said charterparty, and before any breach thereof by the defendants, a state of war existed and had ever since continued between Her Majesty Queen Victoria and the said Emperor of all the Russias.

Seventhly, that the defendant did not refuse to load the said vessel, and discharge the plaintiffs from further **[567]** keeping and detaining the said vessel for the purpose of being so loaded.

Eighthly, that, before the time allowed for loading the said vessel had expired, and before any breach of the charterparty by the defendants, and before any discharge by the defendants of the plaintiffs from further keeping or detaining the said vessel for the purpose of being loaded, the said vessel departed and left the place where she was to have been loaded by the defendants according to the charterparty, and never returned thereto; and that the plaintiffs thereby prevented the defendants from loading the said vessel there according to the true intent and meaning of the charterparty.

The plaintiffs joined issue on the first, second, third, and seventh pleas of the defendants, and took issue on the fourth, fifth, sixth, and last pleas.

They also demurred to the sixth plea, —the ground of demurrer stated in the margin being, "that the state of war did not put an end to the contract between the plaintiffs and defendants, nor did it, in consequence of the existence of a state of war, become illegal by the law of England for the defendants to load or for the plaintiffs to receive a cargo." Joinder.

The issues of fact came on to be tried before Jervis C. J., at the sittings in London after Trinity Term, 1855, when a verdict was taken for the plaintiffs, subject to the opinion of the court upon the following case:—

The "Lavinia" was chartered by the plaintiffs to the defendants on the 1st of November, 1853, under the following charter:—

"New Ship. 10 years.

"Memorandum for charter. "London, 1st November, 1853.

"It is this day mutually agreed between Henry **[568]** Barrick, Esq., for himself and co-owners of the good ship or vessel called the 'Lavinia,' of London, A1, coppered, of the burthen of $\frac{3}{3}\frac{7}{5}\frac{5}{5}$ tons register admeasurement, or thereabouts, whereof A. E. is master, now at Whitby, and Messrs. Buba Brothers, London, merchants,—That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, with all convenient speed, after discharge of outward cargo at Odessa, or so near thereunto as she may safely get, shall there load from the factors of the said freighters a full

(*a*) These words were not in the charterparty.

and complete cargo of tallow, wheat, seed, or other stowage, or grain, at the option of the freighters, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall forthwith proceed to a safe port in the united kingdom (both inclusive), or so near thereto as she may safely get, calling at Cork or Falmouth, at the master's option, for orders (which are to be given by return of post, in reply to the captain's letter to the charterers, or lay days to commence), and deliver the same afloat, on being paid freight as follows—

From Odessa.	To the United Kingdom.				
	£	s.	d.		
For tallow . .	5	10	0	Per ton of 20 cwt. gross.	To a safe port between Havre and Hamburgh, 10 per cent. extra.

Five pounds ten shillings.

Other stowage goods, seeds, or grain, if any, in proportion according to the London Baltic printed rates, being in full of all port-charges, and pilotage as customary. The freighter engages to provide the necessary mats for dunnage. The cargo to be brought to and taken [569] from alongside at charterers' expense and risk; the ship's boats and crew to render all customary assistance in towing the lighters, &c. (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage always excepted); one half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by an approved bill on London at three months' date, or in cash, less discount, at the merchants' option. Forty running days are to be allowed the said merchant (if the ship is not sooner dispatched) for loading and unloading; and, if one half or more of the cargo consist of wool, ten additional lay days to be allowed; and ten days on demurrage over and above the said laying days, at 5l. per day. Detention by frost not to be reckoned as lay days. Cash for ship's use at port of loading, not exceeding 150l., to be advanced the master, free of interest and commission, against the captain's bills on the owners, which they hereby engage to accept, and, if not duly paid, to be deducted from the freight, with interest and insurance. Penalty for non-performance of this agreement, 2000l.

"HENRY BARRICK.
"BUBA BROTHERS."

The "Lavinia" arrived at Odessa on the 6th of February, 1854, with a cargo of coals. She remained in quarantine there until the 16th of February; and on the 17th she went into the mole to discharge her cargo.

On the 11th of February, the master of the "Lavinia," John Crutwell, wrote and forwarded to one of the defendants the following letter:—

"Mr. Buba. "Odessa, February 11th, 1854.

"Dear Sir,—I beg to inform you of the arrival of the barque 'Lavinia,' under my command, chartered by your [570] house in London. I have attended the Palatoria every day since my arrival on the 7th instant, and have not had the pleasure of seeing you there. May I beg an interview with you on the forenoon of the 14th instant, between 11 and 12 o'clock.—Yours, &c. "JOHN CRUTWELL."

The Palatoria mentioned in the above letter is a place on the quay at Odessa where the masters of foreign ships and merchants meet and communicate. To this letter the defendants wrote the following, dated the 18th of February:—

"Odessa, 6 (18) Fevrier, 1854.

"A Monsieur le Capitaine J. Crutwell,
"commandant du navire Anglais, 'Lavinia' (au port).

"Nous avons l'honneur de vous annoncer que nous avons cedé votre charterparty à M. Kellner: c'est lui qui vous donnera votre chargement; et c'est nous qui vous

donnerons vos expéditions. Ecrivez nous une lettre lorsque vous serez prêt à recevoir votre chargement, er dites nous de combien de mattas vous avez besoin. Nous avons l'honneur d'être, "BUBA FRERES."

The "Lavinia" commenced discharging her outward cargo of coals on the 20th of February, and completed the discharge on the 14th of March. On the last-mentioned day, the following letter was received by the defendants from the captain:—

"Messrs. Buba Brothers. "Odessa, Tuesday, March 14, 1854."

"Gentlemen,—This present is to give you notice that the barque 'Lavinia,' under my command, is now ready to receive cargo, and that the lay days according to the terms of the charterparty begin and count to-morrow, Wednesday, March the 15th. Messrs. Maho Menzer will transfer the consignment of the 'Lavinia,' to you, and you will pay all expenses in town. You will also [571] oblige by sending me the permit to load in due time. I beg to observe that there are several vessels loading wheat yet.—Yours, &c., "JOHN CRUTWELL."

The "Lavinia" was ready to load her cargo on the 15th of March.

Previously to the 14th of March.—about four or five days before the coals were discharged,—the captain saw Mr. Buba, who was acting for the defendants, personally, and told him the day that he would be about ready, and desired Mr. Buba to prepare him a cargo; in answer to which Mr. Buba said,—"Mr. Kellner will provide you your cargo."

The captain, in his evidence, stated that at that time there were reports of hostilities, but that he himself had no apprehension.

On the 15th of March, the following letter was received by the defendants from the captain:—

"Messrs. Buba Brothers. "Odessa, Wednesday, March 15th, 1854."

"Gentlemen,—I beg to refer you to the 'Lavinia's' charter mutually agreed to between Henry Barrick, Esq., for himself and owners, and Messrs. Buba Brothers, London, merchants, and freighters of the 'Lavinia.' You will there see I am to load from you (the factors of the said freighters) a full and complete cargo of tallow, wheat, seed, or other stowage goods, or grain, at the option of the freighters.

"Now, as it is said the exportation of bread-stuffs is prohibited, and that it is quite improbable you will be able to ship a cargo of bread-stuff, and that war is inevitable between Great Britain and Russia, I beg of you to ship any cargo you are liable to by the charter, without loss of time. This day is the first lay day of the 'Lavinia.' I do therefore enter this protest, and beg of you to accept it as such, against Messrs. [572] Buba, Brothers, of London, merchants, freighters of the 'Lavinia,' against Messrs. Buba, Brothers, of Odessa, consignees of the 'Lavinia,' and factors of Messrs. Buba Brothers, of London, against all losses, damages, expenses, freight, dead-freight, or demurrage, and penalty, as per charter, that may arise from not shipping any cargo you are liable to by the charter, and which it is not prohibited from this day to the day after when it may be impossible for either of us to ship the 'Lavinia's' cargo, whether from a declaration of war or hostilities occurring between Great Britain and Russia.—Yours, &c., "JOHN CRUTWELL,

"Master of the 'Lavinia.'"

Shortly after this, and on several occasions, as well before as after the declaration of war against Russia, the captain applied to one of the defendants, and asked him for a cargo. The defendant said,—"No. I have already informed you I have ceded your charterparty to Mr. Kellner. Go to Mr. Kellner for your cargo." The captain several times afterwards asked the defendant for a cargo, and always received the same answer, viz. "Go to Mr. Kellner for your cargo." The captain did accordingly go on more than one occasion to Mr. Kellner, who said,—"I have nothing to do with your cargo: Mr. Buba is your merchant."

On the 28th of March, war was declared by Her Majesty against Russia: and, on the 6th of April, the declaration of war between Great Britain and Russia was known at Odessa.

The captain, on cross-examination, stated that, on the 17th of April, there was a difference of opinion among ships' captains there, as to whether vessels would be allowed to leave Russia; that he was not seriously afraid of his vessel being detained;

that he thought there was a possibility of his being detained by the [573] Russians; that, on the 17th of April, he wrote a letter to Mr. Menzer; that, after writing the letter, he met Mr. Menzer the following day at the Palatoria, as he might meet anybody else, and consulted him as to whether it was safe for the vessel to remain at Odessa; that it was after that interview, but not until he had received the answer of Mr. Buba to his letter of the 17th of April, hereinafter set out, that he gave directions to Mr. Menzer to clear his vessel out immediately; and that, as soon as he got his clearances, he moved out from the usual loading place.

On the 17th of April, the captain wrote and sent the defendants the following letter:—

"Odessa, April 17th, 1854.

"Messrs. Buba Brothers. "Quarantine.

"Gentlemen,—This present is to inform you, that, on Sunday next, April the 23rd, the forty running lay days of the 'Lavinia' expire according to the charter. At the expiration of those days, I will clear out and sail, and obtain the highest rate of freight possible elsewhere for charterers' benefit, unless you wish the 'Lavinia' to lay the demurrage days named in the charter also. In that case, you must request me to do so, in writing, through the captain of the port's office, before the days expire.—Yours, &c., "JOHN CRUTWELL.

"P.S.—If you consider hostilities have occurred that prevent the 'Lavinia' from loading at Odessa, please say so; and you will oblige by writing me in English immediately on receipt of this."

To this letter the captain received for answer:—

"Odessa, 6 (18) April, 1854.

"Captain J. Crutwell. "'Lavinia,' Quarantine.

"Sir,—At your arrival at Odessa, we have informed [574] you that we have ceded your charterparty, with all its rights and obligations, to Messrs. George Kellner & Co., of this city, merchants. We beg again now, therefore, to address you for all your claims to those gentlemen as possessors of your charterparty.—We remain, &c., "BUBA BROTHERS."

On the 18th of April the captain wrote the following:—

"Mr. Kellner. "Odessa, 18th April, 1854.

"Sir,—I inclose a copy of a letter I wrote Messrs. Buba on Monday, the 17th instant; also their answer to that letter. On receipt of this, you will oblige me much by writing to me this day, informing me if you are going to load the 'Lavinia' or not, and on what grounds you decline loading the 'Lavinia,' if that is your determination. I have ordered the clearance of the vessel this morning: and my reason for so doing before the lay days expire is, that the Custom House will be closed in a day or two, according to the rites of the Russo Greek Church, and will not again be opened until four or five days after the 'Lavinia's' lay days expire. Therefore, if it is your intention to load the 'Lavinia,' you must let Mr. Costa know before he clears this ship out, as the lay days are nearly expired, and I would wish to come to a fair understanding with all concerned previous to my departure, which will not be before the lay days expire. I will instruct Mr. Costa to hand you my letter before he clears the ship out.—Yours, &c., "JOHN CRUTWELL.

"P.S.—Observe, I am ready at any time to take in cargo. It is only for you to send cargo, and I will take it on board."

The allied fleets came into the Odessa roads on the [575] 20th of April; and, when the fleets came in on that day, the "Lavinia," having obtained her clearances outwards as for an empty vessel, was taken by the captain out of the harbour, which is the usual loading place, into the Odessa roads. She went out from the mole into the Odessa roads, and there lay off the mole, and astern of the fleets.

The Custom House being about to close, on account of a religious holiday, the vessel could not have been cleared out after the 20th of April until several days after the expiration of the lay days, if she had not been cleared out on the 20th.

If the "Lavinia" had been loaded with cargo, she would have required fresh clearances. Without a clearance, the vessel would not have been allowed to sail.

The captain stated that he intended to lay in the mole until the lay days expired, if the fleet had not appeared; but that, owing to the appearance of the fleet, he went out of the mole into the roads.

Between the 14th of March and the 20th of April, several English vessels, all of which had come into the mole after the "Lavinia," were loading with cargos of tallow, linseed, and wool.

On the 22nd of April, Odessa was bombarded by the British and French fleets.

The "Lavinia" lay in the roads of Odessa until the 25th of April, when she sailed for Constantinople.

The captain, being asked by the plaintiffs' counsel, "Was there anything to prevent the defendants communicating with you if they wanted?" said, "They might have sent a note off to us if they pleased."

The "Lavinia" could have been loaded with tallow, seed, or grain in the space of four days: but a cargo of wool would have required a longer time.

The "Lavinia" was and is a British registered ship. The plaintiffs were and are British subjects. The **[576]** defendants were and are Russian subjects, and carrying on business at Odessa. Odessa is a Russian port; and the war had continued ever since 1854 between England and Russia until this action was brought.

The pleadings were to form part of the case; and the court was to draw the same inferences and conclusions of fact that a jury might.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover in this action. If the court was of that opinion, the verdict for the plaintiffs was to stand for an amount to be determined by arbitration. If the court was of a contrary opinion, a verdict was to be entered for the defendants accordingly, and on such issues as the court should direct, and for the plaintiffs on the other issues.

James Wilde, Q. C. (with whom was Unthank), for the plaintiffs. Since the case of *Esposito* v. *Bowden*, 29 L. T. 295, it may be considered as settled that a declaration of war puts an end to all contracts between British subjects and foreigners, which are to be performed in the enemy's country (*a*). The judgment **[577]** must, therefore, be for the defendants upon the demurrer to the sixth plea. Upon the special case, the question will be whether there was a breach of the charterparty before the declaration of war; and that question is altogether independent of that decided in *Esposito* v. *Bowden*. By the charterparty the charterers were to be allowed a certain number of lay days, and ten days additional at 5l. per day. The "Lavinia" arrived at Odessa on the 6th of February, 1854. On the 14th of March she had completed the discharge of her outward cargo, and was ready to load under the charter on the 15th. On the 28th, war was declared between this country and Russia; and it was known at Odessa on the 6th of April. The breach relied on is, that, on being informed that the "Lavinia" was ready to load, the charterers' agents informed the master that the contract had been ceded to Kellner, and referred him to Kellner for a cargo. This took place before the date of the declaration of war. No cargo being provided, the master waited until the lay days expired, and then sailed away. [Williams, J. When do you say that a breach occurred?] When the defendants renounced the contract, and the master, acting upon that renunciation, applied to Kellner for a cargo. In *Reid* v. *Hoskins* and *Avery* v. *Bowden*, 6 Ellis & B. 953, there was no renunciation of the contract by the defendants below, or acceptance of such renunciation by the

(*a*) In delivering the judgment of the court of Exchequer Chamber in that case, Willes, J., says: "It is now fully established, that, inasmuch as the presumed object of war is, as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the crown, is illegal." The sovereign of this country has the right to proclaim war, with all its consequences: enforcing or mitigating them either generally or in particular instances, as may be thought best by her government. One of those consequences, not removed or dispensed with by any treaty, order in council, or license, or by any special circumstances of necessity in the particular case, is, that trade and dealing with the enemy, unless expressly permitted, are forbidden."

plaintiffs below, before the date of the declaration of war (*a*). [Cockburn, C. J. Notwithstanding the cession by the charterers of the benefit of the contract to Kellner, would it not have been competent to them afterwards to furnish a cargo?] If any one had provided a cargo, the plaintiff would have sustained no damage. But here, the charterers profess to be no **[578]** longer bound by the charterparty; and Kellner also refuses to ship a cargo. [Cockburn, C. J. The mere fact of the defendants having arranged with Kellner for furnishing a cargo, does not amount to a renunciation of the contract. We must look at the whole facts. As late as the 18th of April, the master is in communication with the Messrs. Buba about the loading.] In *Hochster* v. *De La Tour*, 2 Ellis & B. 678, the plaintiff declared on an agreement to employ him as a courier, from a day subsequent to the date of the writ,—averring, that from the time of the agreement, till the refusal by the defendant after mentioned, he (the plaintiff) was ready and willing to perform his part of the contract; and alleging for breach, that, before the day for the commencement of the employment, the defendant refused to perform the agreement, and discharged the plaintiff from performing it, and wrongfully wholly put an end to the agreement. Upon motion in arrest of judgment, it was held, that a party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract, and that an action will lie for such breach before the time for the fulfilment of the agreement; and that it sufficiently appeared on the face of the declaration that there was on the part of the defendant, not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which the plaintiff was entitled to act; and, consequently, that the plaintiff was entitled to judgment. So, here, the defendants have no right to affect to absolve themselves from the contract by ceding their rights under it to another. [Cockburn, C. J. They do not absolve themselves from the contract: on the contrary, their very assertion that they have transferred their rights under it to another, keeps the contract **[579]** alive.] They absolutely ignore the master's claim on them for a cargo, and refer him to Kellner; and the master thereupon addresses himself to Kellner. Their letter of the 18th of April expressly speaks of their having ceded the charterparty, "with all its rights and obligations," to Kellner. That is, in effect, saying that they will have nothing further to do with the contract. [Williams, J. Could the master have refused to receive a cargo from Kellner within the lay days?] That would depend upon whether or not he had attorned to Kellner. [Cockburn, C. J. Would the master of the "Lavinia" have been justified in sailing away immediately upon his receiving the intimation from Messrs. Buba that they had ceded their rights under the charterparty to Kellner?] It is submitted that he would: he was not bound to receive a cargo from anybody else. [Cockburn, C. J. Was he not bound to wait for the lay days to run out.] No. *Reid* v. *Hoskins*, and *Avery* v. *Bowden*, shew that the renunciation must be acted upon at the time. [Cockburn, C. J. No doubt, where the contract is entirely repudiated.] It is difficult to reconcile *Hochster* v. *De La Tour* with the cases in the Exchequer Chamber. Here, the renunciation was complete at the time; or, at all events, it became so when the master went to Kellner. A contract is broken when the party incapacitates himself from performing it: *Lovelock* v. *Franklyn*, 8 Q. B. 371. [Cockburn, C. J. I do not find that the master ever foregoes his claim upon the charterers for a cargo.] If once there was a complete renunciation, acted upon by the master, he had no power afterwards to waive the breach. [Cockburn, C. J. *Avery* v. *Bowden*, 5 Ellis & B. 714, is a distinct authority to shew that the charterers' saying "I cannot perform the contract," does not amount to a breach until the expiration of the time stipulated by the contract for its performance. It is no renunciation: he **[580]** does not affect to say that he thereby gets rid of his obligation. In that case, the defendant by a charterparty agreed to load a cargo on board the plaintiffs' ship at Odessa. To a count for not loading, the defendant pleaded, that, before the cause of action arose, war was declared between Great Britain and Russia, which rescinded the contract. It appeared, that, after the ship had arrived, and before the declaration of war, the defendants' agent had repeatedly told the master that he, the agent, had no cargo for the ship, and that he had better go away: but the master continued to require a cargo till the declaration of war was known at

(*a*) See *Reid* v. *Hoskins*, 4 Ellis & B. 979, 5 Ellis & B. 729; *Avery* v. *Bowden*, 5 Ellis & B. 714.

Odessa, which was before the ship's laying days had expired: and it was held, that the refusal of the agent before the time for loading had expired, not being acted on as a renunciation of the contract, was not a cause of action, and that the plea was therefore proved.] Bubas' last letter clearly shews that they intended to repudiate all obligation to load under the charterparty. In *Cort* v. *The Ambergate Railway Company*, 17 Q. B. 127, it was held, that, on a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as the purchaser has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the supply, such vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. Lord Campbell there says: "Was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, 'Make no more for us, for we will have nothing to do with them,' was not that refusing to accept or receive them according to the contract?" [581] Here, there was, it is submitted, an absolute renunciation of the contract by the agents of the charterers, acted upon by the master by his placing the vessel at the disposal of Kellner, and consequently a complete breach before the date of the declaration of war.

Bovill, Q. C., contrà. The case is disposed of by *Avery* v. *Bowden*, 5 Ellis & B. 714, 6 Ellis & B. 953. [He was stopped by the court.]

COCKBURN, C. J. I am clearly of opinion that this case falls within the principle of the decisions of the Exchequer Chamber in *Avery* v. *Bowden*, and *Esposito* v. *Bowden*. There was no breach before the day upon which the declaration of war between this country and Russia took place. The defendants, therefore, are entitled to judgment.

CRESSWELL, J. I am entirely of the same opinion. The sixth plea is disposed of by the judgment of the Exchequer Chamber in *Esposito* v. *Bowden*: and the defendants are entitled to our judgment on the special case upon the authority of *Avery* v. *Bowden* and *Reid* v. *Hoskins*.

WILLIAMS, J. Not only do I agree with my Lord and my Brother Cresswell that this case is governed by the decisions in *Avery* v. *Bowden*, *Reid* v. *Hoskins*, and *Esposito* v. *Bowden*, but I feel bound to add that I dissent entirely from every word of Mr. Wilde's argument.

WILLES, J. I also think that the defendants are, as well upon principle as upon authority, entitled to our judgment both upon the demurrer to the sixth plea and upon the special case.

Judgment for the defendants.

[582] EMERY *v.* CLARK. June 5th, 1857.

A discharge of the principal under the insolvent debtors act, 1 & 2 Vict c. 110, does not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter.

This was an action of debt for money paid by the plaintiff for the defendant, and for money found due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded,—first, never indebted,—secondly, that before the commencement of this suit, to wit, on the 13th of July, 1854, by the order and adjudication then made by the judge of the county-court of Essex, pursuant to the acts then in force for the relief of insolvent debtors in England, at the county-court of Essex holden at Chelmsford, before the said judge on that day, he the defendant was duly and pursuant to the acts then in force for the relief of insolvent debtors in England, discharged of and from the said several causes of action in the declaration mentioned, and each and every of them,—which said order remained in force thitherto.

Issue having been joined upon these pleas, the following case was, pursuant to a judge's order made by consent, stated for the opinion of the court:—

By a certain bond, dated the 19th of July, 1852, and on that day duly executed by the several obligors therein named, being the above-named defendant and plaintiff, one John Edie, and one W. L. Clark, these four persons became held and firmly bound to William Hopkinson in the sum of 1000*l.*, to be paid to the said William Hopkinson, or to his certain attorney, executors, administrators, or assigns, for which payment they the defendant, the plaintiff, John Edie, and W. L. Clark, [583] bound them-

selves, and each of them, and any two and any three of them, their and each of their heirs, executors, and administrators, jointly, severally, and respectively, firmly by the said bond.

The said bond was subject to a certain condition thereunder written for (amongst other things), the payment by the said obligors to the said William Hopkinson of the debt or principal sum of 522*l.*, with interest for the same at the rate of 5*l.* per cent. per annum, by certain instalments and on certain days in the said condition mentioned; and also, until the whole of such principal sum and interest should be fully paid and satisfied as in the said condition mentioned, from time to time duly and punctually paying to the National Provident Institution in the said condition mentioned (amongst other sums) the annual premium of 6*l.* 10*s.* 8*d.* at least fifteen days before the last day on which the same was to be paid, in order to keep on foot a certain policy of assurance in the said condition mentioned.

[A copy of the bond and condition was set out in the case.]

The plaintiff and the said John Edie and William Lewes Clark respectively became parties to and executed the said bond as sureties for and at the request of the defendant, and not otherwise.

The defendant made default in payment of the two instalments of 58*l.* each which according to the said condition became due on the 19th of July, 1853, and the 19th of January, 1854.

After the said bond was executed by the said obligors, after such default, and on the 31st of May, 1854, the defendant, then being a prisoner for debt in the gaol of Springfield, in the county of Essex, according to the statutes in that behalf then in force petitioned the court for the relief of insolvent debtors in England for **[584]** his discharge from such custody and imprisonment, and filed his petition and schedule in that behalf in that court; and, having given the plaintiff due notice according to the insolvent debtors act then in force, was, on the 13th of July, 1854, discharged pursuant to the acts then in force for the relief of insolvent debtors in England, by the order of adjudication then in that behalf made by the judge of the county-court of Essex, pursuant to those acts, at the county-court of Essex holden at Chelmsford before the said judge on that day.

[Copies of the petition and order of adjudication were set out in the case.]

The following is a copy of so much of the schedule filed by the defendant upon his application for his discharge under the insolvent debtors act, as relates to the said William Hopkinson, and the debt owing from the defendant to him:—

No.	Names and descriptions of creditors and claimants, and their present or last residences.	Amount.	When contracted.	Admitted or disputed.	Nature and consideration of the debt, and securities, if any; also, if the debt is disputed, the reason thereof.
		£ s. d.			
2	William Hopkinson, sen., Paul's Wharf, Upper Thames Street, London, corn merchant.	416 16 6 and interest.	1852.	Admitted.	The balance due to this creditor for money lent. The original amount was 557*l.* 9*s.* 2*d.*, for which I gave this creditor a bond dated 12th January, 1852, in which W. Emery, W. L. Clark, and John Edie (creditors No. 3) joined as my sureties. The loan was payable by instalments. I paid the first instalment, and Mr. Emery paid the second; but default was made in payment of the third instalment. This creditor has commenced an action against me and my said sureties.

[585] The following is a copy of so much of the said schedule filed by the defendant as relates to the plaintiff and the said John Edie and W. L. Clark :—

No.	Names and descriptions of creditors and claimants and their present or last residences.	Amount.	When contracted.	Admitted or disputed.	Nature and consideration of the debt, and securities, if any; also, if the debt is disputed, the reason thereof.
		£ s. d.			
2	William Emery, Blackwall, Middlesex, cooper. W. L. Clark, Upper North Street, Poplar, London, broker, and H. Edie, Bow, Middlesex, ironfounder, and W. Papineau, Stratford, Essex, chemist, the two last being executors of John Edie, late of Bow, Middlesex, ironfounder, deceased.	416 16 6 and interest.	1852.	Admitted as to liability.	The amount these creditors are liable to pay to Mr. W. Hopkinson, creditor No. 2, on the bond above mentioned, as my sureties, and for which an action has been commenced against them.

After the defendant was discharged under the insolvent debtors act, as aforesaid, the plaintiff, under and by virtue of the said bond, and the condition thereof, and as the surety in that behalf of the defendant, and not otherwise, was required to and did pay to the said William Hopkinson, on account and in payment and discharge of certain instalments and interest, that is to say, the last six instalments of 58l. each in the said condition mentioned, which after such discharge as aforesaid became due and payable to the said W. Hopkinson under and by virtue of the said bond and condition, and of interest due and payable under and by virtue of the said condition, paid to the said W. Hopkinson six sums of money together amounting to 377l. 0s. 1d.

[586] The following table or account states and shews the day on which each of the said six instalments paid as aforesaid became due, the sum paid as aforesaid by the plaintiff in discharge thereof and of certain interest due under and by virtue of the said bond and condition, and the day on which each such sum so paid by the plaintiff was so paid: each instalment paid by the plaintiff, and the sum paid in discharge thereof and of interest, are in such account on one and the same line :—

Dates when instalments paid by the plaintiff became due.	Amount of instalments paid by the plaintiff.	Dates of payments by the plaintiff.			Sums paid.		
			£	s.	d.	£	s.	d.
19 July, 1854 . . .	58l. . . .	3 Aug. 1854	30	0	0			
		28 Aug. 1854	36	14	0	66	14	0
19 January, 1855 . .	58l. . . .	22 Jan. 1855 . . .				65	5	0
19 July, 1855 . . .	58l. . . .	19 July, 1855 . . .				63	16	0
19 January, 1856 . .	58l. . . .	23 Jan. 1856 . . .				62	7	0
19 May, 1856 . . .	58l. . . .	11 Aug. 1856 . . .				59	18	9
19 Oct. 1856 . . .	58l. . . .	15 Nov. 1856 . . .				58	19	4
						£377	0	1

After the defendant was discharged under the insolvent debtors act as aforesaid, and on the 22nd of December, 1854, the plaintiff under and by virtue of the said bond and the condition thereof, and as the surety in that behalf of the defendant, and not otherwise, was required to and did pay to the said National Provident Institution in the said condition mentioned the premium or sum of 6l. 10s. 8d., which, after the defendant was discharged as aforesaid, and on the 22nd of November, 1854, became payable to the same institution for keeping on foot the said policy of assurance.

On the 18th of December, 1855, under and by virtue of the said bond and the

condition thereof, and as the surety in that behalf of the defendant, and not otherwise, the plaintiff was called upon and required to and did pay to the said institution the further premium or [587] sum of 6l. 10s. 8d., which, after the defendant was discharged as aforesaid, and on the 22nd of November, 1855, became payable to the same institution for keeping on foot the said policy of assurance.

This action was brought to recover the several sums paid by the plaintiff as aforesaid, and together amounting to 390l. 1s. 5d.

The court were to be at liberty to draw any inference of fact which a jury might have drawn upon a trial at nisi prius; and the case was to be amended as the court might direct.

The question for the opinion of the court was, whether or not the defendant's discharge under the insolvent debtors act was an answer or defence as to the plaintiff's demand or any part thereof.

If the court should be of opinion that such discharge was an answer or defence as to the whole of the plaintiff's demand, then the plaintiff agreed that a judgment of nolle prosequi should and might be entered against him immediately after the decision of this case, or otherwise, as the court might think fit.

But, if the court should be of opinion that such discharge was an answer or defence as to only a part of the plaintiff's demand, then the defendant agreed that for that part of the plaintiff's demand, that is to say, for that part of the said sum of 390l. 1s. 5d. with respect to which the court should be of opinion that the said discharge was not an answer or defence, judgment should be entered against him by confession, immediately after the decision of the case, or otherwise, as the court might think fit.

And, if the court should be of opinion that such discharge was not an answer or defence as to any part of the plaintiff's demand, then the defendant agreed that judgment should be entered against him by confession for the whole of the said sum of 390l. 1s. 5d., imme-[588]-diately after the decision of the case, or otherwise, as the court might think fit, and that judgment should be entered accordingly.

Rowley, for the plaintiff. The defendant's discharge under the insolvent debtors act did not, it is submitted, exonerate him from liability to pay the sums sought to be recovered in this action, which became due subsequently to the date of the vesting order. By the 75th section of the 1 & 2 Vict. c. 110, the court is impowered to adjudge the insolvent to be entitled to the benefit of the act "as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as afore said, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid." The 80th section enacts "that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall, upon application at any time made in that behalf, ascertain, regard being had to the original [589] price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of making such vesting order as aforesaid; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by this act, without prejudice, nevertheless, to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act." The sums claimed here are not sums of money payable by way of annuity or otherwise by virtue of any bond, covenant, &c.: they are sums of money claimed by virtue of a rule of law, implying a promise on the part of the principal to repay the surety any sums he may be called upon to pay on his behalf. It is the payment and not the bond, that constitutes the liability. In *Powell* v. *Eason*, 1 M. & Scott, 68, 8 Bingh. 23, it was held that one who was discharged under the insolvent debtors act 7 G. 4, c. 57, was not exonerated from the claim of a surety

on a promissory note which had become due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. Tindal, C. J., after referring to the 10th and 47th sections of the statute, proceeds: "Was, then, the plaintiff a creditor of the defendant at the time of presenting or filing his petition? The plaintiff was then only a surety for the payment of a promissory note due from the defendant to Mary Bell. There was no debt as between the plaintiff and the defendant, and consequently the plaintiff was not a creditor of the defendant at the time of his discharge, and therefore he does not fall within the words or meaning of either of those clauses of the act. In confirmation of this view of the subject, we find that, in the last act for the amendment of the laws relating to [590] bankruptcy (6 G. 4, c. 16), which was passed in the year preceding that in which the statute in question was passed, it was found necessary to introduce a clause to relieve bankrupts from the claims of sureties and other persons who were liable for the bankrupt's debts." He then refers to the 52nd section of the 6 G. 4, c. 16, and concludes thus,—"But there is no such auxiliary clause in the act now before us, from which we may infer that the legislature did not intend a surety for a bankrupt to stand in the same situation as a surety for a person who became insolvent, or that the same relief should be granted to the latter as to the former." And that is confirmed by a subsequent case of *Abbott* v. *Bruce*, 7 Scott, 753, 5 N. C. 598, where it was held that the grantor of an annuity, notwithstanding his discharge under the insolvent debtors act, is liable to his surety for payments made on account of the annuity subsequently to the discharge, though due before.

The court called on

David Keane, for the defendant. The object of the statute evidently was, that the adjudication should enure as a complete discharge of the insolvent from all his debts. To hold that it does not extend to a demand of this sort, would be to make him indirectly liable in respect of a debt from which he has been directly discharged. In all the cases where the insolvent has been held to be liable notwithstanding the adjudication, the decision has proceeded upon the ground that there could be no valuation of the debt. Thus, in *Brown* v. *Fleetwood*, 5 M. & W. 19, 7 Dowl. P. C. 387, where A. purchased of B. his business of an attorney, the purchase-money to be paid by two instalments, and the conveyance contained a proviso giving A. the power, within a limited time, either of completing the purchase or giving B. notice of his abandonment of the contract, in which [591] case B. was to repay 50l. of the purchase-money—it was held that B.'s discharge under the insolvent debtors act before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50l. after such notice given, for that it was not a contingency capable of valuation at the time of the insolvency. Parke, B., there says: "It is clear that the insolvent is not discharged from any debt which cannot be proved before his discharge. It is different in the case of bankruptcy, where the debt may either be valued at the time of the bankruptcy, or the party may until the contingency occurs. In the case of insolvency, there is no provision for future valuation: the insolvent is discharged only from such debts as are capable of valuation at the time of the insolvency. It is perfectly clear that this was not: it was wholly uncertain at that time whether the business would be profitable or not, or whether the plaintiffs would choose to give it up or not." Here, however, the thing is susceptible of valuation.

Per Curiam. The discharge of the defendant under the act, clearly did not enure to release him from liability to indemnify his sureties against payments subsequently made by them under the bond.

Judgment for the plaintiff.

[592] William Forrester Bramley, *Appellant*, Joseph Chesterton, *Respondent*.

May 29th, 1857.

[S. C. 27 L. J. C. P. 23; 3 Jur. N. S. 1104; 5 W. R. 690.]

Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises,

but to whom the tenant's wrongful act had prevented him from delivering possession.

This was an action to recover the sum of 50l., that is to say, 40l. damages sustained by the plaintiff in consequence of the defendant having neglected and refused to deliver up to the plaintiff, when thereunto lawfully required by him, the possession of a certain dwelling-house situate in Granby Street, in the parish of St. Margaret, in the borough of Leicester, of which dwelling-house the defendant had been the occupier as tenant to the plaintiff, and for the determination of which tenancy due notice had been given by the plaintiff to the defendant; and also 10l., the value of two shop-windows, door, and shutters, with the fixings and appendages, unlawfully removed by the defendant from the above-mentioned dwelling-house.

The cause was tried before the judge of the said court, without a jury, upon the 22nd of October, 1856.

The plaintiff proved that he was the landlord of the premises mentioned in the plaint, which in May, 1855, were in the occupation of the defendant as tenant from year to year, at the rent of 35l. a year.

Before the 24th of June, 1855, the plaintiff gave notice in writing to the defendant to quit the said premises on Christmas-day then next. After service of the notice to quit, and so soon as time had expired so that the plaintiff could not give defendant fresh notice to quit at Lady Day, the defendant called upon the plaintiff, and refused to give up possession pursuant thereto, alleging, among other reasons, that his tenancy did not commence at Christmas, and that the notice was informal on other grounds. The defendant also **[593]** immediately instructed his solicitor to write to the plaintiff; and, on the 27th of August, 1855, the following letter was accordingly sent:—

"Leicester, August 27th, 1855.

"Sir,—Mr. Chesterton has brought me a notice to quit sent or delivered by you, directing him to give up possession of the house he now occupies in Granby Street, in this town; on perusing which, and some other documents connected with the tenancy of those premises, it would seem that your notice is informal and invalid on several grounds.

"Thinking you might probably act under the supposition that the notice was good, and that he would leave the premises at the time stated in your notice, I am directed by Mr. Chesterton to acquaint you that he does not intend to give up the premises at that time, unless some satisfactory arrangement be previously made for putting an end to the tenancy.—Yours, &c., "PAUL DUDLEY."

The plaintiff at such interview informed the defendant that he the plaintiff had let the premises as from Christmas then next to Mr. Thomas Harcott, at an increased rent, and that therefore the defendant must go out. The defendant then requested the plaintiff to see if he could arrange with Mr. Harcott to forego his agreement, and he, the defendant, would pay the increased rent. Accordingly the plaintiff saw Mr. Harcott, who refused to give up his agreement, and informed the plaintiff that he should bring an action to enforce it if he were not duly let into possession; that he, Harcott, had given notice to quit his then shop; and that he could not recede from the bargain. This conversation was communicated by the plaintiff to the defendant, who said thereupon that he, the defendant, did not care, that he could not give up the premises.

[594] The defendant did accordingly refuse to quit the said premises pursuant to the said notice; whereupon the plaintiff entered a plaint in the said Leicestershire county-court, and thereupon a summons issued to the defendant; and, upon the said summons coming on to be heard upon the 19th of March, 1856, it was adjudged by the said court that the plaintiff recover of the said defendant the said premises, together with costs of suit: and it was ordered that the defendant should forthwith quit and deliver up possession of the said premises, and that, if necessary, a warrant should issue for that purpose; and it was further ordered that the defendant should pay to the clerk of the court, at his office, 7l. for the plaintiff's costs.

Before the said 19th of March, 1856, the plaintiff was served with a writ in the court of Exchequer at Westminster, at the suit of the said Thomas Harcott, of which writ the defendant had notice, and subsequently with a declaration for breach of the

said agreement, wherein the said Thomas Harcott claimed of the plaintiff 100l. as damages.

The defendant, on or before the 24th of March, 1856, sent Mr. Herbert, as his agent, to the plaintiff, and offered to pay him 8l. 15s. in respect of rent and damages due to him the plaintiff, provided he the plaintiff would sign a receipt tendered by Herbert, and which purported to be in discharge of rent and all damages, but the plaintiff refused to do so, and said that he could not give a receipt for damages, because he did not know what he should have to pay in Harcott's action; but the plaintiff at that time received from Mr. Herbert the sum of 8l. 15s., and signed the following receipt:—

"March 24th, 1856, Leicester.

"Received the sum of 8l. 15s., less property tax, for one quarter's rent due 25th March, 1856." (Signed) "W. F. BRAMLEY."

[595] The plaintiff paid into court in Harcott's action the sum of 10l., which Harcott took out of court, and went on with his action for damages ultrà. After notice of trial was given for the Leicestershire Summer Assizes, 1856, the plaintiff settled the said action, by the payment of 8l. further as damages, and 13l. as the costs of Harcott's attorney; and the plaintiff also paid to his own attorney 6l. 12s. 6d. for his costs in the action,—making together the sum of 37l. 12s. 6d.

At the close of the plaintiff's case, the court determined that the plaintiff could not recover any damages in respect of the shop-windows, or any damage in respect of rent,—being a sum claimed by him amounting to the difference between the rent for a quarter as paid by the defendant, and the amount which would have been paid by Thomas Harcott. The question, therefore, was, could the plaintiff recover the said 37l. 12s. 6d. or any part thereof.

On the behalf of the plaintiff, it was urged that the plaintiff was entitled to recover the amount as special damages in trespass for mesne profits; and the court was referred to *Tindall* v. *Bell*, 11 M. & W. 228, and asked to find as a fact that the plaintiff had done what a reasonable man could be required to do to settle the suit, and that the sum so paid was the necessary consequence of the defendant's wrongful holding over, and that, at all events, the plaintiff was entitled to pay money into court and costs up to that time, and that the plaintiff had done what a prudent man would have done in settling the suit.

On behalf of the defendant, it was argued, that the claim for damages alleged to be consequential on his holding over, was not sustainable, as the plaintiff might have sued the defendant for double value, under the statute 4 G. 2, c. 28; and that the acceptance of rent, received qua rent, up to the 25th day of March, was a **[596]** waiver of the plaintiff's right to claim double value, or to claim damages in the nature of mesne profits on the ground that the defendant was a trespasser after Christmas, 1855; and that the receipt of such last-mentioned rent was an acknowledgment that the defendant was lawfully in possession up to that time: and the case of *Doe d. Cheny* v. *Batten*, Cowp. 243, was referred to.

On behalf of the defendant, it was also contended that the damages were too remote, and that the money which the plaintiff had been compelled to pay to a third person, under a contract to which the defendant was no party, was not the necessary damage resulting from the defendant's holding over.

On behalf of the defendant it was also contended, that, as an action for double value would not lie in a case where the defendant held over under a bonâ fide claim of right,—*Wright* v. *Smith*, 5 Esp. N. P. C. 203,—so, as the defendant held over here under such a claim, this action was not sustainable; and that the plaintiff had no right to let the premises under the circumstances.

On behalf of the plaintiff, it was urged in reply that the right to bring an action for double rent under the statute referred to was a cumulative remedy, and did not deprive the plaintiff of his right to recover the damages claimed as special damages in this action; that the acceptance of the rent under the circumstances was no waiver; nor was the money paid or accepted in satisfaction of damages; nor was such acceptance any admission of the defendants being rightfully in possession,—upon which point the prior judgment of the court was conclusive inter partes.

It was further argued for the plaintiff that the damage was not too remote; that the defendant had all along known that Harcott would bring an action **[597]** on his

agreement; that the damages were the necessary consequences of the defendant's wilfully holding over; and that, as the defendant wilfully held over, bona fides had no influence upon the determination of the rights of the parties.

The judge directed a verdict to be entered for the plaintiff for 37l. 12s. 6d.; and he found as a fact that the plaintiff had done what a reasonable man would have done in settling the action with Harcott upon the terms above mentioned; and that the costs did not exceed what would have been incurred in the paying of the money into court: and that, as a matter of fact, the plaintiff did not accept the said sum of 8l. 15s. in satisfaction of the damages herein, or waive thereby his claim thereto, unless as a matter of law his acceptance of such money, and his giving such receipt, deprived him of his right to bring any action for damages under the circumstances disclosed upon this case.

The question for the opinion of the court was, -first, whether the acceptance of such money, and the giving of such receipt, in point of law, deprived the plaintiff of his right to damages in this action,—secondly, whether the damages sought to be recovered were too remote.

Phipson, for the appellant. It may be conceded that the mere receipt of rent did not in point of law deprive the plaintiff of his right of action for any legal damage he might have sustained. But the question is, what is the true measure of damages sustained by the plaintiff from the defendant's wrongful act in holding over after the expiration of the notice to quit. The real damage, it is submitted, is, the difference between the rent which the defendant contracted to pay and the increased rent. In *Fletcher* v. *Taylour*, 17 C. B. 21, Jervis, C. J., and Willes, J., professing to found themselves upon the rule [598] laid down by the court of Exchequer in *Hadley* v. *Baxendale*, 9 Exch. 341, suggest that the damages in an action for the breach of a mercantile contract should be estimated according to the average per-centage of mercantile profits. *Hadley* v. *Baxendale* was an action against a carrier for unreasonable delay in the conveyance of a shaft for a mill, whereby the mill was prevented from working: and Alderson, B., in delivering the judgment of the court, says: "We think the proper rule in such a case as the present is this:—Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it" (*a*). In *Robinson* v. *Harman*, 1 Exch. 850, 855, Parke, B., says,—"The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." [Williams, J. Suppose the mesne landlord were called upon to pay double value, could he recover that as damages against his tenant?] Possibly that might be a damage naturally resulting from the wrongful act of the under-tenant. [Williams, J. I find in Chitty on Pleading, vol. ii., p. 342, a precedent of a declaration in an action of that sort.] In Maine on Damages, pp. 15, 16, it is said,—"One very common instance in which damages are held to be too remote, [599] arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. Where A. agrees to execute work for B., or to sell him goods, or hire him a ship at a future day, the benefit to A. is the profit flowing from the transaction, and to this he is entitled. But, when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract. This distinction has been very clearly pointed out in a case in the Supreme Court of New York, *Masterton* v. *The Mayor of Brooklyn*, 7 Hill (American), 61. The plaintiffs had contracted with the defendants to furnish marble from a specified quarry, at a fixed

(*a*) See the remarks upon these cases in Maine on Damages, page 9.

sum, for the erection of a city hall. The plaintiffs entered into a contract with the proprietors of the quarry for the required amount, at a smaller sum. After delivering a part of the marble, the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. Kent, J., ruled accordingly 'that the jury should allow the plaintiffs as much as the performance of the contract would have benefitted them;' and this ruling was affirmed in the court above. Nelson, C. J., said: 'It is not to be denied that there are profits or gains derivable from a contract which are **[600]** uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulation between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. When the books and cases speak of the profits anticipated from a good bargain, as too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself,—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement.'" The damages here claimed clearly do not fall within that principle: and it is impossible not to foresee the inconvenience and the difficulty that will result from a departure from the broad rule which these authorities lay down. [Willes, J. I am by no means satisfied that this is an action for breach of contract.] It is submitted that this is sub-**[601]**-stantially an action for the breach of the implied contract on the part of the tenant to deliver up possession of the premises at the expiration of his tenancy. The rule is laid down in Sedgwick on Damages, pp. 66 et seq. and pp. 210 et seq., in terms similar to those in Maine, and several authorities cited, the general result of which is, that "the damage to be recovered must always be the natural and proximate consequence of the act complained of:" and this rule is equally applicable to actions of tort as to actions upon contract. "Substantial damages will be given for the detention of an article which has fallen in value between the time it was taken and the time it was returned:" Maine, p. 217, citing *Williams* v. *Archer*, 2 C. & K. 26, 5 C. B. 318. "The action was detinue for railway scrip which was delivered up under an order in the above terms. The plaintiff proceeded to trial, and proved that, at the time of demand, the scrip were worth 3l. 5s. each, but only 1l. at the time of the delivery. The judge directed the jury that the true measure of damage was the loss the plaintiff sustained by not having the shares when demanded; and that they might, if they pleased, measure that loss by the difference between the price at the time of the refusal and the price at the time when the certificates were given up; and they found accordingly. This direction was held to be correct, on a writ of error." *Pounsett* v. *Fuller*, 17 C. B. 660, further illustrates this principle.

Mundell, for the respondent. This is not a plaint in contract, but strictly in tort: *Doe d. Cheny* v. *Batten*, Cowp. 243; *Goodtitle* v. *North*, 2 Dougl. 583; *Dunn* v. *Large*, 3 Dougl. 335. The tenant is a wrong-doer in holding over after the expiration of notice: from the time the landlord's title accrues, he is a trespasser. [Cockburn, C. J. Was this man a trespasser during the **[602]** time of the occupation in respect of which you accepted rent from him?] It is expressly found in the case that there has been no waiver; and it appears from the statements therein that the appellant had been previously ejected. *Draper* v. *Crofts*, 15 M. & W. 166, shews that this is not an action for breach of contract. It was there held, that, where there is a demise to A. and B. for a term, and B holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over. And *Hanslip* v. *Padwick*

5 Exch. 615, is an authority to shew that, even if this were a case of contract, the damages in question would be recoverable. The argument on the other side, if well founded, would prevent all dealing with an estate in reversion. The defendant must have contemplated at the time of entering into the contract of tenancy, that the landlord would let the premises to a new tenant before the expiration of his term: and the case finds that he did in fact know that the premises had been let to Harcott, and that Harcott threatened an action if he did not obtain possession. Professor Sedgwick, in treating of the measure of damages in an action for mesne profits, says, —2nd edit. p. 128, —"It is plain that the measure of compensation which we are now considering, has been involved in confusion by the technical character of our forms of action. 'The dicta on the subject,' says Gibson, C. J., in Pennsylvania, 'seem to have been predicated by judges who had no precise idea of it, for they have not defined it by any land-marks' (*a*). The action of trespass, being one of tort, admits of any evidence in aggravation, and therefore, in one sense, it is correct to say that the damages in this proceeding are entirely at large and under the control of the jury. But, on the other hand, **[603]** there is nothing necessarily in the action in the nature of a trespass. The property may have been withheld and the rents received in entire good faith. In this case, the allegations of force, &c. are purely fictitious, and it certainly never would be tolerated on such facts that the jury should give any damages beyond the actual value of the income. It may then be said, as long as the technical form of action is maintained, that, where circumstances of malicious aggravation are proved, such, for instance, as a wilful holding for the purpose of oppression, the jury may give vindictive or exemplary damages, but that, where no such facts are shewn, they are limited to the actual annual value of the property, with interest thereon, and the costs of the ejectment suit." This is an exceptional case. [Cockburn, C. J. Do you contend, that, if the landlord had let the premises to the new tenant for the purposes of a manufactory, and the latter had purchased expensive machinery which in consequence of his inability to obtain possession had become useless to him, and he had thereupon brought an action against the landlord for the breach of contract, and recovered large damages against him, the tenant holding over would be liable to recoup him?] It certainly would be difficult to urge the argument to that extent. [Cockburn, C. J. If so, where is the line to be drawn?] The rule laid down in Sedgwick for the action for mesne profits seems to be the reasonable one. One of two persons must suffer. Is it to be the man who has dealt legally and properly with his property, or he who has been guilty of the wrong?

Phipson, in reply. There is no reason for holding this to be an exceptional case. In *Tindall* v. *Bell*, 11 M. & W. 228, which was an action for running down a ship, it appeared that the plaintiff had been obliged, **[604]** in consequence of the injury, to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid 20*l.* into court, and that the Admiralty Court ultimately decreed 45*l.* to the salvors: and it was held, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit. [Willes, J., referred to *Short* v. *Kalloway*, 11 Ad. & E. 28, where Lord Denman says that "no person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend."] This subject underwent considerable discussion, and all the modern authorities are collected, in *Smith* v. *Howell*, 6 Exch. 730. In *Harding* v. *Crethorn*, 1 Esp. N. P. C. 57, upon a tenant holding over, the extent of his liability was assumed to be the rent.

COCKBURN, C. J. I am of opinion that the decision of the judge of the county-court was right, and that his judgment must be affirmed. I am far from saying that a landlord would be entitled to recover any special damage that might result from his inability to fulfil the contract he has entered into, in consequence of his tenant wrongfully holding over after the expiration of his term either by effluxion of time or by a legal notice to quit, where he has re-let the premises for any special and extraordinary purpose. But here the landlord claims no more than what he has been called upon to pay in the shape of damages for being deprived of the ordinary use of the land. Having let the premises, he was prevented from fulfilling his contract with the new tenant by the wrongful act of the defendant in refusing to go out when his term

(*a*) *Alexander* v. *Herr*, 11 Penn. Rep. (American) 537.

expired; and for that breach of contract, so occasioned by the defendant's wrongful [605] act, the plaintiff has been compelled to pay damages to the party with whom he contracted. This use of the land by the landlord, viz. the letting it to a new tenant, is the common and ordinary course of dealing on the part of an owner of land. The defendant, therefore, must have understood, that, when the plaintiff gave him notice to quit, he would enter into a contract with a new tenant to let the premises to him from the expiration of such notice. And in this case there is the further and not unimportant fact that the tenant was apprised of the fact that the landlord had re-let the premises, and consequently was aware of the inconvenience and loss he was exposing him to by his improper conduct. I therefore think it not at all unreasonable, but, on the contrary, very salutary, to hold him liable to compensate his landlord to the extent of the natural and necessary consequences of his wrongful act.

Cresswell, J. I am of the same opinion. I think this may fairly be treated as an action for the wrong. The defendant had notice to quit: he was therefore guilty of a wrong in holding over after the expiration of his tenancy. I do not say that the defendant could be held responsible for extraordinary damages accruing from any peculiarity in the contract into which the plaintiff might have entered with the new tenant; but only for any ordinary claim which could be made upon him for not giving up possession pursuant to his contract. As far as that goes, it seems to me that the decision of the county-court judge was right.

Williams, J. I am of the same opinion. So far as regards the assessment of damages, I think this may very well be treated as an action for mesne profits. All that the plaintiff seeks to recover, is, the damages he has sustained from the act of the defendant. I by [606] no means intend to express an opinion that these damages would not have been recoverable if this were to be considered as an action of contract.

Willes, J. I am of the same opinion. I would wish, however, to guard myself from admitting that, apart from contract, the tenant is liable for holding over. But, assuming this to be in the nature of an action of trespass, the costs and damages here claimed are nothing more than those which naturally resulted from the defendant's wrongful act. It is not suggested that the damages paid to Harcott were paid to him as compensation for the loss of a good bargain. I therefore concur in the judgment pronounced by my Lord and the rest of the court.

Appeal dismissed, with costs.

Patten *v.* Rea. May 25th, 1857.

[S. C. 26 L. J. C. P. 235; 3 Jur. N. S. 892; 5 W. R. 689.]

A master is responsible for an injury occasioned by the negligent driving of his servant, where he is acting at the time in his service and in a manner impliedly sanctioned by him.—A., the general manager of the defendant, the proprietor of a horse-repository, was possessed of a horse and gig, which were kept for him upon the defendant's premises free of charge, and were used by A. in the conduct of the defendant's business. In going (with the knowledge of the defendant) upon the defendant's business, with the horse and gig, A. drove against and killed the plaintiff's horse:—Held, that the defendant was responsible; and that it was immaterial that A. was also going on private business of his own.

This was an action against the defendant for negligence in driving a horse and gig. The declaration stated, that, by the wrongful act, neglect, and default of one William Taylor, then being and acting therein as the servant of the defendant, a certain horse and carriage of the defendant were driven upon and against a horse of the plaintiff, which last-mentioned horse was thereby killed.

[607] The defendant pleaded,—first, not guilty,—secondly, that the horse and carriage in the declaration mentioned were not the property of the defendant as alleged,—thirdly, that the horse and carriage in the declaration mentioned were not under the care, management, and direction of the defendant as alleged. Issue thereon.

The cause was tried before Crowder, J., at the first sitting at Westminster in Hilary Term last. The facts which appeared in evidence were as follows:—The plaintiff was the proprietor of a repository for the sale of horses, at Newington, in the county of Surrey. Taylor was his manager there, acting as auctioneer in the sale

of horses, collection of moneys, and otherwise in the general conduct of the business. He had a horse and gig, his own property, which were kept for him on the premises of the defendant free of charge, and which he was in the habit of using when going out upon the defendant's business. One Smith had bought a horse at the defendant's repository, which he ought to have paid for at the office upon the premises, but had not done so. On the 10th of November, 1856, Taylor was going in the gig to see his medical attendant at Finsbury Place, and also purposed to call upon Smith for payment of the debt he owed the defendant for the horse; and, whilst on his way to the former place, and before he got to Smith's, he negligently ran against and killed a horse belonging to the plaintiff.

It appeared that, whilst Taylor was getting ready the horse and gig for the purpose of going on the journey in question, the defendant asked him where he was going, when Taylor told him he was going to get Smith's money.

On the part of the plaintiff it was insisted that, although the horse and gig were the property of Taylor, yet, as at the time of the accident he was using it in [608] the defendant's business, and with his knowledge, the defendant was liable. The contrary was contended on the part of the defendant.

In answer to questions put to them by the learned judge, the jury found that, on the occasion in question, there was no verbal request by the defendant to Taylor to go with the horse and gig upon the defendant's business; but that Taylor went on the journey upon the business of the defendant, and that the defendant knew it and assented to it.

Upon this finding, the defendant's counsel claimed to have the verdict entered for him upon the second and third issues.

The learned judge, however, ruled that the plaintiff was entitled to the verdict upon all the issues, and the jury assessed the damages at 31*l*.

Atherton, in Hilary Term last, obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge,—first, in not leaving to the jury the question whether the horse and gig driven by William Taylor were used by him on his master's business, at the instance and express request of the defendant,—secondly, in not directing the verdict to be entered for the defendant, on the fact being found, and not disputed, that the horse and gig were the property of William Taylor, not by him made over or bailed to the defendant; or on the ground that the verdict was against the weight of evidence, if it was to be taken that the jury in fact found that the horse and gig driven by Taylor were used by him on his master's business at the instance and express request of the defendant.

Montagu Chambers, Q. C., and Joyce, now shewed cause. The evidence shews beyond dispute that Taylor was at the time the collision took place acting in the [609] service and about the business of the defendant; and the fact of the horse and gig belonging to Taylor can make no difference; the defendant would have been equally liable if they had been the property of a stranger. Taylor had the general management of the defendant's business. A horse had been sold to one Smith, and Taylor was going to him for the purpose of obtaining payment for it. He was also, it is true, going elsewhere, for a purpose of his own: but he met with the accident before he reached Smith's. [Williams, J. Was it essential to the master's business that the journey should be made with the horse and gig?] Probably not: but Taylor was in the habit of going about his master's business with the horse and gig. [Cockburn, C. J. Suppose the master had said to him, "Go to such a place," without more, would he be liable?] That would depend upon the surrounding circumstances. Here, the evidence was, that Taylor's horse and gig were kept for him free of cost upon the defendant's premises, that he was in the habit of using them when going upon the defendant's business, and that, on the occasion in question, the defendant knew where he was going, and the manner of going. He therefore tacitly assented to his going in that manner. The case of *Goodman* v. *Kennell*, 1 M. & P. 241, is very much in point. There, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left to the jury to say whether or not the horse was taken by the servant with the implied consent or authority of the defendant; and, they having found a verdict for the plaintiff, the court refused to interfere. Best, C. J., said: "It has been truly said that a servant's riding the horse of another, without the assent or authority of

his master, [610] cannot render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to shew that Cocking was riding the horse with the defendant's assent, and on his business. It was proved that Cocking was the servant of the defendant; that the horse was in his stable; and that, on the day the accident happened, Cocking was going on the defendant's business or employment. The proof of these three facts was sufficient to raise a strong presumption that Cocking was using the horse with the defendant's consent." Here, the proper question was left to the jury.—Did Taylor go in the gig at the request of the defendant, or with his assent? The jury found that it was done with the defendant's knowledge and assent. [Crowder, J. The contention was, that, in order to render the defendant liable, there must be something tantamount to a command by the master. The rule is not quite correct in the use of the word *express*.] It might almost be said here that there was an express command. The court called on

Atherton, Q. C., and Barnard, to support the rule. This is an action against the defendant, not for an act or omission imputed to him personally, but for an act done by his servant That Taylor was at the time of the accident acting in the service of the defendant, and about his business, is admitted. That, however, is not enough to impose upon him this liability. The rule of law is well exemplified by the language of the declaration itself: to render the defendant liable, Taylor must in the very act of driving have been acting as his servant, and not upon his own account. A man may be the servant of another at the time of doing the act which causes the injury, without that other being responsible for the mode of doing the act. The question is, not whether the servant was engaged on his master's [611] business, but whether he was going in the particular manner,—with the horse and chaise,—as his servant. The mere fact of the master seeing him about to start in the chaise, and making no objection, is not enough. [Cockburn, C. J. That is only one circumstance. The facts seem to be these:—Taylor is employed in the general management of the defendant's business. He possesses a horse and gig; and it is mutually agreed that, in consideration of the use of the horse and gig by Taylor for the purpose of the defendant's business, they shall be kept upon the defendant's premises without charge. Upon the occasion in question, Taylor was going out upon his master's business: the master saw him start upon the journey, and thereby assented to that mode of performing the service. The knowledge of the master was only one circumstance, in addition to the other and more material ones. I think it was a question for the jury, and that there was abundant evidence for them.] There was no evidence of any agreement or arrangement to the effect just stated. There was no bargain that the use of the horse and gig for the purposes of the defendant's business should be deemed an equivalent for the horse's keep. [Cockburn, C. J. It was a tacit arrangement. That seems to have been assumed on all hands.] Suppose a master desires his servant to go to a certain place, and the servant of his own accord borrows a friend's horse for the purpose of riding there, and his master meets him by accident on the way, and says nothing,—could it be contended that, in riding that horse, the man was acting in the service of his master, so as to make him responsible for any misadventure of the servant on the road? [Crowder, J. You must not lose sight of the other facts. Taylor was manager at the defendant's establishment; and his horse and gig were kept there without charge, and were used by him from time to time upon his [612] master's business.] There was no evidence of any contract which made it his duty to use the horse and chaise in his master's service. It clearly was a misdirection not to leave it to the jury to say whether the horse and gig were used by Taylor on his master's business, at the instance and request, express or implied, of the defendant. [Cockburn, C. J. I think the master would have been liable if Taylor had taken the horse and chaise without his knowledge. I think there was abundant evidence for the jury, independently of that fact.] To justify the verdict, it should have been found as a fact that there was some obligation, some binding contract, on the part of Taylor to find a horse and gig for the service of his master.

Cockburn, C. J. I am clearly of opinion that this rule must be discharged. I concur in the argument urged by the defendant's counsel, to this extent, that, to render the master liable, it is not enough to shew that the person driving the vehicle which causes the damage is his servant, but that it must be shewn that the servant was driving with his master's authority and upon his business. Now, I think there was abundant evidence here that Taylor was driving, at the time the accident occurred,

with the defendant's authority and in the course of business as his servant. Taylor, it appears, was the general manager of the defendant's establishment; and, being so, he, either by express agreement or by some tacit arrangement, was in the habit of using in transacting the defendant's business a horse and gig, his own property, which, in consideration of that arrangement, were kept for him upon the defendant's premises free of charge. Looking at these circumstances, and considering the nature of the business, I think Taylor must be assumed to have had authority to exercise his dis-**[613]** cretion as to the mode of performing his duty to his master. Adding to this the fact that the master knew that his servant was using the horse and gig on the particular occasion, I think the evidence was ample to shew that what was done had the sanction and authority of the master. That question was not at all withdrawn from the jury. The contention on the part of the defendant at the trial was, that he was not responsible for the damage, because the horse and gig were the property of Taylor, and because there was no evidence of any express command from the defendant to Taylor to use the horse and gig upon the occasion in question. I think the former part of the argument is met by the fact that the horse and gig were kept by the defendant free of charge to Taylor, and was ordinarily used by him in the performance of journeys about his master's business, and the latter by the fact that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent. I think the case was properly presented to the jury, and that there is no ground for saying that the verdict was not well warranted by the evidence.

WILLIAMS, J. I am entirely of the same opinion. I agree with Mr. Atherton, that, in cases of this sort, the real question is, whether the servant while doing the negligent act complained of was acting as the agent of the defendant. That is demonstrated by the consideration that the plaintiff in declaring in such an action has the option of alleging the negligent act to be the act of the servant, or of relying upon the legal effect, and alleging it to be the act of the master. Thus, in *Brucker* v. *Fromont*, 6 T. R. 659, it was held that a declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that the defendant's servant **[614]** drove the cart. I think there was ample evidence here that Taylor, at the time of the accident, was acting as the servant and by the authority of the defendant. It was incumbent on the plaintiff, no doubt, to shew that Taylor acted as the defendant's agent in the employment of the horse and gig upon the particular occasion. I think there was evidence enough of that for the jury, and that that question was properly left to them. The rule does not complain that it was not so left: the complaint is, that my Brother Crowder misdirected the jury in not leaving to them the question whether the horse and gig driven by Taylor were used by him on his master's business, at the instance and express request of the defendant. Now, it clearly is not necessary in cases of this sort that there should be any express request: the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here. The only other complaint made of the direction was not relied on by Mr. Atherton in his argument in support of the rule; nor could it have been with any hope of success. Upon neither ground, therefore, can this rule be sustained.

WILLES, J. I am clearly of the same opinion. The argument urged on the part of the defendant amounts in substance to a denial of the general rule laid down by Lord Holt in *Tuberville* v. *Stampe*, 1 Lord Raym. 266 (*a*)[1], that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions." Was Taylor, at the time the accident complained of happened, acting in the **[615]** course of his employment? It appears that part of the terms of his employment was, that he should have the benefit of the keep of his horse and the standing of his gig upon his master's premises, in consideration of his using them when going about his master's business; and that he was actually engaged on his master's business, viz. going to collect a debt due to him, at the time. And it further appears that his master knew that he was going, and in what manner he was going. The master is clearly responsible.

CROWDER, J., said nothing.

Rule discharged (*a*)[2].

(*a*)[1] Carth. 425, Com. 32, Salk. 13, Skinn. 681, 12 Mod. 151, Holt, 9, Comb. 459, 1 Vin. Abr. 216, pl. 9, 2 Vin. Abr. 400, pl. 15, 15 Vin. Abr. 311, pl. 9.

(*a*)[2] See *Mitchell* v. *Crassweller*, 13 C. B. 237.

JONES *v.* MARSHALL. May 25th, 1857.

[S. C. 26 L. J. C. P. 229; 3 Jur. N. S. 916; 5 W. R. 623.]

An attorney, not engaged for either of the parties in a cause, but merely attending as the professional adviser of bail put in in the Lord Mayor's court for the purpose of dissolving an attachment, is not privileged from arrest upon a ca. sa. while going to or returning from the registrar's office for that purpose.

H. J. Hodgson, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the defendant, an attorney of this court, should not be discharged out of custody as to his arrest under the writ of ca. sa. issued in this cause,—on the ground that he was at the time privileged from arrest

The affidavit upon which the rule was obtained stated that the defendant was a certificated attorney of this court, and also on the roll of the Lord Mayor's Court, London; that, on the 14th of May, 1857, he accompanied two other persons named Hawke and Mumbray (who joined in the affidavit) to the chief office of the Lord Mayor's court, in Old Jewry, in the city of London, and also to the registrar's office of that **[616]** court, in Guildhall Chambers, Basinghall Street, and that he did, on that day, in pursuance of instructions from those persons, and at their request, as their attorney, attend at the said offices upon the occasion of their being then put in as bail for a defendant for the purpose of dissolving an attachment in and connected with an action then and still pending in that court: that it was his duty, in pursuance of the said instructions, to attend during the putting in of the said bail, on behalf of his said clients; and that he did so attend at the said offices, and not for any other purpose, or on any other business; that, after the said Hawke and Mumbray had been put in as bail as aforesaid, he left the said registrar's office, and, whilst directly proceeding on his return to his place of residence, and before passing through the gateway of the said Guildhall Chambers, he was arrested under a ca. sa. at the suit of the plaintiff.

Honyman shewed cause. There is no pretence for saying that this person was privileged from arrest. It does not appear that he was attending as the attorney of either of the parties to the suit in the Lord Mayor's court; and, as attorney for the bail, he could not have been heard. Even counsel engaged in the cause are not allowed to interpose on behalf of a witness who claims privilege: *Thomas* v. *Newton*, M. & M. 48, n. This sort of privilege was very much discussed in *Newton* v. *Constable*, 2 Q. B. 157, where Lord Denman, in delivering the judgment of the court, says: "The attendance of parties and of witnesses has been always protected. It is absolutely necessary for the ends of justice that their attendance should be privileged, because without it justice cannot be administered. But the protection of legal officers is of a different character, and may well be confined within narrower limits. That **[617]** of barristers attending the superior courts is explained in the case of *Collier* v. *Hicks*, 2 B. & Ald. 663, 672, as depending on prescription. The extent of it is not very clearly defined. When they have been actually engaged in the business of the court, they are certainly privileged: how far this might be the case when the attendance was merely in the exercise of their profession, afforded for the benefit of such suitors as might choose to engage them, but without actual engagement, no reported case has decided. There are traditions in Westminster Hall to which reference is made in *Meekins* v. *Smith*, 1 H. Bl. 636. But this privilege, to whatever extent allowed before the year 1833, may be traced to the recognized position and duties of the bar in Westminster Hall and on the circuits, where the same bar practise under the judges of the land. In that year, a barrister who had been arrested on his return from sessions, was discharged on motion by the court of Exchequer: *Luntly* v. *Nathaniel*, 1 C. & M. 579, 2 Dowl. P. C. 51. But on that case it is to be observed that the privilege was admitted at the bar without any discussion, the issue raised on the affidavits being, whether the defendant, at the time of arrest, was actually on his way home from the sessions: and, further, that it was decided on the authority of *Meekins* v. *Smith*, above mentioned. Now, that case decides no such point. It only refused the privilege to a person who went to Westminster Hall to justify as bail, and was arrested on his return; the court saying it did not apply to all engaged in a cause. The judges stated their recollection of former discharges of barristers, but with the

qualification before adverted to." [Willes, J. The precedents for writs of privilege in Rastell, title "Privilege," seem to be confined to the attorney for the plaintiff and defendant in the suit.] In *Phillips* v. *Pound*, 7 Exch. 881, where it **[618]** was held that an attorney's clerk is not privileged from arrest whilst going to a judge's chambers for the purpose of there conducting the attorney's business,—it was contended, upon the authority of *Meekins* v. *Smith*, "that all persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that business, though not compelled by process so to do, are privileged from arrest, provided their attendance be not for any unfair purpose." But that doctrine was repudiated by the court.

Hodgson, in support of his rule. It may at once be conceded that there is no direct authority to be found in the books upon this subject, but there are many analogous cases. Bail attending to justify, were held entitled to protection from arrest, in *Rimmer* v. *Green*, 1 M. & Selw. 638. [Cresswell, J. Is the personal attendance of the bail necessary in the Lord Mayor's court?] It is: they are required to sign a book. In Archbold's Practice, 9th edit., by Prentice, 719, it is laid down that "every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, attorneys, &c., are privileged from arrest whilst going to, attending, and returning from court or a judge at chambers. So, an attorney is privileged from arrest whilst in attendance at the Master's office taxing costs, as well as going to and returning therefrom: *Re Hope*, 9 Jurist, 856." [Cockburn, C. J. The attorney there means the attorney of a party to the suit. An attorney for bail is not recognised. He can only attend for the purpose of giving private advice to his client. Suppose a witness were to take an attorney with him into court for the purpose of advising him as to whether or not he shall produce certain deeds,—would the attorney be protected from arrest eundo, **[619]** morando, et redeundo?] The presiding judge in that case is the adviser of the witness: he needs no other. The statute 1 & 2 Vict. c. 110, s. 9, requires the attendance of an attorney to attest the execution of a warrant of attorney: that clearly is a case in which the privilege would be allowed. *Gascoyne's case*, 14 Ves. 183, carries the privilege of the attorney a great way. And see *Moore* v. *Booth*, 3 Ves. 350. In Bro. Privilege, 1, and Com. Dig. Privilege (A. 1), the protection is extended to "a servant or farmer who brings money to his master or lessor (plaintiff or defendant) for the suit." [Cockburn, C. J. What possible relation could this person have to the suit in the Lord Mayor's court?] In *Newton* v. *Harland*, 8 Scott, 70, a barrister attending the court to hear judgment pronounced in a cause in which he was concerned, was held entitled to privilege.

Cockburn, C. J. I am of opinion that this rule should be discharged. It is essential to the administration of justice that the parties and their attorneys and witnesses, and all other persons representing the parties to the suit, should be protected from arrest on their way to the court, whilst remaining there, and returning from the court. But no precedent has been cited to shew that that principle has ever been extended to an attorney acting on behalf of some one collaterally and incidentally brought into the suit: and I think it would be attended with dangerous consequences, and would be extending the rule much further than there is any warrant for, if we were to allow the privilege claimed here.

Cresswell, J., and Crowder, J., concurred.

Willes, J. I am of the same opinion. The passage **[620]** cited from Brooke's Abridgment has nothing to do with the privilege of an attorney. It means no more than this,—that a person attending in court for another who is a suitor there, has the same privilege as the person on whose behalf he attends. That passage is as follows: —"Nota que on cestui que use vient a Westminster pur maintener le suit de son feoffee que use, et il est arrest, il avera son privilege; et eadem lex de servant ou fermor que vient pur porter money a son lessor que est en suite, pur maintener le suit; et si home vient pur suer original, et est arrest devant que il poit suer ceo, il sera examyne et avera le privilege, coment que nul ple soyt pendant." 27 H. 8, fo. 20. How that may be at the present day, it is unnecessary to say.

Rule discharged.

SIMONS *v.* THE GREAT WESTERN RAILWAY COMPANY. May 25th, 1857.

A declaration against a railway company, for damage to goods entrusted to them to carry, alleged that the goods were delivered to the defendants as common carriers, and that they received them as such common carriers. Plea, that the goods were received by the defendants to be carried subject to a special contract whereby they were declared not to be answerable for any loss or damage, however caused. In support of the plea, the defendants produced a paper, signed by the plaintiff, acknowledging that the goods were to be carried subject to certain conditions, one of which was, that the company were not to be responsible for any loss or damage, however caused, &c. On the part of the plaintiff, it was proved, that, when asked by a clerk of the defendants at the time the goods were delivered at the company's warehouse to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper:—Held, that, upon this evidence, the jury were warranted in finding that the goods were not delivered to the company to be carried under the special contract.

This was an action against the Great Western Railway Company for the loss of certain goods entrusted to them to carry.

The declaration stated, that the plaintiff, on, &c., delivered to the defendants as common carriers, and the defendants, as such carriers, received divers, to wit, 150 **[621]** packages of furniture, goods, chattels, and effects of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendants, to wit, from Paddington, in the county of Middlesex, to Taunton, in the county of Somerset, there to be safely delivered to the plaintiff for certain reward therefor then paid by the plaintiff to the defendants: yet the defendants so carelessly and negligently conducted themselves in and about the carrying and conveying of the said goods, that, by and through the carelessness, neglect, and default of the defendants, divers, to wit, 10 of the said packages, and the contents thereof, were wholly lost to the plaintiff, and the residue of the said packages, and the furniture, goods, chattels, and effects therein contained, were by the like carelessness, neglect, and default of the defendants in the carriage and conveyance thereof, greatly broken, damaged, and destroyed.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff did not deliver nor did the defendants receive the goods to be carried as in the declaration alleged,—thirdly, that the defendants received the goods to be carried subject to a special contract that they should not be answerable for the loss of or damage to the goods if insufficiently or improperly packed, and that the goods were insufficiently and improperly packed,—fourthly, that the said furniture, goods, chattels, and effects in the declaration mentioned, were received by the defendants from the plaintiff to be carried and conveyed by the defendants for the plaintiff from Paddington to Taunton as aforesaid, at a certain special mileage rate, and under and subject to a certain contract made between the plaintiff and the defendants, and signed by the plaintiff, whereby it was agreed that the said furniture, goods, chattels, and effects, being so received as in this plea mentioned, the defend-**[622]**-ants should not be answerable for any loss or damage, however caused, of or to the said furniture, goods, chattels, and effects, while the same were being carried and conveyed by the defendants for the plaintiff; and that the loss and damage in the declaration mentioned occurred and was caused while the said furniture, goods, chattels, and effects were being carried and conveyed by the defendants for the plaintiff.

The plaintiff took issue on all the defendants' pleas: and, for a second replication to the third and fourth pleas respectively, said, that the said contracts in those pleas mentioned were respectively contained in a certain paper or document, partly printed and partly in writing, purporting on the face thereof to specify the packages of the said furniture and goods received by the defendants as in the declaration mentioned, and the charges to be paid on the delivery thereof; on the back of which said document was printed a certain notice, conditions, or declaration, limiting the liability of the defendants for loss or injury to the said goods in the receiving, forwarding, or delivery thereof occasioned by the neglect or default of the defendants, and which

said paper or document was in the words and figures following, and not further or otherwise. The replication then set out the form of receipt, and the conditions of carriage, the 15th of which was as follows:—"Goods conveyed at special or mileage rate must be loaded and unloaded by the owners or their agents; and the company will not be responsible for any risk of stowage, loss, or damage, however caused, nor for discrepancy in the delivery, as to either quantity, number, or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused."

The cause was tried before Crowder, J., at the sittings in London after the last term. The facts were as **[623]** follows:—The plaintiff, having certain packages of furniture to send from London to Taunton, in October, 1854, went to the office of the Great Western Railway Company at Paddington to inquire the terms upon which they would be carried. Being told the terms, he again went to the office with the goods on the 8th of November, and, after they were loaded into the company's trucks, he paid the sum demanded, viz. 7l. 16s. After the plaintiff had paid the money, a clerk of the company produced a paper, and asked the plaintiff to sign it. The plaintiff told the clerk that he had not his spectacles with him, and that he very much objected to sign a paper which he could not read. The clerk said it was of no consequence, and that the signature was a mere matter of form: and, upon the faith of that representation, the plaintiff signed it.

The paper so signed was put in. It was an acknowledgment that the goods were received by the company upon the conditions set out in the replication, and was relied on by the defendants as shewing that the goods were not received by them on the terms stated in the declaration, viz. as common carriers, but under the special contract. The clerk who wrote the receipt was called as a witness; but he stated that he had no recollection of the transaction, and could not tell whether or not the sum charged for the carriage was a special or mileage rate.

On the part of the plaintiff, it was insisted that it was not competent to the defendants to avail themselves of a contract the signature to which had been thus fraudulently obtained by their servant.

It was agreed that the goods were damaged to the extent of 21l.

The learned judge left it to the jury to say whether or not the goods were delivered to and received by the defendants to be carried under a special contract,—**[624]** telling them, that, if they were not, the plaintiff was entitled to the verdict.

The jury found for the plaintiff.

Knowles, Q. C., pursuant to leave reserved, moved for a rule nisi to enter a verdict for the defendants, or for a new trial on the ground that the verdict was against the evidence. [Cockburn, C. J. The whole question was, whether the plaintiff signed the receipt knowing what he was about: and that the jury found against the company.] Assume that the company's servant was guilty of a fraud, still the paper which the plaintiff signed was the contract upon which the goods were carried. [Cockburn, C. J. The plaintiff delivers the goods to the company as common carriers; and they induce him to sign a paper negativing their receipt of the goods in that character, leading him all the while to believe that he is dealing with them as common carriers.] Whatever might have been passing in the plaintiff's mind, it is clear that the defendants received the goods only upon the terms mentioned in the special contract which the plaintiff signed. [Willes, J. Is not the defendants' promise that which their act induced the plaintiff to believe to be the promise? In Com. Dig. Fait (B. 2), it is said: "If an illiterate man executes a deed which is falsely read, or the sense declared different from the truth, it does not bind him: And. 9 H. 6, fo. 59 b., 2 Rol. 28, l. 5, *Thoroughgood's case*, 2 Co. Rep. 9 b., *Throwgood* v. *Turnor*, F. Moore, 148, Moore, 184, pl. 326. As, if it be read to be upon a condition, when it is absolute: 2 Rol. 28, l. 25. So, it does not bind, if the false reading be by a stranger, any more than if by the party to whom the deed is given: *Thoroughgood's case*, 2 Co. Rep. 9 b. So, though it be by a friend of him who executes it, without covin: *Thoroughgood's case*, 2 Co. Rep. 9 b. So, if a man **[625]** lettered, but blind by age, &c., executes a deed falsely read, it does not bind him: 2 Rol. 28, l. 20. If a feoffment, with a letter of attorney, is falsely read, it is void for both: 2 Rol. 28, l. 27, *Pigot's case*, 11 Co. Rep. 28 a."] The general principle of law is not disputed: but the question is, what is the contract which the defendants have entered into? There are many cases where carriers have been held to be exonerated from their common law liability, by reason of the receipt by the consignor of a

paper shewing that they had not received the goods as common carriers (*a*). [Crowder, J. It is quite evident that the company, when they received the goods, did not intend the plaintiff to think that they received them otherwise than as common carriers. Cockburn, C. J. The plaintiff was not told that he would have his goods carried at a lower rate if he signed the paper, than if he did not.] *Shaw* v. *The York and North Midland Railway Company*, 13 Q. B. 347, is very much in point. There, the declaration alleged that the defendants received from the plaintiff a horse to be "safely and securely" carried by them, and there was a plea denying that the horse was delivered and received to be "safely and securely" carried, as alleged. At the trial, it appeared that the plaintiff had pointed out a defect in one of the partitions of a horse-box shewn to him for the reception of his horse; that a servant of the defendants then endeavoured to secure the partition, and assured the plaintiff **[626]** that he had done so; that the horse was carried in that box, and that the horse's death was occasioned during the journey by the insecurity of the partition. A receipt was given to the plaintiff for the amount paid for the conveyance of the horse, at the foot of which receipt was written,—"N.B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages, while travelling, or in loading or unloading:" and it was held that the terms of the memorandum formed part of the contract for the conveyance of the horse, and that they disproved the averment in the declaration that the defendants received the horse to be "safely and securely" carried. So, here, the receipt signed by the plaintiff at the time the goods were delivered at the warehouse of the company, was evidence that they were delivered to and received by the company, not as alleged in the declaration, but under a special contract. [Crowder, J. *Shaw* v. *The York and North Midland Railway Company* was not the case of a representation in a matter affecting the contract.]

Cockburn C. J. I see no ground for finding fault with the verdict in this case. To hold the plaintiff bound by a contract foisted upon him under such circumstances, would be to permit the defendants to take advantage of their own fraud.

The rest of the court concurring,

Rule refused.

[627] Michael *v.* Gillespy. May 23rd, 1857.

[S. C. 26 L. J. C. P. 306; 3 Jur. N. S. 1219.]

Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which such freight is to be earned: and there is a total loss of freight, if the cargo be so damaged by a peril of the sea, in the course of the voyage, as to render it impossible (except at an expense which would greatly exceed its value on arrival,) to carry it to its port of destination.—Freight was insured by a "club-policy" from the 24th of January, 1852, to the 1st of March, 1852, subject to the rules of the association,—one of which was as follows: "That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties." No notice having been given:—Held, that this was a continuing policy, and not merely a policy to enure till the 1st of March.

This was an action by a ship-owner against a member of a mutual insurance association, on a time policy on the freight of a cargo of coals.

The declaration stated, that the plaintiff, at the time of making the policy of insurance thereinafter mentioned, was, and still was, a ship-owner, and member, together with the defendant and divers other persons, of a certain association called the

(*a*) See *Shaw* v. *The York and North Midland Railway Company*, 13 Q. B. 347, *Austin* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454, *Austin* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 16 Q. B. 600, *Carr* v. *The Lancashire and Yorkshire Railway Company*, 7 Exch. 707, *Walker* v. *The York and North Midland Railway Company*, 2 Ellis & B. 750, and *The York, Newcastle, and Berwick Railway Company, App., Crisp, Resp.*, 14 C. B. 527.

Whitby Insurance Association, and the ship or vessel thereinafter mentioned was, from the day of the making of the policy of insurance thereinafter mentioned, admitted and entered in the said society: That the plaintiff, on the 24th of January, 1852, caused, to be made a certain policy of insurance, purporting thereby and containing therein that the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and caused himself and them and every of them to be insured, lost or not lost, at and from meridian of the 24th of January then current, to meridian of the 1st of March, 1852, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the "Charles Kerr," whereof was master E. K., under God, for that voyage, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the ship or the master thereof was or should be named or called, beginning the [628] adventure upon the said goods and merchandises from the loading thereof aboard the ship, upon the said ship, &c., on cargo and freight, and so should continue and endure during her abode there, upon the said ship, &c and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, should be arrived at as above, upon the said ship, &c., until she had moored at anchor twenty four hours in good safety, and upon the goods, &c., until they should be then discharged and safely landed: and it should be lawful for the said ship, &c. in the said voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, and without prejudice to the said insurance: The said ship, &c., goods and merchandises, &c., for so much as concerned the assured, by agreement between the assured and the assurers in the said policy, were and should be valued at interest: Touching the adventures and perils which the assurers were contented to bear, and did take upon them in the said voyage, they were of the seas, men of war, fire, enemies, &c., restraints, &c. of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to the said insurance, to the charges whereof the assurers would contribute, each one according to the rate and quality of his sum therein assured: That the said writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made [629] in Lombard Street, or in the Royal Exchange, or elsewhere in London; and so the assurers were contented, and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises; having confessed themselves paid the consideration due unto them for the said assurance by the assured, at and after the rate of 20*l.* per cent.: And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5*l.* per cent; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general or the ship should be stranded: And by a certain other memorandum thereunder written, it was mutually agreed that the regulations annexed to the said policy of assurance should form part of the said policy: And it was by the said regulations annexed to the said policy of assurance, amongst other things, declared, that the members of the said association severally and respectively, and not jointly or in partnership, nor the one for the other of them, but each of them only in his own name, should insure each other from noon of the day of entry of each vessel into the said association, until noon of the 1st of March, 1852, against all general averages and total losses of cargo and freight, to the extent of 8*l.* or 16*l.* per keel, as might be entered by the owner, provided his interest at the time of loss should amount to the sum, otherwise only the actual loss sustained: and that the several rules and regulations following the said rule then in recital should be as binding and conclusive as if inserted in and made a component part of the said policy: That ships lost in ballast should be entitled to receive for [630] outfit one fourth part of the sum entered,

—That insurances might be effected by the said association on the cargo and freight of any ship insured in the Whitby Insurance Association, or approved of by the committee, and that, on being entered, the owner should pay 1s. per keel, to the extent of twelve keels, and 6d. per keel for each extra keel above that number on the entire burthen of the ship, and also for the policy duty and power of attorney, —That no claim would be allowed for the loss of cargo and freight in any ship when employed in any unlawful trade with the knowledge and consent of the insured, nor when loading or unloading on any main shores or beaches, excepting in vessels not exceeding six keels burthen, between the 25th of April, at noon, and the 15th of September, at noon, nor in any ships excepting those from the Mediterranean, or ports to the south of Gibraltar, sailing to the ports in the Gulf of Finland and Bothnia, after the 1st of October; Riga, the ports in Riga Bay, or to Stockholm, after the 10th of October; lower ports in the Baltic, not higher than Memel, inclusive, nor to any port or place in the Bell Sound or Cattegat, above Gottenburg, after the 20th of October; Gottenburg and the ports in Norway, from the 10th of November to the 25th of February inclusive; the ports between Ostend and the Scaw, from the 20th of November to the 1st of February inclusive: ships sailing from the western coast of Great Britain (that is to say, between Falmouth and Duncansby Head), or from Ireland, to any of the ports above mentioned, should be required to sail ten days earlier: ships proceeding outwards in ballast seeking freight might move from port to port situate within the prescribed limits of sailing without restriction; but ships taking a cargo outwards, and afterwards changing ports for freight homeward, should, in case of loss or average, suffer a **[631]** deduction of 10 per cent., unless such ship should have commenced her voyage ten days earlier than the time specified: nor when sailing from any port in Europe to the ports in the White Sea after the 5th of August; ports and places on the River St. Lawrence above Cape Gaspe after the 15th of August; British Colonies in North America (ports and places on the River St. Lawrence above Cape Gaspe excepted,) after the 1st of September, —That no ships, excepting such as are classed A1 in Lloyd's register-book, should be insured when sailing to any port in America situate to the northward of 35 degrees north latitude after the 15th of June; neither should any lengthened ship of any classification, nor any ship unless classed A1 or Æ1 in Lloyd's register-book, be permitted to take a cargo outwards across the Atlantic, -as by the said policy and memoranda and regulations thereunto annexed, reference being thereunto had, would more fully and at large appear; of all which premises the defendants had notice. The declaration then went on to aver, that the said policy of assurance with the memoranda was so made by the plaintiff for and on behalf of himself, and that the insurance so made as aforesaid was made as aforesaid for the sole use of himself: That the said policy of insurance was then subscribed with the name of the defendant and divers other persons, and was then duly subscribed by an agent of the said several persons as assurers for the sum of 300l. upon the premises in the said policy of insurance mentioned: That a certain cargo of coals was shipped and loaded at Shields in and on board of the said ship or vessel in the said policy mentioned, to be carried and conveyed therein to Aden; and that the plaintiff was then and from thence continually afterwards until and at the time of the loss thereinafter mentioned, interested in the freight of and for the said cargo of coals, to the amount of the money **[632]** insured or caused to be insured thereon: That the said ship or vessel afterwards, and whilst she was protected by the said policy, that is to say, on the 25th of January, 1852, departed and set sail from Shields aforesaid upon the said voyage, and from thence until and at the time of the loss thereinafter mentioned, was upon the high seas, and not employed, trading, laden, going, or sailing in any matter, or to or from any place, at any time prohibited by the said regulations of the said association: That the plaintiff then had and still has always performed and fulfilled the said regulations and every thing which, on his part, as such member as aforesaid of the said association, and as such assured, were to be performed and fulfilled: That theretofore, and before the said 1st of March, and whilst the said ship or vessel was protected by the said policy, and before the arrival of the said ship at Aden aforesaid, the said ship or vessel, with the said cargo on board thereof, was by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, and damaged, and was cast upon a rock, and was there broken, shattered, and destroyed, and the said cargo of coals so loaded in and on board of the said ship as aforesaid became and was wholly lost, and

never did arrive at Aden aforesaid, and the said freight thereon was by reason of the premises wholly lost to the plaintiff,—of all which premises the defendant had notice: By means whereof, the defendant, as such insurer as aforesaid, became and was liable to pay the plaintiff a large sum of money, to wit, 300l.

First plea,—that the said policy in the declaration mentioned was not made or subscribed in manner and form as in the declaration alleged.

Second plea,—that, at the time of the making of the said policy, the said ship was lying in the river Tyne, in the port of Shields aforesaid, bound and about to [633] sail on the said voyage from Shields aforesaid to Aden aforesaid, which last-mentioned place is in parts beyond the seas, with the said cargo of coals then on board thereof; that the said policy was made in contemplation of the said voyage with a cargo of coals, and of no other voyage or cargo, and primarily in order to protect and insure the freight for and upon that voyage with such cargo of coals,—of which the plaintiff and defendant respectively at the time of the making of the said policy and the commencement of the said adventure had notice and knowledge; that the said ship, at the time of the making of the said policy and commencement of the said adventure, and from thence until the time of the happening of the loss and damage in the declaration mentioned, was, by and with the permission and privity of the plaintiff, greatly overladen by and with the said cargo of coals in the declaration mentioned, and also leaky and in a state of imperfect repair, and that, by reason thereof, the same cargo could not be carried on board the said ship on the said voyage with safety, or without great risk of being damaged and lost during the said voyage by reason of the said ship's being so overladen, leaky, and in a state of imperfect repair as aforesaid; and that, by reason thereof, the said ship, at the time of the making of the said policy and the commencement of the said voyage and the said adventure, and thence until the time of the happening of the loss and damage in the declaration mentioned, was unseaworthy for the said voyage with the said cargo on board thereof,—of which premises the plaintiff during all that time had notice and knowledge, but of which the defendant had no notice or knowledge; that the plaintiff knowingly, wilfully, unlawfully, and improperly sent the said ship to sea on the said voyage in such unseaworthy state and condition, caused as aforesaid; and that the damage and loss in [634] the declaration mentioned happened whilst the said ship was in such unseaworthy state and condition as aforesaid, and by reason of the ship being so unseaworthy in manner and from the cause aforesaid.

Third plea,—that the said ship called the "Charles Kerr," in the said policy mentioned, for and during a long time, to wit, two weeks and more before the making of the said policy, and until and at the time of the making of the said policy, and from that time and until and at the time the said ship set sail upon the said voyage in the said policy mentioned, was lying and being in the river Tyne, with the said cargo of coals in the said policy mentioned in and on board of the said ship; that the said ship, before or whilst she was so lying or being in the said river, sprung divers leaks, and during all the time aforesaid greatly leaked and made much water, which premises were material to and greatly altered and increased the risk in the said policy in that behalf mentioned and insured against, and were material to be known by the defendant and the other members of the said association in the declaration mentioned who became insurers against the risks as in the declaration mentioned, and ought to have been communicated by the plaintiff to the defendant and the said other members of the said association,—of all which premises the plaintiff at the time of the making of the said policy, and from thence until the time the said ship so set sail on her said voyage, had notice and knowledge: but that the plaintiff wrongfully and improperly concealed and suppressed from the defendant and the other members of the said association, and each and every of them, the said premises and every part thereof, and the defendant and the said other members of the said association had not, nor had any or either of them, at the time of making the said policy, or at any time before the said ship set sail on the said [635] voyage, any notice or knowledge thereof; and that the defendant and the said other members of the said association would not, nor would any or either of them, have subscribed or suffered their or any of their names or name to be subscribed to the said policy, if the said premises had been communicated to them or him by the plaintiff, as they ought to have been, before the said policy was made as in the declaration mentioned, and would not have effected the said insurance in and by the said policy so effected as in the declaration mentioned.

Fourth plea,—that, before and at the time of the said ship or vessel departing and setting sail as in the declaration alleged, the same was in an unseaworthy state and condition, and it was dangerous for the said ship or vessel to go to sea in the state and condition in which she then was, with the said cargo on board thereof,—all which the plaintiff then well knew; that the plaintiff then was the owner and possessed of the said ship; and that the plaintiff, well knowing the premises, wrongfully suffered and permitted the said ship or vessel to depart and set sail upon the said voyage with the said cargo as in the declaration alleged, and sent the same to sea on the said voyage in the state and condition aforesaid; by reason of which premises the said ship or vessel and the cargo and freight became and were lost as in the declaration alleged.

Fifth plea,—that the said ship or vessel with the said cargo on board thereof, was not, nor was the said cargo, or any part thereof, lost by the perils, dangers, adventures, and causes in the declaration in that behalf mentioned, or any or either of them, as in the declaration was alleged; nor was the said cargo, or any part thereof, by reason of the causes in the declaration in that behalf mentioned, or any of them, prevented from arriving at Aden; nor was the freight thereon, or any part thereof, by reason of the causes in the declaration [636] in that behalf mentioned, or any of them, lost to the plaintiff in manner and form as in the declaration alleged.

The plaintiff joined issue on the first plea, and took issue on each of the others.

The cause was tried before Cockburn, C. J., at the sittings in London after Michaelmas Term last. The facts were as follows:—The plaintiff was the owner of the "Charles Kerr," and on the 24th of January, 1852, insured her in an association called the Whitby Insurance Association, of which the defendant was a member, by the policy declared upon, and which policy was subject, amongst others, to the following condition or regulation,—

"Rule 14. That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties: but, in either case, when a ship may be at sea on the 5th of March, 1852, the committee shall, if required by the assured, grant a policy from that date until the arrival at her port of destination."

The insurance was from the 24th of January, 1852, until the 1st of March, with a proviso for its renewal from time to time for a year, subject to the rules of the association.

The "Charles Kerr," on the 25th of January, 1852, sailed from Shields with a cargo of coals for Aden, where she could not have arrived until long after the 1st of March. Immediately after her departure she encountered tempestuous weather, and ultimately she was compelled, on the 8th of February, to put into Cuxhaven for repair, having fifteen or sixteen feet of water in her hold. It became necessary to unload the coals; and, when unloaded, they were found to be so impreg-[637]-nated with deliquescent salts that it would have been extremely dangerous, according to the evidence of scientific witnesses, to carry them on in their then state to Aden, inasmuch as they would be liable to spontaneous ignition: and it was proved, that, owing to want of facilities for that purpose at Cuxhaven, it would have cost more than thrice their value (at Aden) to free them from the salts by washing, which alone would have enabled them to be carried with safety. Upon learning these facts, the owner of the coals abandoned them to the underwriters as a total loss, and the vessel, being repaired, proceeded upon another voyage.

On the part of the defendant, it was objected,—first, that there was no loss of the subject-matter of insurance, inasmuch as the policy was a time policy from the 24th of January, 1852, until the 1st of March, and, as the vessel could not have arrived at Aden before the latter day, no freight could have been earned during the currency of the policy; and *Morby* v. *Jones*, 4 B. & C. 394, 6 D. & R. 479, was relied on,—secondly, that, although by a peril insured against the coals were in such a condition that it would cost more than their value to make it safe to carry them to their destination, yet, inasmuch as it was not physically impossible to carry them on, there was no total loss of freight.

Reserving the first point for the opinion of the court, the Lord Chief Justice left it to the jury to say whether under the circumstances there was not a total loss; telling them, that, in order to arrive at a determination of that question, they might

take into their consideration the amount which would be required to be expended to restore the coals to a state which would have rendered it fit and safe to re-ship them.

The jury having returned a verdict for the plaintiff,

Shee, Serjt., in Hilary Term last, obtained a rule nisi [638] to enter a verdict for the defendant, or a nonsuit, "on the ground that the policy was a time policy for a period during which the freight could not be earned, and that the loss was not complete within that period;" or for a new trial "on the ground that the judge presiding at the trial misdirected the jury in telling them that whether or not there was a total loss on freight might depend upon the question of the expense at which the cargo might be restored to a state which would render it fit and safe to re-ship it."

Byles, Serjt., J. Brown, and M'Intyre, shewed cause. The first point in reality does not arise here; for, the policy was to enure, not till the 1st of March, 1852, only, but up to that day and so on from year to year until put an end to by the notice contemplated by the 14th rule. The loss occurred before the 1st of March, when it became impossible, by reason of the sea damage, to carry on the coals: and it is not the less a total loss of the freight at that time, though the freight could not have been earned within the time. [Cresswell, J. When you insure freight you are insuring something which does not exist and cannot at the time exist. Could you insure the expected profits to arise from the sale of a cargo of rice, as far as the Cape, on a voyage to England?] That is a very different matter. The underwriter who insures freight insures that the owner shall be in a condition to earn freight. [Cresswell, J. When is the loss to be paid, and what is the extent of the underwriter's liability?] The assured would be entitled to be paid immediately, and the amount would be the present value of the freight which he was thereafter to receive. The policy, it is submitted, covers the whole time: and there is nothing inconsistent or incongruous in saying that freight may be lost before it is earned. In Phillips on Insurance, 3rd. edit., vol. i., [639] p. 684, a case of *Coit* v. *Smith*, 3 Johns. (American) Rep. 16, is referred to. That was an action on a policy upon horses from Liverpool to New York, "against all risks, including the risk of death from any cause whatever, until safely landed." One of the horses died three or four days after being landed, of injuries received in a gale on the voyage. Kent, then justice, states the question in such case to be, what was the condition of the article when landed? "One of the horses," he says, "received a death-wound during the voyage. The damages so received are a proper subject of retribution. How much damage ought to have been assessed at the time he was landed?" And the judgment upon this ground, which, the learned author observes, seems plainly to be the true one, was for the full value of the animal. [Williams, J., referred to *Moreton* v. *Dunlop*, 1 T. R. 260.] Mr. Phillips (ubi supra), speaking of that case, says that Willes, J., there "stated a preceding decision by the English K. B., where a ship insured for a certain time 'received her death wound' from a peril insured against, three days before the end of the time, but, by pumping, was kept afloat till three days after it had ended, in which the verdict, being against the claim for the loss, was confirmed by the court. Mr. Justice Willes compares such a case to one of a policy on a life, where the party insured for a year receives a mortal wound during that time, of which he dies after the end of the year. But the cases are not parallel; to render them so, the insurance on the life should be, not against death merely, as a life-policy is, but against wounds, as a ship is against the perils of the sea. The comparison is accordingly illusive." In 2 Phillips on Insurance, 345. it is laid down, upon the authority of a case of *Whitney* v. *The New York Firemen Insurance Company*, 18 Johns. (American) 208, that "the absolute loss of the cargo, as of the ship, is a total loss of [640] freight, although the ship may be in a condition to continue the voyage." And he adds: "Though the cargo is not wholly destroyed, yet, if it is so damaged by the perils insured against that it cannot be carried on without endangering the health or lives of the crew, or so as to arrive at the port of destination as continuing to be the same description of goods as at the beginning of the risk, this constitutes a total loss of freight:" for which he cites *Hugg* v. *The Augusta Insurance Company*, 7 Howard's R. Sup. Ct. U. S. 595. "If," he continues, "the goods are sold by the master at an intermediate port, with the consent of the shipper, or under circumstances rendering the sale binding upon him, as being made in pursuance of the authority with which the master is invested by the emergency, a right to freight pro ratâ accrues, which is salvage under the policy on freight." To this the learned author adds the following note,—"According to *Thorboom* v. *Chapman*,

13 M. & W. 230, the entire freight is forfeited in such case, unless the shipper consents to the sale: meaning direct, and not merely constructive and implied consent. But the better doctrine seems to be as stated in the text." The real question is,—has the ship-owner sustained a loss of freight by a peril insured against? By a peril of the sea, the cargo is damaged to such an extent that it is impossible,—not physically impossible, but impossible for any commercial purpose,—to carry it to its destination. Jervis, C. J., thus lays down the rule as to goods, in *Rosetto* v. *Gurney*, 11 C. B. 176, 186,—"As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether a cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case: and this word **[641]** 'practically,' as explained by my Brother Maule in *Moss* v. *Smith*, 9 C. B. 94, comprehends the condition upon which the difference between a total and partial loss depends. 'In matters of business,' says that learned judge, 'a thing is commonly treated as impossible when it is impracticable, and as impracticable when it cannot be done without laying out more money than the thing is worth.' Thus, if goods are reduced in such a state, by sea-damage, as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry* v. *Aberdein*, 9 B. & C. 411, 4 M. & R. 343. So, if, from sea-damage, the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Roux* v. *Salvador*, 3 N. C. 266, 4 Scott, 1." There is no reason why the same principle should not apply to freight. Could the coals here have been sent forward in their damaged state to their destination? If not, there is a total loss of freight. Upon these authorities, therefore,—to which may be added *Green* v. *The Royal Exchange Assurance Company*, 6 Taunt. 68, 1 Marsh. 447, and *Knight* v. *Faith*, 15 Q. B. 649,—it is submitted that the direction of the Lord Chief Justice to the jury was quite correct, and that there is no pretence for disturbing the verdict.

Shee, Serjt., Hugh Hill, Q. C., and J. Addison, in support of the rule. The facts are short and simple. The ship, though damaged, was reasonably repairable and was finally repaired, and proceeded upon another voyage. The charterer and owner of the cargo, who had paid 800*l*. of the 1200*l*. freight stipulated for by the charter-party, finding that he could not profitably pursue the adventure, abandoned it, and sold the coals, receiving back the 800*l*. which he had paid. The **[642]** owner of the ship purchased the coal, and afterwards re-sold it at a price nearly equal to its original cost. It appeared that the coal was only damaged to the extent of justifying an apprehension of its ignition in the course of a long voyage. It is submitted that the Lord Chief Justice misdirected the jury in telling them that there was a total loss of freight, if the goods were so damaged by perils of the sea that they could not be made fit for re-shipment except at an expense which no prudent owner would incur,—meaning, of course, owner of the coals. [Williams, J. I am not sure of that: he may have meant owner of the ship.] It was submitted on the part of the defendant, that the question of expense did not properly form an ingredient in the consideration of whether or not there had been a total loss of freight. And this argument was founded upon the case of *Morby* v. *Jones*, 4 B. & C. 394, 6 D. & R. 479, which is nearly identical with the present case. That was an action on a policy on freight. It appeared that the ship in the course of her voyage, having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea-water that it could not be re-shipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with an expense equal to the freight. Under these circumstances, the master sold these goods, and, finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted. The underwriters were held not to be liable for the loss of the freight. In giving judgment, Abbott, C. J., after stating the facts, says: "The question was, whether, under these circumstances, the underwriter was answerable pro **[643]** tanto for the freight of the goods thus re-landed and left behind: and there appears to be no case or decision exactly in point, and yet such an occurrence must probably have happened many times, and upon the whole we are of opinion that the

underwriter was not liable for the freight of these goods. It may be very true that the most prudent thing for the master of the ship might be, to leave the goods behind, and sail without them; but it does not therefore follow that the underwriter is to make good the freight thereby lost. If it should be held, in a case of this kind, that the underwriter would be liable to make it good, it would open a temptation to the master of a ship to sail away under circumstances like these, instead of stopping until the goods could be re-shipped; which would be very mischievous. We think inconvenience would result by laying down a rule which should make the underwriter answerable in a case of this kind. It is very proper that the master should exercise a discretion whether it be more fit to leave the goods behind, and give up the value of the freight, than to bring them home. But it by no means follows as a consequence, that, if he does in the sound exercise of his discretion leave part of the goods behind, and his owner thereby loses freight pro tanto, that he can throw that loss on the underwriter." *Murdock* v. *Potts*, Park, Ins. 8th edit. 634, Marsh. Ins. 2nd edit. 326, is very like this case. It was an action upon a policy of assurance on freight of the ship "Bethiah," at and from Bordeaux to Virginia, warranted American ship and property: the declaration alleged that the ship was an American ship and the property of American subjects. The plaintiff proved the ship to be American, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but, upon the evidence, it appeared that the goods, **[644]** whether American or not, were to be carried in the ship from Bordeaux to St. Domingo, and that she was only to call at Norfolk in Virginia for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord Kenyon being of opinion that the underwriters upon this policy had a right to expect that the goods upon which the freight was payable were consigned to Virginia, and that, if the freight was payable for the carriage of them from Bordeaux to St. Domingo, the underwriters were not liable for the loss, though the ship was to call at Norfolk for orders, the freight payable being in such case different from the freight insured: the plaintiff was nonsuited, and no application was made to set aside the nonsuit. It is clear, upon the authorities, that, if the ship in consequence of sea-damage is prevented from pursuing the voyage, there is a total loss of the ship. It cannot be denied, also, that, if the goods are so damaged by means of a peril insured against that they cease to retain their original character, that would constitute a total loss of freight. [Williams, J. Do you dispute the proposition, that, supposing the goods to be reduced by sea-damage to such a state that it is impossible to carry them to their destination without danger to the ship or to the lives of the crew,—and therefore practically impossible to carry them at all,—that would amount to a total loss of freight?] It is submitted that there is no authority for that proposition. [Cockburn, C. J. Is it not clear upon principle, independent of authority?] At all events, that point does not arise here. At the utmost, here is only a loss of the voyage: *Brocklebank* v. *Sugrue*, 1 M. & Rob. 102. The coals still remained coals, except for the purposes of the particular voyage. [Williams, J. My impression is, that, if it was impracticable to restore the coals so as to enable them to be carried forward to their desti **[645]**-nation, the freight is totally lost, although there has not been a total loss of ship or goods.] There can be no total loss, if any part of the freight has been received: and, here, in substance, freight pro ratâ itineris was earned. [Cockburn, C. J. This point was not made at the trial.] It was not, unless it is involved in the question of total loss of freight. The point reserved was, that this was a time policy from the 24th of January to the 1st of March, subject to the right to renew, unless notice was given under the 14th rule; and that, no such notice having been given, the loss was not complete within the time mentioned. [Cockburn, C. J. Unless notice was given, the policy would be a continuing policy.] *Taylor* v. *Wilson*, 15 East, 324, at first sight, seems adverse to the defendant. It was there held, that freight may be insured for part of a voyage. The vessel sailed with a cargo from St Ube's for Gottenburgh, with intent to proceed from St. Ube's to Portsmouth, to take up convoy on her way to Gottenburgh; the underwriters having no notice that the ultimate destination of the ship and cargo was Gottenburgh. But there there was an express contract. The owner may have thought fit to insure for the more dangerous part of the voyage. [Cockburn, C. J. Why may not a man insure for a portion of the duration in point of time as well as of distance?] The effect is, that he is insuring for a voyage not designated, for a very inadequate

premium. [Cockburn, C. J. Would not that remark be equally applicable to the facts in *Taylor* v. *Wilson*? Cresswell, J. It seems to me rather to resolve itself into a question whether or not the party had an insurable interest. If he had, I do not see why he may not insure it for a month or for any other time. The case of *Taylor* v. *Wilson* only fortifies the opinion we all I believe entertained before.] The rule is thus stated in Arnould on Insurance, vol. i., p. 230,—"A **[646]** vested interest in possession is not necessary to give the right of insuring. An expectancy, coupled with a present existing title to that out of which the expectancy arises, is an insurable interest. Inchoate rights founded on titles subsisting at the time of loss are insurable interests: thus, freight payable either on the arrival of the goods, or under a charter-party, is insurable by the ship-owner, provided his title to the freight has accrued at the time of loss, so that nothing but the intervention of the loss can prevent him from earning it." *Murdock* v. *Potts* is observed upon by Lord Ellenborough in *Taylor* v. *Wilson*: but it is cited without disapprobation in *Hall, App., Brown, Resp.*, 2 Dow, P. C. 367.

Cresswell, J. The Lord Chief Justice wishes me to express my opinion first, inasmuch as one ground of the motion was that he was supposed to have misdirected the jury. I entirely agree with him that the expense of putting the coals in a state to enable them to be carried safely to their destination was a very fit subject of inquiry. It would be just as reasonable to call upon the ship-owner to incur great expense in the repair of the ship when she has sustained damage to such an extent, that, when repaired, she would be worth less than the sum laid out upon her, as to call upon him to incur an expense, in order to carry the cargo to its destination, which would greatly exceed its value (!) when it got there. I therefore think there is no ground for a new trial in this case upon the score of misdirection. With regard to the other question, as to the effect of the policy, it is to be observed that it is one of a somewhat novel character. The rules of club-policies have not usually been applied to policies on freight. It seems, however, that these time policies are greatly on the increase. With regard to the parti-**[647]**-cular question now before the court, it seems to me to be free from any serious doubt. It cannot be denied, that, where a contract for freight is made, and the goods are prepared and actually on board, the ship-owner who has contracted to carry them has an inchoate right to the money agreed to be paid, and that gives him an insurable interest. That being so, I do not see why he may not insure such freight for a week or a month, or for distance, or for a voyage. For instance, where the voyage is from the port of London to the West Indies, why may he not insure as far as Portsmouth? There is nothing unreasonable in such a contract. In *Murdock* v. *Potts*, Lord Kenyon seems to have proceeded upon the ground that there was no such freight as that from Bordeaux to Virginia, which was the subject of insurance in that case. Here, the owner having contracted for freight, that freight was at risk. The insurer says, "I will insure your interest in the freight from a given day to a given day." By one of the perils insured against, the freight is lost before the day mentioned for the termination of the risk. It seems to me to fall within the ordinary case of a loss by a peril insured against. I see no ground for disturbing the verdict.

Williams, J. I entirely agree with my Brother Cresswell upon the last point: I will, therefore, confine myself, in the few remarks I have to make, to the imputation of misdirection, which is, in accordance with the objection urged on the part of the defendant at the trial, founded upon an exaggerated notion of the doctrine of *Morby* v. *Jones*, 4 B. & C. 394, 6 D. & R. 479, that, to entitle him to freight, the ship-owner must have actually carried the goods to their destination. I think that doctrine is not fairly deducible from the decision in *Morby* v. *Jones*. If it were, I for one should not be disposed to agree with it, inasmuch as it in-**[648]**-volves, as it seems to me, a striking absurdity. It is easy to suggest cases where it would be ridiculous to expect the owner to pursue the adventure,—it might be that the expense of putting the goods into a fit condition to proceed, would many times exceed their presumed value when arrived at their destination.

Willes, J. I am of the same opinion. As to the first question, it appears to me that the policy is a contract with the ship-owner to warrant him against loss by reason of damage arising from any of the perils insured against, within the period mentioned therein. These policies are made renewable from year to year, on account of the stamp-duties. It appears to me that there was a sufficient probability that the insured

would continue a member of the club down to the time that the freight which was the subject of insurance would have been earned, and that matters would remain as they were. It clearly must have been intended that the insurance should cover the freight during the voyage, unless the contract were put an end to by the notice provided by the 14th rule. I therefore think, upon either of the grounds urged by my Brother Byles, that this policy does extend to cover the freight in question although it might not have been actually earned until after the expiration of the term specifically mentioned therein. Upon the first point, therefore, I am of opinion that there is no reason for holding that the defendant is entitled to have his rule made absolute. As to the second point upon which the rule was moved, the argument for the defendant in truth amounts to what Mr. Addison contended for, viz. that no loss of the cargo can be considered a loss of freight within the terms of this policy. That clearly could not have been the intention of the policy. If the goods the carriage of which is to entitle the ship-owner to freight are lost, **[649]** the freight is as much lost as if the ship herself were lost. The question simply comes to this,—whether a person who can only earn 100*l.* freight by expending 1000*l.* in restoring goods damaged by a peril of the sea to a condition to enable them to be carried forward to their destination, can be said not to have sustained a loss of the freight by a peril of the sea. The proposition needs only to be stated, to suggest the only answer that could be given to it. Upon the point reserved, therefore, I think the defendant has failed to shew that the verdict was wrong; and I think there was no misdirection.

Cockburn, C. J. I am of the same opinion. As to the first point, I am disposed to think that this is a continuing policy, by reason of the provision contained in the 14th regulation, that it should be renewed for another year unless notice be given on either side to put an end to the contract. But, independently of that, I do not see why freight should not be insured by a time policy, even though the freight should not be actually earned within the time mentioned in the policy. The case of *Taylor* v. *Wilson*, 15 East, 324, where it was held that freight might be insured from St. Ube's to Portsmouth, upon a ship which sailed with a cargo from St. Ube's for Gottenburg, with intent first to proceed to Portsmouth, seems to me to be applicable here. I see no reason why, if the earlier part of the voyage is peculiarly perilous, the owner may not cover his freight,—his expected profit,—by an insurance applicable to that part only. And there is no hardship on the underwriter: he receives his premium on the whole amount of the freight, which cannot be earned till the completion of the voyage. As to the second point, I have heard nothing in the argument,—able as it has been,—to satisfy me that the proposition **[650]** contended for, viz. that the question whether there is a total loss on freight where the goods are so damaged by a peril of the sea as to be incapable, except at a cost which no prudent owner would incur, of being carried to their destination, is not an essential ingredient in the consideration of this case, is tenable. It is now well settled, with regard to a policy on ship or on cargo, that, where either has sustained damage by a peril insured against, but is capable of being restored so that the ship may proceed and the cargo be carried to its destination, the question whether there has been a total loss or not depends upon whether that result may be obtained by the expenditure of a sum such as a prudent owner uninsured would reasonably be expected to incur. I see no reason why the same principle should not apply to an insurance on freight. The ship-owner insures his freight with a view to protect himself against a loss of that freight by the loss of the goods by the carriage of which it is to be earned. If, in order to enable him to carry the goods to their destination, the ship owner is bound to expend upon them an amount which would eat up the whole freight to be earned by the voyage, it is clear that he would be incurring that expense, not for his own benefit, but for that of the underwriters. The effect would be, that, to obtain immunity to the underwriter, the owner would be doubling his own risk. It seems to me, therefore, that the principle which is admitted to be applicable in the case of a policy on a ship or on goods, is equally applicable to a policy on freight. It was clearly proved here that the coals could not be re-shipped and carried to their destination in their then state: but that they might have been restored, though at an expense far exceeding their value, by reason of the difficulty of obtaining a sufficient quantity of water to free them from the salt with which they had become impreg **[651]** nated. My Brother Shee insisted that the sole question for the jury to consider was, whether or not it was physically practicable to put them in a state to be carried forward. But I thought the real question was, not whether it was physi

cally practicable, but whether it was commercially practicable, and therefore I also put to them the question of expense.

Rule discharged.

SMITH v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF HARWICH.
June 2nd, 1857.

[S. C. 26 L. J. C. P. 257.]

An agreement was entered into between the corporation of Harwich and S., a contractor for works, whereby the corporation agreed to let to S. the making, constructing, and completing certain works which they were impowered by an act of parliament to make, according to a specification and plans annexed, at or for the sum of 12,305l., and "on the conditions and in manner thereinafter mentioned:" and S. agreed to take the said works and complete the same in manner set forth in the specification, and for the sums and subject to the provisions thereinafter mentioned. The agreement then went on to provide that S. should construct certain of the works, described in the specification as the "first portion" thereof, for 7318l., to be paid as in the specification mentioned; and that he should also construct the "second portion," as described, for 4987l., subject to the following provisions, that is to say,—"that the assent of the commissioners of woods and forests shall be given to the said mayor, &c., to carry out the said last-mentioned works, so far as the same affect the land or soil, &c. of the crown,—and that the said mayor, &c., are not prevented from carrying out the said last-mentioned works by the Eastern Union Railway Company, &c.,—and, further, that the approbation of the lords commissioners of the treasury is given to the said mayor, &c., to borrow on bond or on mortgage of the rates and property of the borough, &c., such sum or sums of money as may enable the said mayor, &c., to pay for the same."—In an action by S. against the corporation upon this agreement, the declaration assigned for breach that the defendants had omitted within a reasonable time to procure and obtain the assent of the commissioners of woods and forests, and the approbation of the lords commissioners of the treasury, as in the agreement mentioned, or to permit the plaintiff to commence the second portion of the said works:—Held, that there was nothing in the language of the agreement to warrant the court in implying a covenant on the part of the corporation to obtain the assent and approbation therein mentioned.

The declaration stated, that, on the 15th of April, 1852, a certain memorandum of agreement under seal [652] was made and entered into by and between the defendants of the one part, and the plaintiff of the other part, and sealed with the corporate seal of the defendants, which was and is in the words and figures following,—"Memorandum of agreement made and entered into this 15th day of April, 1852, between the Mayor, Aldermen, and Burgesses of the borough of Harwich, in the county of Essex, of the one part, and Edmund Smith, of Woolwich, in the county of Kent, contractor for works, of the other part,—Whereby the said mayor, aldermen, and burgesses agree to let to the said Edmund Smith the making, constructing, and completing of the several works impowered to be made under and by virtue of the act of parliament made and passed in the last session, and intituled 'The Harwich Improvement Quays and Pier Act, 1851' (14 & 15 Vict. c. xlii.), and which works are fully set forth and described or laid down in the specification as altered in ink and plans hereunto annexed, at or for the price or sum of 12,305l., and on the conditions and in manner hereinafter mentioned: And the said Edmund Smith hereby agrees and contracts with the said mayor, aldermen, and burgesses to take the said work and to construct, make, and complete the same in manner set forth in the said specification, and for the several sums, and subject to the provisions hereinafter mentioned and contained, that is to say, That he the said Edmund Smith, his executors and administrators, shall and will well, truly, and faithfully construct, make, and execute the pier and the cant thereof, part of the wharfing, and filling in at the back thereof, and also the dredging and other works mentioned and described in the said specification as the first portion of the said works, and as laid down on the said plans, and comprised within the letters, numbers, and colours mentioned in the same specification, with

reference to the said plans, at and for the price or sum [653] of 7318l., to be paid in manner set forth in the said specification: and that he and they shall and will also well, truly, and faithfully construct, make, and execute the second portion of the said works as set forth and described in the said specification, and laid down on the said plans, at and for the price or sum of 4987l., subject to the following provisions, that is to say, that the assent of the commissioners of Her Majesty's woods, forests, land revenues, works, and buildings shall be given to the said mayor, aldermen, and burgesses to carry out the said last-mentioned works, so far as the same affect the land or soil, or any rights in respect thereof, belonging to Her Majesty in right of Her crown; and that the said mayor, aldermen, and burgesses are not prevented from carrying out the same last-mentioned works by the Eastern Union Railway Company, or any other company, or by any person or persons under or by virtue of the power given to the said railway company for making part of the said last-mentioned works; and further that the approbation of the lords commissioners of Her Majesty's treasury is given to the said mayor, aldermen, and burgesses to borrow on bond or on mortgage of the rates and property of the borough, and of the rates and tolls to be levied and property to be created by virtue of the said act, such sum or sums of money as may enable the said mayor, aldermen, and burgesses to pay for the same; and which said sum of 4987l. is also to be paid in manner set forth in the said specification: And he the said Edmund Smith doth, for himself his executors, and administrators, further agree, that, immediately on the execution of these presents, and from time to time until the completion of the said contract or contracts, he and they shall and will obey, carry out, and perform all and every the provisions and stipulations provided in the said specification to be obeyed, carried out, and performed: And [654] the said mayor, aldermen, and burgesses hereby promise and agree that they and their successors in the said corporation shall and will well and truly pay or cause to be paid to the said Edmund Smith, his executors or administrators, all and every sum and sums of money which may hereafter become due and payable to him by virtue of these presents, and in manner set forth in the said specification, and on their parts shall and will duly carry out and perform all and every the provisions and stipulations provided in the said specification to be obeyed, carried out, and performed: And it is hereby mutually agreed, that, on the request of either party hereto, a further and more formal contract and agreement for the due and faithful carrying out and performance of the several matters and things hereinbefore mentioned and contained, or herein referred to, shall be prepared and executed on their respective parts and as provided by the said specification: Given under the common seal of the borough of Harwich at a meeting of the council of the said borough duly convened, and held on the 26th of April, 1852." Averment, that, by the said specification in the said memorandum of agreement mentioned and referred to, the defendants, amongst other things, engaged and promised that they would make payments of 80l. per cent. within fourteen days from the period that their engineer should have certified to them that the plaintiff had completed work and delivered materials to the extent of 1000l., and, after that, to make payments in the same proportion within fourteen days after the delivery by the said engineer of each monthly certificate; that the balance due on the contract at the completion of the works should be paid for, half at the expiration of six months, and the remainder at the expiration of twelve months from the date of the said engineer's certificate; but such balance to carry interest at the rate of 4l. per [655] centum per annum: Breach, that, although the plaintiff did well and truly construct, make, and execute the said pier, and the cant thereof, part of the wharfing, and filling in at the back thereof, and also the dredging, and all other works mentioned and described in the said specification as the first portion of the said works, and as laid down on the said plans by the said memorandum of agreement referred to; and although before the commencement of the suit all things were done and happened to entitle the plaintiff to be paid by the defendants the said sum of 7318l.; yet the defendants had not paid the same, or any part thereof: And the plaintiff further said that he had at all times been ready and willing to commence the construction and execution of the said second portion of the said works, and long since, and before the defendants suffered and permitted the plaintiff to commence the same, all things had been done and happened to entitle the plaintiff to have done and performed by the defendants all things which were according to the said memorandum of agreement by the defendants to be done before the said second portion of the said works could be

commenced; and although the defendants could and might within a reasonable time after the making of the said memorandum of agreement have procured and obtained the assent of the said commissioners of Her Majesty's woods, forests, &c., and also the approbation of the said lords commissioners of Her Majesty's treasury, as in the said memorandum of agreement was mentioned and provided for; and although it was necessary that such assent and approbation should be obtained; and although the defendants could and might within such reasonable time have suffered and permitted the plaintiff to commence such second portion of the said works; yet the defendants wrongfully and improperly omitted to procure or obtain the said assent [656] or the said approbation within such reasonable time, or within such time to suffer or permit the plaintiff to commence such second portion of the said works, and wrongfully and improperly hindered and delayed the plaintiff in commencing such portion, whereby the plaintiff was prevented from commencing and working at such second portion of the said works as soon as he otherwise might and would have done, and was forced and compelled to pay higher prices for materials and labour than otherwise he would have had to pay, and was deprived of great profits and gains which he otherwise would have made from the performance of such works.

The defendants demurred to the second breach,—the ground of demurrer stated in the margin being, "that the deed contains no covenant to which the second breach in the first count is applicable."

Second plea,—to the first breach,—that the approbation of the lords commissioners of Her Majesty's treasury was not at any time given to the defendants to borrow on bond, or on mortgage of the rates and tolls to be levied, and the property to be created, by virtue of the said act, such sum or sums of money as might enable the defendants to pay for the same, or any part of the amount of the moneys alleged to have been unpaid to the plaintiff, as in the first breach therein mentioned.

The plaintiff demurred to the second plea,—the ground of demurrer stated in the margin being "that the giving of the approbation in the second plea mentioned was not a condition precedent to the performance of the covenant to the breach of which the second plea is pleaded."

Fifth plea,—to the first count of the declaration, except so far as the same related to the alleged breach of covenant in that count first above assigned,—that the [657] said specification, as altered in ink in the said deed in the first count mentioned, contained the provisions and stipulations following, that is to say,—"The contract to be entered into is to be with the Mayor, Aldermen, and Burgesses of Harwich, and is to be for the carrying into execution the whole or a portion of the works hereinafter described, which they are impowered to execute under their act of parliament of the 14th & 15th Victoria. The contract comprises the erection of a timber pier extending from the shore adjacent to Angel Quay, in a north-westerly direction, with a cant or arm to the eastward forming a pier or harbour between it and the shore. Also the erection of the whole or a portion of the timber quaying authorised to be constructed by the above-recited act, with the necessary excavation and dredging to form the approaches to allow of vessels coming alongside the said pier and wharfs, which excavation and dredging is to be filled in behind the timber wharfing, there to form embanked approaches to the said pier, as well as a convenient line of quays and roadway." "The corporation reserve to themselves the power of proceeding with only a portion of the works, or the whole, as may be determined on. It will therefore be necessary that the contractor should tender in two separate portions, as follows:—The first portion to comprise the wharfing A. B. C. D. and E., and the filling of the inclosed space with the boat-landing; the excavation from section No. 1 to 9, with portions of 10 and 11, and as far as I.; the formation of the pier and cant, and the breaking up and applying the breakwater ships: the colouring of this portion of the contract is of the dark shade in pink and green: The second portion to comprise the wharfing D. J. M. N. L., and the filling of the inclosed space as far as the material will go, and the excavation of the space D. I. K.: the colouring of this portion is of the lighter shade in [658] pink and green:" And that the said "first portion" and "second portion" mentioned in the provisions and stipulations thereinbefore set forth were and are the same first portion and second portion of the works in the deed in the first count of the declaration mentioned.

Replication,—that, before the making of the memorandum of agreement in the first count mentioned, and before the alteration of the specification in the said first

count and in the fifth plea mentioned, the defendants caused to be issued and delivered to the plaintiff and to others, contractors, for the purpose of enabling and inducing them to tender for the works therein referred to, a certain specification of works to be executed, which was in the words, letters, and figures following:—[After setting out the specification, the replication proceeded]—That, after such specification was so issued, the plaintiff, being a contractor, did in accordance therewith make two several tenders to the defendants for the two portions of the said works in the said specification respectively mentioned and described, that is to say, one tender for the first of the said two portions, and another for the second of the said two portions, which said tenders were then accepted and assented to by the defendants: That, after such acceptance and assent, the defendants determined on proceeding with the whole of the said works, that is to say, both portions of the said works in the specification mentioned, and then made known such determination to the plaintiff; and thereupon, and by reason of such determination, it became and was unnecessary to execute a portion of the works in the said specification mentioned and therein referred to as the wharfing from D. to E.; whereupon, before the making of the said contract in the said first count of the declaration mentioned, the said specification was with the assent of the plaintiff **[659]** and of the defendants altered by striking out in ink the following, —"should the whole be proceeded with, there will be a proportionate reduction for the wharfing from D. to E., if not executed:" And that such specification so altered then became and was the specification as altered in ink in the said first count and in the said fifth plea mentioned.

Demurrer,—the ground stated in the margin being, "that the striking out of the specification of the words in that replication lastly set forth, did not deprive the defendants of their option to proceed with the second portion of the works or not, as they should think fit." Joinder.

C. Pollock (with whom were E. James, Q. C., and Bovill, Q. C.), for the plaintiff (*a*). [Lush, for the de-**[660]**-fendants, intimated that he did not mean to rely on the second plea.] The second breach assigned in the declaration is founded upon the three conditions upon which the plaintiff was to perform the second portion of the work, viz.

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

As to the demurrer to the second breach,—"that such breach discloses a good cause of action, that the defendants ought within a reasonable time to have obtained the assent of the commissioners of the woods and forests, and also the approbation of the lords of the treasury,—that, in construing the agreement declared upon, effect must be given to the manifest intention of the parties thereto, whether expressed or implied, and to the substance thereof,—and that the defendants ought within a reasonable time to have permitted and enabled the plaintiff to commence the second portion of the works."

As to the demurrer to the second plea,—"that the second plea contains no good answer to the first breach,—that the approbation of the commissioners of the treasury was not a condition precedent to the payment by the defendants of the sum mentioned in the first breach,—that, if such approbation were a condition precedent, the obtaining of it was the duty of the defendants, and not of the plaintiff, and also that the second plea was bad for not alleging that the defendants were unable to obtain it, or had used any efforts to do so,—that the payment of the sum mentioned in the first breach did not depend upon the defendants' borrowing money, and that the second plea did not aver that it was necessary for the defendants to borrow money in order to pay the plaintiff such sum, and that it was consistent with the facts alleged in that plea that the defendants could have paid such sum without borrowing."

As to the demurrer to the replication to the fifth plea,—"that, upon the true construction of the agreement declared upon, coupled with the specification, and the facts averred in the said replication, the defendants were bound to go on with both portions of the work,—that the option reserved to the defendants by the specification of proceeding with only a portion of the works, ceased to exist upon the making of the agreement sued upon,—that such option is inconsistent with and repugnant to the other provisions of the agreement declared on, and to the general intent thereof, and therefore the clause containing such option must be rejected,—and that the making by the defendants of the contract sued on was a waiver of the option, or an exercise of it in favour of the plaintiff's view."

the procurement of the assent of the commissioners of woods and forests, the non-interference of the Eastern Union Railway Company, and the approbation of the lords commissioners of the treasury to the raising of the money by the corporation in the manner mentioned. Now, the assent of the commissioners of woods and forests was to be given to the corporation; and the approbation of the lords of the treasury was required to authorize the corporation to raise money on bond or by mortgage of their tolls and rates. It clearly must have been intended that these should be obtained by the defendants, to enable the plaintiff to proceed with the second portion of the work. [Cockburn, C. J. It comes by way of proviso in that part of the agreement which deals with what the contractor covenants to do.] The position of the **[661]** words will not affect their construction: the whole agreement must be taken together, in order to ascertain what the parties have contracted for. The work is to be paid for in a given manner: it is only by the permission of the lords of the treasury that the defendants could raise the money; and they alone could apply for the approbation of the treasury to their so doing. [Cockburn, C. J. You contend that there is an implied covenant on the defendants' part to obtain the requisite assent and approbation?] Clearly so. No particular words are necessary to constitute a covenant: it is enough that the court can see upon the whole instrument that the parties have mutually agreed to do something. *Porcher* v. *Gardner*, 8 C. B. 461, shews that the court will not look for any special form of words, but will look to the substance of the agreement. There, by articles of agreement between the plaintiffs, trustees of a marriage settlement, and the defendants, three of the committee of management of a projected railway company,—reciting that a bill for the formation of the railway was pending in the House of Commons, and that the railway was intended to pass through a certain park which was subject to the settlement,—it was agreed, that, if the bill should pass into a law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the said park and hereditaments, pay the plaintiffs 11,700*l.*; and that, in consideration of that sum, the company should have conveyed to them nineteen acres of the said land, &c.,—the whole of the said agreement to be null and void, unless sanctioned by the court of Chancery in a cause of *Lawrence* v. *Porcher*, and so much of that agreement as the court should require should be inserted in the act: and it was held, that the plaintiffs' obtaining the sanction of the court **[662]** to the agreement within six months of the passing of the bill, was a condition precedent to their right to sue the defendants for the money. [Cockburn, C. J. In that case, the consideration for the payment of the money by the railway company, was, the conveyance of the land to them with a good title. To enable them to make a good title, the plaintiffs were bound to procure the consent of the court of Chancery. Here, the very language of the deed attaches the proviso or condition to the covenant of the contractor to do the work. Had it been annexed to the covenants of the defendants, the case would have been different: but, can we change its position in order to give effect to your construction of the deed? It is difficult to see, if it be a qualification of the plaintiff's contract, how it can impose any obligation upon the defendants.] The authority above referred to shews that the substance of the contract is to be regarded rather than the particular allocation of the clauses. The same doctrine is laid down in many cases: see, amongst others, *Wood* v. *The Copper-Miners Company*, 7 C. B. 906, 14 C. B. 428, 15 C. B. 464, 18 C. B. 561, *Harrison* v. *The Great Northern Railway Company*, 11 C. B. 542, 815, 12 C. B 576, *Aulton* v. *Atkyns*, 18 C. B. 249. The stipulation for a more formal instrument affords an additional reason for giving a liberal construction to this agreement. [Cockburn, C. J. You are, in effect, asking us to import into this agreement a notion that the commissioners referred to can only deal with the corporation. How can we assume that the plaintiff might not have obtained the necessary assent and approbation?] The assent and approbation of the respective commissioners must of necessity be given to the corporation, who alone could act upon them (*a*). The replication to the fifth **[663]** plea in substance sets out

(*a*) The 36th section of the 14 & 15 Vict. c. xlii., enacts, "that nothing in this act contained shall extend or be construed to extend to enable the said corporation to sell, demise, mortgage, or alienate, for the purposes of this act, without the approbation of the lords commissioners of Her Majesty's treasury, or any three of them, any messuages, lands, tenements, or hereditaments which they could not have sold, demised, mort-

the whole of the specification upon which the agreement is founded. It appears, that, after the plaintiff's tender for the works therein described, the specification was altered by striking out a portion, and the agreement was made referring to the specification so altered. The reservation by the defendants of the power of proceeding with only a portion of the works, or the whole, as might be determined on, is repugnant and inconsistent with the sense in which the agreement is to be read, taken all together. The court will reject a provision the use of which is obviously gone. [Cockburn, C. J. There is no provision in the **[664]** contract that the corporation shall have power to withdraw from the second portion of the works: and it may be a question how far the agreement is to be controlled by the specification, which is referred to, but not incorporated into it.]

Lush (with whom was J. Brown), contrà (*a*). There is no contract on the part of the defendants to procure the assent and approbation referred to in the agreement: all they contract for is, that, if the works are to be done, the plaintiff shall do them, and they will pay for them. The defendants could not use crown lands without the consent in writing of the commissioners of woods and forests, or pledge the corporate property, or the rates and tolls of the borough, without the approbation of the lords of the treasury. The plaintiff, therefore, might well contract to see that that assent and approbation were obtained; and such a matter might very properly be placed as a qualification of his covenant to do the work. Assume that it is a condition inserted for the benefit of both, the court cannot, it is submitted, imply therefrom a covenant on the part of the defendants to obtain the assent and approbation of the respective commissioners. Would they be bound to accept such assent upon whatever terms the crown might choose to impose? *Rashleigh* v. *The Eastern Counties Railway Company*, 10 C. B. 612, was a much stronger case than this. There, Maule J., in delivering the judgment of the court, lays down **[665]** the true principle by which the decision of this case will be governed. "It was rightly conceded on the argument," he says, "and is undoubted law, that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose, which shew an intention to be bound by the deed to do or omit that which is the subject of the covenant: any such words are sufficient, and some such words are necessary, to make a covenant. It was argued, in the present case, that the several covenants by which the defendants bound themselves to do certain things (as, to build a bridge over the new cut, and fill up the old course of the stream, after it had been diverted, and to re-convey the slip forming the new course of the river,) which are incidental to, or to be done after, the new cut is made, and the stream diverted, being in their terms absolute, and not conditional on the making of the new cut and diversion of the stream, shew a clear intention that the defendants meant to bind themselves to do that principal act of making the cut and diverting the stream, to which the things which they in express terms absolutely covenanted to do were incidental. But we

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gaged, or alienated without such approbation before the passing of this act, anything in this act to the contrary notwithstanding."

And s. 39 enacts "that nothing contained in the recited acts* or in this act shall extend to authorise the company to purchase, take, or use any land or soil, or any rights in respect thereof, belonging to Her Majesty in right of Her crown, without the consent in writing of the commissioners for the time being of Her Majesty's woods, forests, land revenues, works, and buildings, or any two of them, first had and obtained for that purpose, and which such commissioners, or any two of them, are hereby authorised and impowered to give, or to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in or enjoyed by Her Majesty, her heirs and successors."

(*a*) The points marked for argument on the part of the defendants were,—

"1. That the deed contains no covenant, express or implied, on the part of the defendants, to procure the consents of the authorities mentioned in the contract:

"2. That, by the contract between the parties, the defendants had an option to do or to abandon the second portion of the works."

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* The 59 G. 3, c. cxviii., for paving, &c., the town of Harwich, "The Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18), and "The Harbour, Dock, and Pier Clauses Consolidation Act, 1847" (10 & 11 Vict. c. 27).

think that such an intention cannot properly be inferred: the true inference, as it appears to us, is, that the parties to the deed both of them expected that the new cut would be made, and the stream diverted, and entered into the contract in question under that expectation,—treating it as a thing that was certain to take place, and providing for that event only: but it by no means follows from this state of things that the parties intended that the defendants should bind themselves by the deed to make the cut, and divert the stream, any more than a covenant to lay down the permanent rails, or to complete the railway, is to be inferred from the covenants to do certain things after those events. No reason has been suggested, why, if the **[666]** defendants were really intended to be bound as the plaintiffs contend, in a deed of which the sole object is to express the covenants by which the defendants were to be bound to the plaintiffs, the principal thing to be done by the defendants should be left to implication, and the incidental matters minutely provided for." Every argument used in that judgment is applicable to the present case. If such an important stipulation as this had been intended, it never would have been left to inference and implication. [Cockburn, C. J. It must have been contemplated that somebody would obtain the required assent.] It may have been expected: but is it covenanted? *Aspdin* v. *Austin*, 5 Q. B. 671, 1 D. & M. 515, and *James* v. *Cochrane*, 7 Exch. 170 (*a*)[1], are also authorities to shew that the court cannot infer a covenant unless the words used evidence a clear and unmistakeable intention in the parties to make a covenant. The cases cited on the other side are all in the defendants' favour, as far as they go. *Porcher* v. *Gardner* was disposed of by the remarks that fell from the court. In *Wood* v. *The Copper-Miners Company*, there was an express agreement upon which the action was founded. In *Harrison* v. *The Great Northern Railway Company*, the language used was such that the court could not do otherwise than infer that the company intended to contract for the required number of sleepers. And in *Aulton* v. *Atkins*, they declined to draw such an inference from language far stronger than that which is found here. The court here called on

C. Pollock to reply. *Rashleigh* v. *The South Eastern Railway Company* and *Aspdin* v. *Austin* proceeded upon the rule "Expressum facit cessare tacitum." In **[667]** both those cases the deeds were carefully drawn; whereas, it is impossible to conceive anything more loose than the agreement now in question. The last-mentioned case is commented upon by Erle, J., in the House of Lords, in *Emmens* v. *Elderton*, 13 C. B. 495 (*a*)[2], where it is put upon its true ground, viz. that it never could have been contemplated that the defendant should enter into an engagement to continue to carry on his business merely for the purpose of employing a workman. Here, the parties contemplate and provide for the execution of a more formal instrument: and it would hardly be asking the court too much to call upon them as a court of equity to carry out the intention of the parties in that respect.

Cockburn, C. J. It appears to me that there must be judgment for the defendants upon the demurrer to the second breach of the declaration in this case. It is true, that, according to the authorities which have been cited, where it is ambiguous on the face of a deed, by which of the parties a certain thing is to be done which the deed provides shall be done, the court will endeavour to ascertain from the general scope and tenor of the instrument upon whom is cast the duty of performing it. So, where a covenant may be implied from the general provisions of the deed, though there be no express provision on the subject, the court will give effect to the implied covenant. But the difficulty here is, that, there being no express covenant by the defendants to do that the omission of which is complained of, none arises by implication so clear that we can give effect to it. The corporation of Harwich by the memorandum of agreement in question agree to let to the plaintiff the making, constructing, and com-**[668]**-pleting of certain works which were authorized to be made under the Harwich Improvement Quays and Pier Act, 1851, according to certain plans and specifications; and they agree to pay to the plaintiff, his executors, &c., all and every sum and sums of money which might thereafter become due and payable to him by virtue of those presents, and in manner set forth in the said specification, and to carry out and perform all and every the provisions and stipulations provided in the specification to be carried out and performed. The plaintiff, the contractor,

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(*a*)[1] Affirmed in error, 8 Exch. 556.

(*a*)[2] And see *Elderton* v. *Emmens*, 4 C. B. 479, 498, 6 C. B. 160.

also thereby agrees with the corporation to take the work and to complete the same in manner set forth in the specification, and for the sums and subject to the provisions thereinafter mentioned, viz. certain works described as "the first portion" of the said works for the sum of 7318l. The agreement then goes on to provide that the plaintiff shall well and faithfully construct and execute "the second portion" of the said works, as described and laid down in the specification and plans, for 4987l., subject to the following provisions, that is to say, amongst others, that the assent of the commissioners of woods and forests shall be given to the corporation to carry out the said last-mentioned works so far as the same might affect the property or rights of the crown, and that the approbation of the lords of the treasury shall be given to the corporation to raise the money to pay for the same. It has been insisted, on the part of the plaintiff, that these provisions relate to matters which are to be accomplished by the corporation, the defendants. Now, the first observation which arises upon that is, that the proviso for the assent of the commissioners of the woods and forests attaches itself to the covenant on the part of the plaintiff for the performance of the works, and by ordinary intendment would operate a qualification of his covenant. But, assuming [669] that the proviso applies not merely to the plaintiff's covenant, but also to the covenants on the part of the corporation,—which I consider to be at best extremely doubtful,—then, there being a total absence of any express covenant on the part of either to obtain, in the one case the assent of the commissioners of woods and forests, and in the other the approbation of the lords of the treasury, it would seem that the parties have entered into the contract upon the mere assumption that these contingencies would come to pass, and this assent and approbation be given. If that be so, the case comes very much within the principle of *Rashleigh* v. *The South Eastern Railway Company*, 10 C. B. 612, where Maule, J., refers the form of the contract to an expectation of the parties that certain things which were contemplated would actually be done, and providing for what was to happen upon that assumption. But the court there held that no implied contract arose on the part of the defendants to do the thing in question. That seems to me to be very applicable to the present case. The parties have entered into a contract to do certain things, upon the assumption that certain necessary assents would first be obtained: but there is no provision, express or implied, to shew that either of them took upon themselves the accomplishment of that preliminary step. That being so, it is not competent to the court to make a contract for the parties which they have not thought fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used.

Cresswell, J. I am of the same opinion. The parties have not introduced into their contract words which are sufficient to lead the court to infer that the defendants meant to covenant to obtain the assent and approbation required. The parties may possibly have [670] contemplated that they would be given; but I find nothing in the agreement to shew that the defendants intended to bind themselves to obtain them.

Williams, J. I entirely concur in the opinions expressed by my Lord and my Brother Cresswell, and in the reasons assigned by them for holding the defendants entitled to judgment.

Willes, J. I must confess I had entertained some doubt in the course of the argument. But, upon looking closely into the agreement, I am unable to find therein any such covenant as the plaintiff's counsel contended for. I therefore agree that the defendants are entitled to judgment on the demurrer to the second breach in the declaration.

Judgment for the defendants.

C. Pollock. The plaintiff will have judgment on the demurrer to the second plea.

Lush. The defendants must have judgment on the demurrer to the replication to the fifth plea.

Cockburn, C. J. Probably, if the plaintiff consents to go no further upon the judgment, the fifth plea and the replication and demurrer thereon, may be struck out.

[671] MOOR *v.* ROBERTS AND ANOTHER. June 8th, 1857.

[S. C. 26 L. J. C. P. 246; 3 Jur. N. S. 1221; 5 W. R. 693. Referred to, *Edmunds* v. *Greenwood*, 1868, L. R. 4 C. P. 74.]

The court will not allow interrogatories (under the 17 & 18 Vict. c. 125, s. 51) the tendency of which is to discover how the plaintiff intends to shape his case, without furthering any case which the defendant has to set up.—Neither will interrogatories be allowed for the purpose of contradicting a written document.

This was an action against the defendants for breach of an undertaking to pay any deficiency which might arise on the sale of certain premises.

The declaration stated that one William Kirby was desirous of borrowing the sum of 1200l. upon mortgage of certain land, with the houses, messuages, and buildings thereon erected, and known as Nos. 12, 13, 14, 15 Russell Terrace, Holland Road, in the county of Surrey, and it was proposed and intended that interest should be payable on the said principal sum of 1200l. at the rate of, to wit, 5l. per cent. per annum, and that the mortgage-deed to be executed should express that such interest should be payable, and should also contain all necessary and usual powers of sale upon default; that thereupon, in consideration that the plaintiff and one George Mallows, since deceased, at the request of the defendants, would advance to the said W. Kirby the said sum of 1200l. upon such mortgage as aforesaid, the defendants undertook and promised the plaintiff and the said G. Mallows, that if, after any sale of the said premises so to be mortgaged duly made under the said powers of sale to be contained in the said mortgage-deed, the purchase-money should not be sufficient to satisfy the aforesaid sum of 1200l., and all interest, costs, charges, and expenses which might be then due in respect of the said mortgage, they would immediately thereafter make good and pay to the plaintiff and the said G. Mallows such deficiency, whether the same should be occasioned by any defect in the title to the said premises, or otherwise howsoever: Averment, that the plaintiff and the said G. Mallows did accordingly **[672]** advance to the said W. Kirby the said sum of 1200l. as aforesaid, on mortgage of the said premises, and that a mortgage-deed containing, among other things, a provision as to the payment of such interest as aforesaid, and also such power of sale as aforesaid, was duly executed and delivered by the said W. Kirby to him the plaintiff and the said G. Mallows, and that afterwards default was made by the said W. Kirby, to wit, in not paying the said principal sum and interest, according to the terms of the said mortgage-deed, whereby the said powers of sale became exerciseable, and were thereupon duly exercised by the plaintiff, who had survived the said G. Mallows, accordingly, and the said premises included in the said mortgage and powers of sale were duly and properly sold in virtue thereof; and that, upon the said sale, the purchase-money of the said property was not sufficient to satisfy the said sum of 1200l. and a further sum of 250l. then due in respect of the said mortgage for interest, costs, charges, and expenses, and that there was a deficiency thereon to the amount of 800l.; and that the plaintiff and the said G. Mallows, before his death, and the plaintiff since the death of the said G. Mallows, respectively, did all things, and all things were done and happened, to entitle him the plaintiff to have the said sum of 800l. made good and paid to him, as the survivor of the said G. Mallows, but that the defendants had not paid the same, &c.

The defendants, on the 27th of May, pursuant to an order of Crowder, J., of the 26th, pleaded,—first, that they did not undertake or promise in manner and form as in the declaration alleged,—secondly, that it was not proposed and intended as in the declaration alleged,—thirdly, that the plaintiff and the said G. Mallows did not advance to the said W. Kirby the said sum of 1200l. as in the declaration alleged,—fourthly, that a **[673]** mortgage-deed was not executed and delivered as in the declaration alleged,—fifthly, that the said powers of sale did not become exerciseable, nor were they exercised, as in the declaration alleged,—sixthly, that the said premises were not sold as alleged,—seventhly, that there was not a deficiency upon the said sale, as in the declaration alleged.

The defendants had previously, viz. on the 25th of May, taken out a summons calling on the plaintiff to shew cause why they should not be at liberty to deliver to

him the following interrogatories, pursuant to the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125:—

"1. Are you the plaintiff in this action, and is the same brought with your authority and on your behalf? and when and whom did you instruct to bring the same?

"2. Did you and George Mallows (since deceased) advance the 1200*l.* alleged to be advanced by you and George Mallows to William Kirby? and did you advance the same out of your own moneys or how otherwise? and when and how did you pay the same?

"3. Were you not as a banker, or was not your firm as bankers or otherwise, or was either of you, in the habit of lending to one F. H., of, &c., various sums of money? and was not the alleged 1200*l.* stated to be advanced to William Kirby part of such sums lent to the said F. H. by you? and were not your names made use of in trust for him? and are you or were you not guaranteed by the said F. H.? State fully.

"4. Was not the said F. H. in the habit of putting out money on mortgage or by way of loan for you and the said G. Mallows, or one of you, on his own guarantee, and at his discretion? and was not the said 1200*l.* so advanced by you and the said G. Mallows in that manner, or how otherwise? State fully.

"5. Had you and the said G. Mallows, or either of **[674]** you, any interest whatever in the said mortgage-debt and premises, beyond that of permitting your names to be used nominally or as a trustee for the said F. H. or any other party, or whom? or what interest had you and have you therein? State fully.

"6. Have you not since the date of the alleged mortgage of the 15th of January, 1847, aforesaid, assigned all your right, title, and interest in the said mortgage-debt and interest? If so, to whom and when did you assign the same? State fully.

"7. Have you not been released from all claim in respect of the said mortgage-debt and premises? When was such release executed, and by whom given? State fully.

"8. Was not the guarantee mentioned in the declaration intended, according to the true intent and meaning of the parties thereto, to have continued only till such time as certain buildings should be completed on the said land in the declaration mentioned? And were not the said buildings so completed several years since? State when they were so completed.

"9. Was it not the intention of the parties to the said guarantee that the said sum of 1200*l.* should be repaid at a period not exceeding three years after the advance thereof, and that the said guarantee should only remain in force during such period of three years? And has not the said period of three years long since expired? and when?

"10. Did you, and when and how, authorise a sale of the said mortgaged premises? and, if so, what reserved price did you place thereon? When did the sale take place? By and to whom, and in what manner? And what was the amount of the purchase-money? And has the same, or what part thereof, been, and when, paid to you?

"11. What is the balance of the principal money **[675]** due to you? And how and in what manner is it made out? How much for interest, and how much for costs, charges, and expenses? And when and to whom did you pay the same costs, charges, and expenses?

"12. Is not the contract for the sale of the said premises still depending and incomplete, and subject to further negotiation and inquiry? And is such contract of sale in writing? And how, when, and between what parties was the same made? And in whose possession is the same?"

Upon the hearing of the summons on the 26th of May, the learned judge made an order disallowing the interrogatories, with costs.

Rochfort Clarke, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why that order should not be rescinded, and why the defendants should not be at liberty to deliver the said interrogatories, &c.

Griffits now shewed cause. The proposed interrogatories are not such as ought to be allowed. The rule on this subject is well laid down by Lord Campbell, in *Whateley* v. *Crowder*, 5 Ellis & B. 709, where he says,—"Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51, a party may administer interrogatories for the purpose of obtaining a discovery, if the interrogatories are such that the answers may

be reasonably expected to discover matters which will advance the case of the interrogating party, though the answers may also disclose what is the case of the interrogated party. The object of the enactment was, to obviate what was a scandal to the law, viz. the necessity of commencing a fresh suit in a court of equity for the purpose of obtaining discovery in aid of an action at law. To effectuate this, it is enacted, that, by leave **[676]** of the court or a judge, a party to a suit may deliver 'interrogatories in writing upon any matter as to which discovery may be sought.' What is the interpretation to be put upon that? I think it is too wide an interpretation to say, as seems to have been said by Alderson, B., in the case cited in the Exchequer (*a*), that every question may be asked on interrogatories which might be asked if the party were a witness at the trial. I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity. I adopt the rule in the very terms used by Sir James Wigram (*b*): 'The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case,—and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.' You may inquire into all that is material to your own case, though it should be in common with that of your adversary; but you may not inquire into what is exclusively his case." Again, in *Edwards* v. *Wakefield*, 6 Ellis & B. 462, the same learned judge says: "This was an action of trover by the assignees of a bankrupt, to recover property alleged to form part of the bankrupt's estate: and the proposed interrogatories were for the purpose of compelling the plaintiffs to state upon oath what act or acts of bankruptcy they intended to rely upon in support of the title of the assignees. We think that the application is not authorized by the enactment in question. We are disposed to think that the section now under our consideration is intended to apply to cases only where the matters inquired into would be evidence in the cause, and **[677]** that it was not intended thereby to give one party the power of asking the other how he intends to shape his case. Such an inquiry is a mode of requiring particulars on oath without the party being obliged afterwards to confine himself to the particulars. When the justice of the case requires such particulars to be given, the courts have generally the means of compelling them to be given under such provisions as are reasonable. We think that we ought, at all events, to hold that the discovery, under the 51st section, is limited, by the words 'upon any matter as to which discovery may be sought,' to the cases where a discovery would be given in equity: and we think that the proposed questions clearly fall within the rule that a party is not to make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he intends to support it." "We were much pressed with the recent case of *Flitcroft* v. *Fletcher*, 11 Exch. 543. If the court there meant to decide that the defendant may always ask the plaintiff to declare on oath how he means to shape his case, we are not prepared to assent to it; and we should not feel ourselves bound by a decision of this nature, to the same extent as where a decision can be reviewed on error, even if the case were precisely in point." The interrogatories here proposed are open to all the objections above suggested: they are either inquiries as to matters not relevant to the cause, or directed to information which the defendant has by the ordinary practice of the court other means of obtaining, or to that which is exclusively the plaintiff's case. The second, tenth, and twelfth interrogatories relate exclusively to matters which the plaintiff would be bound to prove in support of his case: the third, fourth, fifth, seventh, and ninth have no application to any of the issues in the cause: the sixth can only be for the pur-**[678]**-pose of founding an application for security for costs: the eighth goes only to a denial of the guarantee in terms: and the eleventh is addressed to the damages, which do not form a proper matter for interrogatories.

R. Clarke, in support of his rule. In *Edwards* v. *Wakefield*, 6 Ellis & B. 462, the whole of the proposed interrogatories tended solely to an inquiry into the plaintiff's case. But, in *Whateley* v. *Crowter*, 5 Ellis & B. 709, the court of Queen's Bench distinctly recognise the right of a party to administer interrogatories in support of his own case, even though the answers may at the same time disclose the case of his adversary. It is enough, according to the case of *Croomes* v. *Morrison*, 5 Ellis & B.

(*a*) *Osborne* v. *The London Dock Company*, 10 Exch. 698, 702

(*b*) Wigram on Discovery, 2nd edit. 261.

984, if the court are satisfied that the interrogatories are pertinent. [Cockburn, C. J. Can you be permitted to ask the plaintiff what is the real nature of his case?] If any of the interrogatories proposed are such as the plaintiff ought not to answer, he may decline to answer them on that ground. [Cockburn, C. J. If this had been an application to the court of equity for a discovery, would they have granted what you now ask?] The true rule in the court of equity undoubtedly is as stated in the passage cited by Lord Campbell from Wigram on Discovery. [Cockburn, C. J. Is it not limited to this,—that, having a case, you seek to extract from your adversary the means of proving it? Here, you are seeking to discover what is the plaintiff's case. What is the case which you wish to establish?] That the defendants did not enter into the contract stated in the declaration. [Cresswell, J. That is in writing: it will speak for itself.] The defendants traverse the alleged intention: the guarantee was not intended to continue beyond three years; and all that it contemplated is accomplished. [Cockburn, C. J. In whose breast is that?] In the plaintiff's as well **[679]** as in that of the defendants. The defendants want to shew that a third party, and not the plaintiff, was really the principal in the transaction. The rule laid down in the cases cited only goes to preclude a defendant from putting to the plaintiff interrogatories as to something which is exclusively part of his case.

Cockburn, C. J. I am of opinion that this rule should be discharged. The obvious intention of the 51st section of the Common Law Procedure Act, 1854, was to supersede the necessity of recourse being had in all cases to a court of equity for the purpose of aiding by discovery the proceedings in an action at common law, and to give the courts of common law power to afford the same sort of assistance to suitors there. But we must consider what was the object of the act; and we shall find it to have been this,—that, where either party has a case, but the materials for proving it are not in his own possession or under his own control, but in the possession of his adversary, he should be enabled to interrogate his adversary in order to establish his own case. But the statute clearly was not meant to apply so as to enable one party by means of interrogatories to discover how the other intends to shape his own case, and to see whether there are any defects in it which he may avail himself of. The defendants here do not come with any affidavits shewing how the proposed interrogatories will further their defence to the action: but they come with a series of questions the manifest object of which is to probe the case of the plaintiff, without in any degree advancing that which they themselves propose to set up.

Cresswell, J. I am of the same opinion. There is undoubtedly considerable difficulty in drawing the line in each case between what interrogatories ought and **[680]** what ought not to be allowed. But it seems to me that all those which are proposed in this case fall within one or other of three classes,—first, where the defendant is seeking to discover the plaintiff's case, which cannot be allowed,—secondly, where the interrogatories are what are called fishing interrogatories, thrown out for the chance of getting hold of some fact or admission which might help the defendant's case,—thirdly, where the proposed interrogatories have a tendency to contradict a written document. Upon the whole, I think the decision of my Brother Crowder was right, and that this rule must be discharged.

Williams, J. I am entirely of the same opinion. This is in substance an attempt on the part of the defendants by indirect means to obtain a knowledge of what the plaintiff intends to rely on in support of his case. To allow that would be to make the statute an instrument of oppression to the suitor.

Willes, J., concurred.

Rule discharged, with costs.

[681] Gorrissen and Others *v.* Perrin and Others. June 11th, 1857.

[S. C. 27 L. J. C. P. 29; 3 Jur. N. S. 867; 5 W. R. 709. Applied, *Corkling* v. *Massey*, 1873, L. R. 8 C. P. 400.]

A. contracted to sell to B. 1170 "bales" of gambier, "now on passage from Singapore, and expected to arrive in London, viz. per 'Ravenscraig,' 805 bales, per 'Lady Agnes Duff,' 365 bales:" -Held, a warranty that the goods were then on passage.

—Held, also, that evidence was admissible to shew, that, by the usage of the trade, a "bale" of gambier was understood to mean a package of a particular description; and that the contract was not satisfied by a tender of packages of a totally different size and description.—Quære, as to the extent of the vendor's liability on a sale of goods "expected to arrive" by a particular ship, where goods of the description contracted to be sold do arrive, but are consigned to a third party?

This was an action for the breach of a contract for the sale by the defendants to the plaintiffs of a quantity of gambier.

The first count of the declaration stated, that, by an agreement made between the plaintiffs and the defendants, it was agreed that the plaintiffs should buy of the defendants, and the defendants should sell and deliver to the plaintiffs, 1170 bales of gambier, which the defendants thereby warranted to be then on passage from Singapore, and expected to arrive in London, that is to say, 805 bales by a vessel called the 'Ravenscraig,' and 365 bales by a vessel called the 'Lady Agnes Duff,' at certain prices then agreed upon between the plaintiffs and defendants; and it was thereby further agreed, that, if either or both of the said vessels should be lost, the said agreement should be void for the quantity so lost: Averment, that the plaintiffs had done all things, and that all things had happened, and all times had elapsed, necessary to entitle them to a performance of the said warranty of the defendants, and to maintain this action for non-performance thereof; and that neither of the said vessels was lost: Breach, that the defendants had broken their contract, in this, to wit, that 1170 bales of gambier were not, nor was any part thereof, at the time of making the said agreement, on passage from Singapore, within the true meaning of their said contract; whereby the plaintiffs had lost and been deprived of the said gambier, and of the profit and advantage they would have derived from having the same.

[682] Second count,—that, by agreement between the plaintiffs and defendants, it was agreed that the plaintiffs should buy from the defendants, and the defendants should sell and deliver to the plaintiffs, 1170 bales of gambier then on passage from Singapore, and expected to arrive at London, that is to say, 805 bales by a vessel called the 'Ravenscraig,' and 365 bales by a vessel called the 'Lady Agnes Duff,' at certain prices then agreed upon between the plaintiffs and the defendants; and it was thereby further agreed, that, if either or both of the said vessels should be lost, the said agreement should be void for the quantity so lost: Averment, that the plaintiffs had done all things, and all things had happened, and all times had elapsed, necessary to entitle them to a delivery of the said gambier by the defendants, and to sue the defendants for non-delivery thereof; and that neither of the said vessels was lost; but that the said specified quantities of gambier arrived at London by the said vessels respectively: Breach, that the defendants did not nor would at any time deliver to the plaintiffs the said 1170 bales of gambier, according to the true intent and meaning of the said contract, but tendered and offered to deliver to the plaintiffs in lieu thereof 1170 small packages of gambier, being a much less quantity of gambier than the 1170 bales of gambier so agreed to be delivered by the defendants to the plaintiffs; and the plaintiffs had thereby been deprived of the said gambier, and of the profit and advantage they would have derived from having the same: Claim, 1000*l*.

The defendants pleaded,—first, that they did not promise as alleged,—secondly, to the first count, that the bales of gambier in the contract mentioned were at the time of making the contract on passage from Singapore,—thirdly, to the second count, that the specified quantities of gambier did not arrive at London by the **[683]** said vessels or either of them respectively,—fourthly, to the second count, that the defendants were at all times ready and willing to deliver to the plaintiffs all the said gambier which did arrive in the said vessels, or either of them, and that the plaintiffs were not ready nor willing to accept the same,—fifthly, to the second count, that the defendants did deliver to the plaintiffs the said gambier, according to the true meaning of the said contract. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts were as follows:—On the 5th of February, 1856, one Field, a colonial broker, was instructed by the plaintiffs to procure for them about 100 tons of gambier. Field informed them that he had two shipments to dispose of, and they agreed to take them; and, accordingly, Field on the same day sent them the following bought-note:—

"Messrs. Gorrissen, Huffel, & Co. "London, 5th February, 1856.

"Gentlemen,—I have this day bought by your order and for your account, 1170 bales gambier, now on passage from Singapore, and expected to arrive at London, viz.

"Per 'Ravenscraig' . . . 805 bales
Per 'Lady Agnes Duff' . . . 365 „

1170 bales, at 15s. 6d. per cwt. sound.

"For damages, if any, an allowance to be made of

"1s. per cwt. 1st class, damaged or heated,
2s. „ 2nd „ „
3s. „ 3rd „ „

"Should either or both vessels be lost, this contract void for quantity so lost.

[684] "Usual conditions. Prompt, three months from last day landing. Deposit, 15 per cent.

"Brokerage, ½ per cent. "W. Field, Broker."

A sold-note in similar terms was on the same day sent by the broker to the defendants.

The "Ravenscraig" arrived in London on the 24th of March, having on board 805 packages of gambier consigned to the defendants, and five other parcels containing in the aggregate 2382 bales consigned to other parties. The "Agnes Duff" arrived on the 25th of April, having on board 365 packages of gambier consigned to the defendants, and 1693 bales consigned to other parties.

The 805 packages by the "Ravenscraig" and the 365 by the "Lady Agnes Duff" turned out to be of less than a third of the size and weight of the packages usually known in the market as "bales" of gambier, which, it was proved, average about 2 cwt. each.

All the other packages brought by the two vessels were in fact ordinary bales. The plaintiffs thereupon declined to receive the gambier as a performance of the contract, but by arrangement they afterwards took it without prejudice.

Evidence was offered on the part of the plaintiffs, that the term "bale," as applied to gambier, was universally understood to mean a compressed bale of the average weight of 2 cwt. This was objected to on the part of the defendants, on the ground that it was in effect varying by parol evidence a written contract, which was not ambiguous upon the face of it, and which related to certain specific packages which were identified therein. The evidence was received.

On the part of the plaintiffs it was submitted, that the contract amounted to a warranty that 1170 bales of the description commonly known in the market as [685] bales of gambier were on their passage from Singapore in the vessels named, and that that warranty was broken; or, assuming the contract to be conditional on the arrival of the bales, the plaintiff was still entitled to recover, inasmuch as a sufficient number of bales did in point of fact arrive by the "Ravenscraig" and "Lady Agnes Duff" to satisfy the contract, though consigned to other parties.

For the defendants, it was insisted that the contract was conditional, depending upon the double contingency of the stipulated number of bales arriving by the vessels named, and coming consigned to the defendants.

The Lord Chief Justice left it to the jury to say whether the packages in question were "bales" in the ordinary acceptation of the term, and whether that term had by the usage of the gambier trade acquired the signification contended for by the plaintiff, viz. that of a package compressed, and weighing upon an average 2 cwt.

The jury found that the packages were not "bales" in the ordinary acceptation of the term, and that the bale of gambier known in the trade was a package compressed and weighing 2 cwt. His Lordship thereupon directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move.

James Wilde, Q. C., in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the defendants on the first count of the declaration, on the grounds "that there was no warranty that the bales mentioned in the contract were the usual bales sold in London, and that the evidence was inadmissible; also that there was no warranty that at the time of the contract the bales were on their passage, and that

the goods delivered were sufficient to fulfil the contract; and on the second count, on the ground that the defendants were not **[686]** bound to deliver any other bales than those which they did, and that the bales belonging to others which did arrive were not the bales contracted for;" or for a new trial, on the ground that the evidence as to the meaning of the word "bale" was inadmissible. He submitted that the words "now on passage from Singapore," were words of condition, and not of warranty; and he referred to *Hayward* v. *Scougall*, 2 Campb. 56, *Boyd* v. *Siffkin*, 2 Campb. 326, *Bold* v. *Rayner*, 1 M. & W. 343, *Lovatt* v. *Hamilton*, 5 M. & W. 639, *Stockdale* v. *Dunlop*, 6 M. & W. 224, *Johnson* v. *Macdonald*, 9 M. & W. 600, *Fischel* v. *Scott*, 15 C. B. 69, and *Barker*, *App.*, *Windle*, *Resp.*, 6 Ellis & B. 675.

Byles, Serjt., and Honyman, in Easter Term, shewed cause. The first question is, whether the evidence of the understanding of the trade as to the meaning of the term "bale" was properly received. Upon that the current of authorities is tolerably clear. In the notes to *Wigglesworth* v. *Dallison* (Dougl. 201), in 1 Smith's Leading Cases, 453, 462, the rule is thus stated,—"With respect to commercial contracts, it has been long established that evidence of a usage of trade applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written contract is silent." And this rule is not limited to contracts which are strictly of a mercantile character: thus, in *Smith* v. *Wilson*, 3 B. & Ad 728, evidence was received to shew that by the custom of a particular district the words "1000 rabbits" meant "1200 rabbits." See the authorities also referred to in Taylor on Evidence, 2nd edit. §§ 1061, 1062. In *Taylor* v. *Briggs*, 2 C. & P. 525, where a controversy arose as to the meaning of the words "cotton in bales" in a charterparty, Abbott, **[687]** C. J., said: "If the word 'bale' had acquired a particular meaning in regard to the trade of Liverpool and Alexandria, I should consider that that meaning should apply in this case; but there should be distinct evidence that the word has that particular meaning." Here there was distinct evidence upon the subject. The contract is for 1170 bales of gambier. Would that be satisfied by the delivery of 1170 packages of any size or description? If not, evidence clearly must be admissible to shew what the things are with respect to which the parties are contracting. [Cockburn, C. J. If the term "bale," as applied to gambier, has acquired in the particular trade a signification differing from its ordinary signification, evidence must be received on the subject, otherwise effect is not given to the contract.] It is difficult to perceive upon what foundation the objection to the evidence rests. Then, as to the construction of the contract. The declaration contains two counts: the first treats the statement in the contract that the bales were "then on passage from Singapore," as a warranty, alleging for breach that the 1170 bales of gambier were not at the time of making the agreement on passage from Singapore; and the second proceeds upon the assumption that the stipulated quantity of bales had arrived by the ships in question, and alleges for breach their non-delivery. Whatever be the construction, therefore, which the court put upon the contract, one or other of these counts must be supported; for, if the first is not made out, it is by reason of a fact which entitles the plaintiffs to a verdict upon the second count, viz. that the goods contracted for did arrive. [Cockburn, C. J. Do you contend, that, if a man contracts to sell you goods expected to arrive by such a ship, he is bound to deliver to you somebody else's goods?] Such seems to have been the impression of this court in *Fischel* v. *Scott*, 15 C. B. 69. [Cresswell, J. **[688]** There was no decision in that case; the defendants elected to amend, though, as appears from the note at the end of the case, they ultimately declined to avail themselves of the leave to do so.] Assume, for the present, that the contract is confined to gambier the property of the defendants,—in order to establish their right to recover upon the first count, the plaintiffs must make out that the contract involves a warranty that the articles contracted for were "bales of gambier" in the sense found by the jury, and that they were then on passage from Singapore. [Cockburn, C. J. The argument on the other side, as to this part of the case, is, that the contract is conditional on the contingency of the ships' arrival each with the stipulated number of bales of gambier on board.] A contract for the sale of goods, "on arrival" (*Boyd* v. *Siffkin*, 2 Campb. 326), "to be shipped" or "to arrive" by a particular ship (*Splidt* v. *Heath*, 2 Campb. 57, n., *Lovatt* v. *Hamilton*, 5 M. & W. 639, *Stockdale* v. *Dunlop*, 6 M. & W. 224, *Johnson* v. *Macdonald*, 9 M. & W. 600), or "that may be loaded" (*Hayward* v. *Scougall*, 2 Campb. 56), has been held to be

subject to the double contingency of the arrival of the vessel named, and of the goods being on board. But no case has yet held the contract to be conditional where the words used are at all like those used in the present case,—"now on passage from Singapore, and expected to arrive in London per 'Ravenscraig' and 'Lady Agnes Duff.'" If these words do not amount to a warranty on the part of the seller that the goods were then on their passage from Singapore, it is impossible to conceive any words which would amount to a warranty. The introduction of "expected to arrive" cannot control the absolute and unconditional words by which they are preceded,—"now on passage from Singapore." In *Ollive* v. *Booker*, 1 Exch. 416, to an action for not loading a vessel in pursuance of the terms of a charter-**[689]**-party, the defendant pleaded, setting out the whole of the charterparty, which stated that it was agreed between the plaintiff "original charterer of the good ship or vessel 'Dove,' A1, of the measurement of 149 tons, or thereabouts, now at sea, having sailed three weeks ago, or thereabouts," and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, &c. The plea then averred, that time was an essential and material part of the contract; that the probable situation of the vessel with reference to the date of her sailing, and the object of her voyage, was also an essential and material part of the contract; and that, in point of fact, at the time of the making of the charterparty, the vessel had not sailed three weeks before, but, on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the vessel. It was held that the time at which the vessel sailed was material, and that the statement in the charterparty amounted to a warranty. "The main question," says Parke, B., "is, whether the allegation in the charterparty, of the vessel being 'now at sea, having sailed three weeks ago,' is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavour to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks: and, if time is of the essence of the contract, no doubt it is a warranty, and not a representation. Such also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the **[690]** vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel." So, here, the statement that the goods were then on passage was of the very essence of the contract, and could not have been intended as mere words of representation or description. In *Shepherd* v. *Kain*, 5 B. & Ald. 240, where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened,—it was held, that, notwithstanding the words "with all faults, &c.," the vendor was liable for the breach of the warranty. In giving judgment, the court there say: "The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold 'with all faults,' and it turns out to be plated; can there be any doubt that the vendor would be liable? 'With all faults' must mean, with all faults which it may have consistenly with its being the thing described. Here, the ship was not a copper-fastened ship at all" (*a*). In *Barker* v. *Windle*, 6 Ellis & B. 675, the statement in the charterparty that the ship was A1, was mere matter of description, or, as was said in *Hurst* v. *Usborne*, 18 C. B. 144, a warranty of her then state only. In *Allan* v. *Lake*, 18 Q. B. 560, the defendant, by his agent, sold the plaintiffs a parcel of turnip-seed, and gave the following sold-note:—"Mr. T. C. R. (defendant's agent). Sold Messrs. B. & Co. (plaintiffs), for Mr. C. Lake (defendant), 14 quarters Skirving's Swedes, at 17s. per bushel:" and it was held **[691]** that this description of the seed in the sold note amounted to a warranty that it was Skirving's Swedes. So, in *Nichol* v. *Godts*, 10 Exch. 191, it was held that an agreement for the sale and delivery of certain oil, described as "foreign refined rape-oil, warranted only equal to samples," is not complied with by the tender of oil which

(*a*) But see *Taylor* v. *Bullen*, 5 Exch. 779.

is not "foreign refined rape-oil," although it be equal to the quality of the samples. Pollock, C. B., there says: "The important words in the contract are these: 'foreign refined rape-oil, warranted only equal to samples.' My Brother Parke told the jury, that, according to the true construction of this contract, not only the article delivered must agree with the samples in quality, which was the meaning of the words 'warranted only equal to samples,' but also that the oil ought to agree with the description of it in the contract as to its character. It was contended by Mr. Watson that the expression 'warranted only equal to samples' excluded every other description of warranty; and, provided the oil delivered was equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in point of fact, it did not answer the description of being foreign refined rape-oil. The effect of that argument is, to render the words 'foreign refined rape-oil' of no avail. Such a proposition cannot be supported. I think the direction was perfectly correct; for, as my Brother Platt observed, it could not be contended that, if it had turned out that the oil was whale-oil, the contract would have been performed." That affords a decisive answer to any argument that may be founded upon the words "expected to arrive," in this case. [Cresswell, J. Suppose the defendants had tendered, as a fulfilment of their contract, 1170 packages of gambier of 2 cwt. each, but not properly packed,—could the plaintiffs have objected to receive them? The argument must go that length upon this part of the case.] **[692]** If the packages were such as not to answer the description of "bales of gambier," it is submitted that they might be rejected. The description on the sale of goods is an express warranty (*a*). Should the court be of opinion that the contract does not amount to a warranty that the goods contracted to be sold were actually shipped, the plaintiffs are still entitled to recover upon the second count. The "Ravenscraig" and "Lady Agnes Duff" arrived in London, with the stipulated quantity of bales of gambier on board, although not belonging to the defendants. There is nothing illegal in a man contracting to sell goods which he has not: *Hibblewhite* v. *M'Morine*, 5 M. & W. 462. A man may lawfully contract to sell to another the horse that shall win the next Derby (*b*). [Cockburn, C. J. We must put a reasonable construction upon the contract: it cannot be assumed that the defendants meant to sell somebody else's goods. The case of *Fischel* v. *Scott*, 15 C. B. 69, though not precisely a decision upon the point, contains **[693]** a pretty strong intimation of the opinions of two members of the court. The contract there was for "100 hhds. of Gingelly oil expected to arrive by the ship 'Resolute' from Madras:" the "Resolute" arrived with 100 hhds. of Gingelly oil on board, but it turned out that 34 hhds. only were consigned to or under the power or control of the seller. Maule, J., said: "The oil is described pretty clearly: the question is, whether the oil which came was oil 'expected to arrive per "Resolute."'" And Jervis, C. J., said: "The oil which was expected did arrive. The defendant expected it to come consigned to him: but it turned out that it was consigned to some one else." In *Vernede* v. *Weber*, 1 Hurlst. & N. 311, special words were introduced into the contract to avoid this difficulty,—"provided the same be shipped for seller's account." Upon the whole, it is submitted that there was here a warranty on the part of the seller that the goods were actually shipped and on passage, or, if there was no warranty, but the contract was conditional only, that the condition has been fulfilled by the arrival of the vessels with a sufficient quantity of bales of gambier on board to answer the contract, and that the plaintiffs were entitled to have them delivered to them.

(*a*) See *Simond* v. *Braddon*, ante, p. 324.

(*b*) In Pothier on Obligation, vol. i., p. 1, c. 1, s. 4, § 2, p. 78, it is said: "Even things which do not belong to the debtor, but to another person, may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them in order to fulfil his engagement: and, if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under the pretext that no man can be obliged to perform an impossibility. For, this excuse is only valid in case of an absolute impossibility; but, where the thing is possible in itself, the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it: and he is answerable for the damages occasioned by the non-performance of his engagement. The thing being possible in its nature, is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not."

James Wilde, Q. C., and Blackburn, in support of the rule. The substantial question here is that which arises upon the meaning of the contract. Three constructions are proposed: it may mean compressed bales, which averaged 2 cwt. each, and which were on board the two vessels named, but were consigned to strangers, —or compressed bales of 2 cwt. which never were on passage at all, and about which the vendors are supposed to warrant that they were on passage,—or the bales or packages which were on board, and which did belong to the vendors. If the court are to choose between **[694]** these three, independently of authority, there can be little doubt that they would conclude that the vendors intended to sell and the vendees to buy that which the former had to sell. 1. What reason is there for presuming that the parties intended to deal with goods in which the vendors had no interest? *Fischel* v. *Scott*, 15 C. B. 69, is supposed to be an authority against the defendants upon this point. There, the plaintiff declared, not setting out a mercantile contract, but merely alleging that it was agreed between himself and the defendants to buy of them certain oil "expected to arrive from Madras" by a particular vessel, that the oil did arrive, and the defendants refused to deliver it: the defendants did not by their plea answer, as they should have done, that the oil which was expected belonged to them, but did not arrive; but they simply denied that the oil which did arrive belonged to them: and the court in effect say that the plea admits that the oil which was the subject of the contract did arrive, but seeks to exonerate the defendants from liability to deliver it, by saying that it was not their property. There was no contract before the court upon which to put a construction (*a*)[1]. This, therefore, is a totally different case from that. Here, the exact number of packages contracted to be sold did arrive by the vessels named,—805 by the "Ravenscraig," and 365 by the "Lady Agnes Duff," the whole of which were consigned to the person from whom the defendants bought: and the court are asked to hold, that, under these circumstances, the parties were contracting about the bales of some other **[695]** people, of which there were enough on board of either vessel to satisfy the contract, but it was not shewn that a sufficient quantity belonged to any one consignee. *Hayward* v. *Scougall*, 2 Campb. 56, is precisely in point. The defendants sold to the plaintiffs all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by Messrs. Schmids & Co., the agents of the concern: the Messrs. Schmids shipped on board these vessels only 71 tons of hemp on account of the defendants, but upwards of 300 tons on account of other persons: and it was held that the contract must be confined to such hemp as the Schmids should ship as agents to the defendants, and that the defendants were not answerable to the plaintiffs for more than the 71 tons. Lord Ellenborough said: "As all the hemp which the Schmids were to ship at Riga was not to belong to the defendants, this renders it improbable that they should mean to sell what was not their own. In the case alluded to (*Splidt* v. *Heath*, 2 Campb. 57, n.), the party had agreed to ship and deliver a certain quantity of hemp; and, to be sure, nothing could excuse him from doing so. But here the defendants only sold what they supposed their agents would ship for them. No doubt they expected Schmids & Co. to ship at least 300 tons of hemp on their account: but they were disappointed. They seem to have contemplated the possibility of this. They say, in substance, 'We will sell you all that our agents at Riga ship for us, to the amount of 300 tons. If they send us so much, you shall have it; if they send us none, we have sold none to you.' The words employed are by no means strong enough to intimate that they had undertaken to sell that which did not belong to them, and over which they had no control." 2. The contract in question is one of a class which is common in modern times, where the sale is of goods "to arrive," or "on arrival." With **[696]** the exception of *Fischel* v. *Scott*, this is the first case in which the words used have been "expected to arrive"(*a*)[2]. It

(*a*)[1] The learned counsel stated that he had been informed by Mr. Tomlinson, who argued that case, that the reason why the defendants declined to avail themselves of the leave to amend, was, that the matter in dispute was of such small value that it was thought not worth while further to contest it.

(*a*)[2] See *Bold* v. *Rayner*, 1 M. & W. 343. A broker gave the following bought and sold notes: — 1. "We have this day bought for your use, from J. O. Bold, 100 tons dry palm-oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash at fourteen days from delivery, less 2½ per cent. discount: the above oil to be delivered from the 'Speedy' or 'Charlotte,' expected to

is a somewhat stronger expression than the others; and shews that the parties are dealing with a thing which they know something about. The word "expected" is not inserted with a view to the protection of the vendor in case the vessels should be lost: for, that contingency is expressly provided for. [Cockburn, C. J. The same words occur in the contract in *Johnson* v. *Macdonald*, 9 M. & W. 600; and they were held not to have the effect of altering the contract, which was conditional on the double event of the arrival of the vessel with the goods on board. Cresswell, J. My Brother Parke treats those words as superfluous; and so they are, if the contract is conditional.] It is submitted that the whole is conditional here, as well as in that case. [Cresswell, J. The words are, "expected to arrive in London": does that import a condition that the goods shall arrive in London?] In *Lovatt* v. *Hamilton*, 5 M. & W. 639, the contract was for goods "to arrive per 'Mansfield,'" and it was held that their arrival in that vessel was a condition precedent, and that the **[697]** vendors were not entitled to have goods brought in another vessel. So, here, if the goods came to Liverpool, the defendants would not be bound to deliver them. The words "now on passage," it is submitted, do not amount to a warranty. They are really put in in order to protect the sellers. [Cockburn, C. J. Why are we to assume that those words are put in to protect the sellers, and not for the benefit of the buyers?] To make an affirmation at the time of sale a warranty, it must appear to have been so intended: see the notes to *Chandelor* v. *Lopus* (Cro. Jac. 4), 1 Smith's Leading Cases, 4th edit. 140; *Budd* v. *Fairmaner*, 8 Bingh. 48, 1 M. & Scott, 74; *Jendwine* v. *Slade*, 2 Esp. N. P. C. 572; *Dunlop* v. *Waugh*, Peake's N. P. C. 167; *Gwillim* v. *Daniell*, 2 C. M. & R. 61. That the words here used are words of condition or description only, is fortified by the recent decisions as to the warranty of seaworthiness in policy cases: see *Gibson* v. *Small*, 4 House of Lords Cases, 353, *Jenkins* v. *Heycock*, 8 Moore's P. C. Cases, 351, *Michael* v. *Tredwin*, 17 C. B. 551, and *Fawcus* v. *Sarfield*, 6 Ellis & B. 192 (*a*). The words "the vessel to sail from England on or before" a given day, were, in *Glaholm* v. *Hays*, 2 Scott, N. R. 471, 2 M. & G. 257, held to be a condition; but they have never been held to amount to a warranty. [Cockburn, C. J. If it be a condition precedent on the one side, it is a contract to be performed on the other.] No doubt, it may be both. [Cresswell, J. According to the party who wishes to take advantage of it. Crowder, J. In *Ollive* v. *Booker*, 1 Exch. 416, Parke, B., holds a statement in a charterparty of the vessel being "now at sea, having sailed three weeks ago," to be a warranty, and not a representation, that the vessel had sailed three weeks; and **[698]** therefore a condition precedent.] The word "warranty" is constantly used, though in truth it is only a condition. 3. The ground upon which the decision of the case must ultimately rest, is, that the parties were contracting for the purchase and sale of specific packages of gambier which had been shipped and were then on board the vessels named. The contract being for a specific thing, it is satisfied by the delivery of the article mentioned: *Chanter* v. *Hopkins*, 4 M. & W. 399; *Parsons* v. *Sexton*, 4 C. B. 899; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Gompertz* v. *Bartlett*, 2 Ellis & B. 849; *Young* v. *Cole*, 3 N. C. 724, 4 Scott, 489; *Gurney* v. *Womersley*, 4 Ellis & B. 133; *Prideaux* v. *Bunnett*, ante, vol. i. p. 613.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

This was an action for breach of contract, in not delivering 1170 bales of gambier pursuant to a contract of sale whereby the defendants contracted to sell and deliver to the plaintiffs 1170 bales of gambier, stated to be "now on passage from Singapore, and expected to arrive at London; 805 bales per 'Ravenscraig,' and 365 per 'Lady Agnes Duff,' at 15s. 6d. per cwt"; with a proviso, that, should either or both vessels be lost, the contract was to be void for the quantity so lost.

Both vessels in fact arrived at London, each with the specified number of packages

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arrive about November or December next." 2. "We have this day sold, for your use, payment in fourteen days, by cash, less 2½ per cent. discount, from delivery, 100 tons dry palm-oil, at 31*l.* 10*s.* per ton, ex 'Speedy' and 'Charlotte,' to arrive:" It was held, that evidence of mercantile usage was admissible to explain all the variances between these notes, and that, being so explained, the variances were not material, and did not avoid the contract.

(*a*) And see *M'Swiney* v. *The Royal Exchange Assurance*, 14 Q. B. 634.

of gambier on board, on the defendants' account; but, these packages proving to be only about one third of the ordinary size and weight of the packages of gambier known in the trade as "bales," the plaintiffs declined to accept them as a performance of the contract. By arrangement, however, with the defendants, they afterwards accepted them, without prejudice to their rights under the con-[699]-tract, and brought this action in respect of the difference.

Besides the packages of gambier before mentioned which arrived consigned to the defendants, there came also in the two ships, the "Ravenscraig" and "Lady Agnes Duff," but consigned to other parties, a number of bales of gambier, of the full and accustomed size and weight, sufficient to have satisfied the contract.

The declaration contained two counts. The first treated the statement in the contract that the bales were then on their passage from Singapore, as a warranty, and alleged as a breach of such warranty that the 1170 bales of gambier were not at the time of making the agreement on their passage from Singapore within the true meaning of the contract: the other count, proceeding on the assumption that the bales of gambier had in fact arrived in the specified quantities by the ships in question, alleged the non-delivery of the same as a breach of the defendants' contract.

Thus, both at the trial, and on the argument before us, it was contended, on the part of the plaintiffs, that, either the contract, by virtue of the alleged warranty, must be treated as an absolute sale, in which case the contract had been broken by the omission to deliver bales of the proper weight according to the trade meaning of the term: or, if the contract was to be treated as conditional on the arrival of the bales, then that this condition was satisfied by the arrival of the bales which came consigned to other parties by the "Ravenscraig" and "Lady Agnes Duff." For the latter position, the case of *Fischel* v. *Scott*, 15 C. B. 69, which was recently before this court, was relied on as an authority.

To establish the breach in the first count, the plaintiffs tendered evidence at the trial, that the term "bales," used in the contract, had a particular signification in the gambier trade, and that it meant a com-[700]-pressed package weighing about 2 cwt. The jury found both these facts in the affirmative. This evidence was objected to at the trial, and its inadmissibility was made one of the grounds on which the rule nisi was moved for.

This objection was not, indeed, persisted in on the argument before us; but, as it appears in the rule, it may be as well to observe that we entertain no doubt whatever that the evidence was properly received.

For the defendants, it was contended that the contract was conditional on the arrival of the gambier, and that the case fell within the principle of the cases cited in the argument, in which it has been held, that, in a contract for the sale of goods "to arrive," or "expected to arrive" by a particular ship, the obligation is conditional on the double event, first, of the arrival of the ship, and, secondly, of the goods being on board.

Without desiring at all to interfere with the rule laid down in the cases referred to, we may, in passing, observe that we think it has been carried far enough, and that its effect may have been to introduce uncertainty into contracts which were not intended by the parties to be contingent on accidental circumstances, such as, the transfer of a cargo from one ship to another. We are, however, of opinion that the present case is plainly distinguishable from those referred to, by the statement that the goods were on board at the time the contract was entered into. We are of opinion that this statement amounts to a warranty; and although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words "expected to arrive," we think they cannot resort to them to get rid of the positive assurance that the goods were then on their passage; on the faith of which, possibly, the purchaser may have entered into the contract to buy.

[701] Our opinion being thus in favour of the plaintiffs on the first count of the declaration, it becomes of less importance to consider the case with reference to the second: nevertheless, as the authority of *Fischel* v. *Scott* was much pressed upon us in the argument, we think it right to say a few words on this part of the case.

It is, in the first place, to be observed that there was not in *Fischel* v. *Scott* any positive adjudication of the court. Observations were thrown out during the discussion in that case, by individual members of the court, upon which the counsel for

the plaintiff elected to amend. But, what is still more material, is, that the facts of the present case are plainly distinguishable from those in *Fischel* v. *Scott*. In the latter case, the defendants had taken upon themselves to sell the goods, trusting to their coming consigned to them. Jervis, C. J., observes,—"The oil which was expected did arrive: the defendants expected it to come consigned to them; but it turned out that it was consigned to some one else." Here, the bales of gambier, on the arrival of which the plaintiffs in their second count rely, never were expected by the defendants to come consigned to them; nor did they affect to deal with them. On the contrary, the goods which they expected actually arrived consigned to them, only not in such a form and quantity as to satisfy the terms of the contract.

Now, it may well be, that, if a man takes upon himself to dispose of goods expected to arrive by a certain ship, as goods over which he has a power of disposal, and the goods afterwards arrive not consigned to him, he shall be precluded from saying, that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. He has dealt with them as his own, and cannot be allowed to import into the contract a new condition, viz. that the goods on their arrival shall prove to be his. **[702]** It is obviously a very different thing to say, that, where a man has sold certain specific goods, subject to the contingency of their arrival, the arrival of a different cargo, though of similar goods, consigned to another person, and with which the vendor has never affected to deal, will operate to fix him with consequences against which he has expressly guarded himself.

Rule discharged (*a*).

In the Matter of the Complaint of John Painter *against* The London, Brighton, and South Coast Railway Company. June 9th, 1857.

A railway company granted exclusive permission to a limited number of fly-proprietors to ply for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of a fly-proprietor who was excluded from participation in this advantage,—although it was sworn by the complainant and by several other fly-proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued.

Lush moved for a writ of injunction against the London, Brighton, and South Coast Railway Company, under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 2, to restrain them from giving an undue preference to certain persons named, and imposing an undue and unreasonable prejudice on the complainant.

The motion was founded upon the affidavit of the complainant, which stated, that the directors of the company or their officers at Brighton had granted to five fly-proprietors at that place, named, &c., owning together about fifty-six flys, certain privileges and advantages for the entry of the whole of their flys into the terminus at Brighton, for the conveyance of passengers arriving there by all the down-trains, in priority and exclusion of all the flys belonging to the other **[703]** proprietors in the town; the arrangement being, that, until the whole of the flys in attendance of the above-named persons had entered and obtained fares, no other flys were permitted to enter or approach the platform or take up passengers, which virtually was almost a monopoly of the traffic, as only on occasions when heavy trains arrived were more flys required than the persons above named could supply: That the fly-proprietors generally considered the preferential arrangement above described so made with the persons named, not only unfair towards them, but also very disadvantageous and prejudicial to the passengers, by reason of its preventing a proper supply of flys at the terminus, as the fly-owners who had not the same privileges, and were prevented entering the station in due turn of arrival, could not afford to wait on the bare chance of a sufficient number of the flys of the privileged persons not being there, or of the passengers by any train being more numerous than could be accommodated by the flys of the privileged persons; the consequence of which had frequently been that many passengers had been detained at the station a considerable time, namely, until the privileged flys which had obtained fares had been and set down and then returned to the station, or other flys had been sent for and brought up to the terminus. The affidavit then went

(*a*) See *Hale* v. *Rawson*, post, vol. iii.

on to detail particular instances of obstruction offered to the complainant by the servants of the company, and refusal to permit him to enter into the arrival part of the station for the purpose of obtaining fares, and alleged, that the above described arrangement was also prejudicial to the interests of the public, as in many instances it compelled the passengers, although the weather might be wet or cold, to ride in open carriages, against their wish: That the fly-proprietors were willing and had frequently offered to conform to and abide by any general rules of the [704] company for enforcing order and regularity: That, if the station were open to all flys without preference, and all were allowed to enter in due course of arrival, the complainant's fly would be in the habit of attending, and complainant believed the flys of the other owners would attend also, and that there would be a much better supply of flys, and that the public would not be subjected to the inconvenience they were often put to under the existing arrangement: And that the complainant believed that the company's station at Brighton was large enough to admit many more flys and carriages than the privileged parties usually had been in the habit of sending there to meet the trains, and that it would be no inconvenience to the company if all cabs and flys, without distinction, were allowed to enter it in turn for the purpose of taking up fares in the same manner as the deponent was informed and believed they did at the central station in London.

There were also the affidavits of six other fly-proprietors who were similarly excluded from the railway station, and who deposed generally to inconvenience sustained by passengers from such exclusion.

It was submitted that the affidavits disclosed a clear violation of the statute. [Cresswell, J., referred to *In re Beadell*, ante, p. 509, where a similar application was made on behalf of a cab-proprietor against the Eastern Counties Railway Company, and refused.] The circumstances of that case were totally different from those here: no inconvenience to the public being there shewn to have arisen from the arrangement into which the company had entered; whereas, here it is distinctly shewn that the public are inconvenienced by the preference shewn by this company to the five favoured proprietors of flys. It appears that, at the terminus in London, all vehicles are allowed to enter the com-[705]-pany's premises in turn without any partiality or preference; and it is sworn that the same arrangement might be made at the Brighton station without any inconvenience or obstruction to the company.

Cresswell, J. I am of opinion that no ground is presented to justify the interference of the court. Before we put the powers of the act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is bonâ fide made on behalf of the public (*a*).

Williams, J. The complaint must come from those who use the railway.

The rest of the court concurring,

Rule refused.

[706] Tetley *v.* Easton and Another. June 11th, 1857.

[S. C. 26 L. J. C. P. 269.]

A patentee describing his invention in the specification, is to be taken to claim as part of his invention all that he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. The plaintiff obtained a patent for "certain improvements in machinery for raising and impelling water and other liquids"; and by his specification he described a machine for raising and impelling water by centrifugal force, the material parts of which were as follows: — "*g g* is an iron case made air-tight. In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two: *r r* I call the nave, which is hollow; and *s s* are two hollow shafts, one at each side of the wheel. In the interior of the nave *r* there is a boss or plate of metal, marked *u*, which is cast in at the time the wheel is cast, and which carries the wheel. The shaft *i i* passes through the centre of this plate, and is firmly keyed in." "In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases, propose to substitute circular discs, with a narrow water channel between them,

(*a*) See *In re the Caterham Railway Company*, ante, vol. i. p. 410, *In re Barrel*, ib. 423, *In re Marriott*, ib. 499.

and a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralize the effects of suction, by having a corresponding or proportionate degree of suction at each side." "I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force." He then introduced nine several distinct claims, the whole of which were subsequently by two memorandums of disclaimer struck out, except the following:—"I claim as my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides." And by one of the memorandums of disclaimer, the plaintiff stated,—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separately from the machinery described: and I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described."—Upon the trial of an action for an infringement of the patent, in which issues were taken on the plaintiff's being the first inventor and on the novelty of the invention, it appeared that one R. had previously patented an invention of "a new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus," the specification of which described a series of fans revolving in cases into which the air or water to be acted upon was admitted equally on both sides. The fans and cases so described in R.'s specification were almost identical with the wheel used by the plaintiff, except that they had not a central disc, and were attached to the axle by spokes extending from the axle to the outer edge of the openings for the admission of the air or water:—Held, that, as neither the form of the wheel used by the plaintiff, nor the plan of admitting water at both sides for the purpose of being projected forward by centrifugal force, was new, the plaintiff could not claim to be the inventor of "the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides"; and, consequently, that he failed upon the issues of invention and novelty.—The discovery that a particular advantage may be attained by the use of a machine known before, in a manner known before, is not an invention or application which can be made the subject of a patent.—And, per Cresswell, J., the effect of a disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed: it cannot be read as explanatory of that which remains.

This was an action for an alleged infringement of a patent.

The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, viz. [707] "of certain improvements in machinery for raising and impelling water and other liquids, and also thereby to obtain mechanical power"; and thereupon Her Majesty Queen Victoria, by letters-patent duly sealed in that behalf, to wit, under the Great Seal of the United Kingdom of Great Britain and Ireland, granted the plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of 14 years from the 11th of February, 1846, subject to a condition that the said plaintiff should within six calendar months next after the date of the said letters-patent cause to be inrolled in the high court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner it was to be performed; that the plaintiff did within the time prescribed fulfil the said condition; that, on or about the 14th day of April, 1853, the plaintiff, according to the statute, duly entered with the clerk of the patents of England, a disclaimer of part of the title of the said invention, and a disclaimer and memorandum of alteration of parts of the said specification, which said disclaimer and memorandum of alteration was duly filed by the said clerk of the patents and inrolled with the said specification; that, on or about the 20th of April, 1854, the plaintiff, according to the statute, duly entered with the clerk of the patents of England another disclaimer and memorandum of alteration of other parts of the said specification, and which said last-mentioned disclaimer and memorandum of alteration was duly filed by the said clerk of the patents, and inrolled with the said specification; and that the defendants during the said term, and after the inrolment of the said last-mentioned disclaimer and alteration, did infringe the said patent right of the plaintiff.

[708] The following were the particulars of breaches delivered with the declaration :—

"That the defendants, since the filing of the disclaimer and memorandum of alteration lastly mentioned in the declaration, have made and vended or used machines for raising water by centrifugal force, which said machines are known as centrifugal pumps, and which machines so made and vended or used have the combinations of the several parts as follows, viz. of a hollow wheel having a central plate and outer discs, with an axle and pulley, with an inclosing case for the said wheel, with two supply-pipes whose area respectively in horizontal section is greater than the area of the respective apertures into the said hollow wheel,—or, otherwise, of one supply-pipe in which the water diverges to the two sides of the said hollow wheel, such last-mentioned supply-pipe being of a greater area in its horizontal section internally than the area of the two apertures into the said hollow wheel,—jointly with a stuffing-box ; whereby, in virtue of such combinations, the machines made and invented or used as aforesaid perform more beneficially, and are more commercially useful than other combinations known at the date of the plaintiff's patent, for the purpose of raising water or other liquids by centrifugal force."

The defendants pleaded,—first, that Her Majesty did not by the said letters-patent in the declaration mentioned, make such grant as alleged,—secondly, that the plaintiff was not the first and true inventor of the said supposed invention in the declaration mentioned, as alleged,—thirdly, that the said supposed invention was not a new manufacture, as alleged,—fourthly, that the plaintiff did not within six calendar months next after the date of the said letters-patent cause to be inrolled in the High Court of Chancery any instrument in writing under his hand and seal, particularly describing **[709]** and ascertaining the nature of the said invention, and in what manner the same was to be performed,—sixthly, that the supposed disclaimers and memorandums of alteration in the declaration mentioned, were not entered, filed, and inrolled, as alleged,—sixthly, not guilty. Issue thereon.

There had been two other actions by the plaintiff against the defendants, for the same alleged infringements. The first of these was tried before Pollock, C. B., at the sittings in the Exchequer at Westminster after Michaelmas Term, 1852, and resulted in a verdict for the defendants upon pleas negativing that the plaintiff was the first inventor, that the invention was new, and that a proper specification had been inrolled.

The defendant thereupon (under 5 & 6 W. 4, c. 83, s. 1), entered the memorandum of disclaimer and alteration hereinafter set out at p. 720, and commenced a fresh action in the court of Queen's Bench, to which the defendants pleaded pleas similar to the first, second, third, fourth, and seventh pleas in this case. The cause was tried before Wightman, J., at the Summer Assizes at York in 1853, when that learned judge ruled that the specification was too large, inasmuch as it claimed absolutely the wheel as therein described, whereas the evidence shewed that the wheel was not new, it being described in a patent previously taken out by one Ruthven (referred to, post, p. 727), and directed a verdict to be entered for the defendants on the second and third issues. A rule was afterwards obtained for a new trial, on the ground of misdirection, which was afterwards discharged : see *Tetley* v. *Easton*, 2 Ellis & B. 956. The plaintiff thereupon entered the second memorandum of disclaimer and alteration set out at p. 723.

This cause was tried before Willes, J., without a jury, at Guildhall, on the 31st of October last.

[710] The plaintiff's specification and disclaimers, which were put in, were as follows : (*a*)—

"Whereas Her present most excellent Majesty, Queen Victoria, by Her royal letters-patent under the great seal of Great Britain, bearing date at Westminster, the 11th of February, in the ninth year of Her reign (1846), did, for Herself, Her heirs and successors, give and grant unto me, the said Charles Tetley, my executors, administrators, and assigns, Her especial licence, full power, sole privilege, and authority, that I, the said Charles Tetley, my executors, administrators, and assigns, or such others as I, the said Charles Tetley, my executors, administrators, and assigns,

(*a*) The portions of the specification in italics are those which are disclaimed or altered by the two memoranda of disclaimer hereinafter set out, the parts affected by the second disclaimer being inclosed within brackets.

should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, within England, Wales, and Town of Berwick-upon-Tweed, and in the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and also in all Her said Majesty's colonies and plantations abroad, my invention of 'certain improvements in machinery for raising and impelling water and other liquids, *and also thereby to obtain mechanical power*:' in which said letters-patent is contained a proviso that I, the said Charles Tetley, shall cause a particular description of the nature of my said invention, and in what manner the same is to be performed, to be inrolled in Her said Majesty's high court of Chancery within six calendar months next and immediately after the date of the said in part recited letters-patent, as in and by the same, reference being thereunto had, will more fully and at large appear:

[711] "Now know ye, that, in compliance with the said proviso, I, the said Charles Tetley, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawings hereunto annexed, and to the figures and letters marked thereon, that is to say:—

"In order that my improvements may be understood, reference must be had to the accompanying drawings, marked figures 1, 2, and 3.

"In reference to figure 1, *a* is a pipe, the lower extremity of which is supposed to extend down into the water or liquid to be raised. The upper end at *b* diverges into two branches marked *c c*. At the top end of each branch is an air-tight iron box, each of which is marked *d d*, and each having a removeable lid at the side marked *e e*. [*f f f is a pipe of small diameter, forming a passage for air from one box to the other, by which means one exhausting air-pump answers for both boxes.*] *g g g g* is an iron case made air-tight. *i i* is a wrought-iron shaft, at one end of which is either a pulley or a toothed wheel marked *j*. *k k* are two journals or bearings fixed in the inside of the boxes *d d*, for the purpose of carrying the shaft *i i*. *m* is a stuffing-box, which makes the passage through which the shaft *i i* passes into the box *d* air and water-tight. *n o p* is a pipe which joins to the under part of the case *g g g g* by means of the bend at *o*, and which may, when desirable, be enlarged at *o*, and provided with valves opening upwards. In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two; *r r* I call the nave, which is hollow; and *s s* are two hollow shafts, one at each side of the wheel. *t t* are two stuffing-boxes, truly bored, and the shafts *s s* are truly bored to fit them.

[712] "In the interior of the nave *r* there is a boss or plate of metal marked *u*, which is cast in at the time the wheel is cast, and which carries the wheel in the manner shewn in the other section, marked Figure 2. The shaft *i i* passes through the centre of this plate, and is firmly keyed in. On the end of each of the hollow spokes *q q* is fixed a short piece of pipe or tube, made of leather or of india-rubber, or other flexible and water-proof material or materials, and which are marked *v* and *w*: the one marked *v* being shewn as open, and the one marked *w* being shewn as shut or collapsed. These flexible valves are to be secured in a firm and air-tight manner on to the ends of the spokes by clamps or other secure means. *x* is an exhausting air-pump for drawing air out of the machine, and *y* is the piston-rod thereof. : : are two vanes, a front view of which (in the interior side) is shewn in Figure 3, and which are fastened on to the shaft *i i* so as to revolve with it. A manhole is to be provided in some part of the case *g g*, but which is not shewn in the drawing. All the parts which have now been described (in Figure 1), are represented in cross vertical section, with the exception of the air-pump, the pipe *n o p*, [*and the pipe f f f*], of which three the drawing shews merely an external view. The top end of the pipe *n o p*, the lower part of the pipe *a*, and the top end of the jump-rod, are represented as broken off, it being to be understood that of the former the first may be conducted where the liquid is desired to be conveyed, and the second into the well or liquid to be raised, while the pump-rod may be connected to the moving power in any way most convenient.

"Figure 2 represents a vertical section of the hollow wheel already described in Figure 1, taken through the dotted line c^2 c^2, or through the plane in which the wheel revolves. *q q* are the hollow spokes; *v v* and *w w* **[713]** are the flexible valves, five of which are shewn as open, and three as collapsed; *u* is the boss or plate of metal carrying the wheel; *i* is the hole therein for the solid shaft. From an inspection of this figure, it will be seen how the plate *u* is made to carry the wheel, while, from an

inspection of Figure 1, it will be seen that the hollow spokes are enlarged in their cross-section at the ends next the nave, so as to admit the liquid to pass at each side of the plate *u* into the spokes.

"The operation of the machine is as follows:—Let the attendant first close all the flexible valves at the ends of the hollow spokes, and then put the air-pump *x* into operation to exhaust the air from the interior of the wheel, the boxes *d d*, the pipes *c c* and *a*. As this exhaustion takes place, the liquid will rise up the pipes *a* and *c c*, and fill the boxes *d d*, and the wheel. After the exhaustion of the air just mentioned has begun to take place, all the flexible valves will remain closed and air-tight, in virtue of the external pressure of the atmosphere, so long as the machine is at rest. After the wheel has become filled with the liquid, let it be put into rapid rotatory motion by means of the pulley or toothed wheel *j*. The speed at which the hollow wheel revolves must be so regulated as to communicate to the liquid which now fills the hollow spokes such degree of tendency to fly off (or out) by virtue of the centrifugal force imparted thereto as will cause it to force open the flexible valves, notwithstanding any pressure of air externally thereon, and fly out. The liquid will be received into the iron case *g g*; as one portion of liquid comes out of the hollow wheel, a corresponding portion will ascend up the pipes *a* and *c c* to supply its place. Now, if it be not intended to raise the water more than twenty-eight or from that to thirty-two feet, that is to say, not higher than the force of the atmosphere would lift it in vacuo (computing **[714]** such distance from the surface of the water to be raised to the hollow shaft), then the water or liquid may at once be drawn from the case and conveyed where desired, the machine as now described being sufficient. In such instances, however, it is not requisite the case should be air-tight, but may be open at the sides, and in some instances there need be no case at all. But, if it be desired to raise the water higher than such distance without employing two machines, then the case must be air-tight, and the further operation will be as follows:—The pipe *n o p* may be filled with the water or other liquid to be raised, and, either by the aid of a forcing air-pump or any other ready method known for such purposes, the air-tight case is to be filled or charged with as much compressed air as will balance the column of liquid in the pipe *n o p*, whatever may be the height of the column, without suffering the liquid to rise high enough in the case to submerge any part of the wheel. Means must also be provided to renew such compressed air from time to time as may be required. Inasmuch as this can always be done by a forcing air-pump as well as several other methods which are well known, I have not exhibited any means of doing so in the drawings, it being unnecessary. Now, the case being filled with air so compressed, and the hollow wheel with its supply pipes being filled with the liquid to be raised, as before described, then such speed in the rotation of the wheel must be communicated as will throw the liquid out of the wheel into the case, notwithstanding the latter being charged with air so compressed. The liquid so thrown out of the wheel will fall to the bottom of the case, and the pressure of the compressed air on its surface will force it out by the pipe *n o p* with the same velocity with which the wheel introduces it into the case, and by that means prevent the liquid rising in the case to impede the rotation of the wheel. **[715]** By this means, the liquid may be raised the height desired above thirty-two feet, care being taken to make the case and all the other respective parts of the strength requisite to sustain the pressure. I would, however, observe something upon that law of hydraulics by which the motion of liquids ascending decreases in speed in proportion to the height or length of the ascending pipe or channel. For example, if the hollow wheel in Figure 1 be thirty feet above the surface of the water in the well, then the liquid would not rise up the pipes *a* and *c c*, with near the same velocity as it would do if the wheel was but twenty feet above the liquid to be raised. Therefore, if the pipes *a* and *c c* are made of such diameter as only to have the same area for the passage of the water up them as is the area of the shafts of the hollow wheel, they will in such case not supply sufficient water for the wheel. It is found that the decrease in speed of water ascending perpendicular pipes is nearly as the square root of the distance between the water to be raised and the point of discharge. *Upon this I found one part of my invention or improvements, namely, to** make the pipes *a* and *c c* of such internal area over and above the internal area of the hollow shafts of the wheel, as will cause them to pass as much water, notwithstanding the slower motion thereof up such pipes

* Insert "I."

in consequence of their length, as will supply the wheel with all it can discharge. Now, in the drawing, these pipes are shewn of too small a diameter to give full effect to this improvement if they are of any considerable length. This being understood, I would now say that I prefer to make the area of such pipes as many times greater than the area of the hollow shafts as is the square root of the distance ** between the surface of the water to be raised and the said hollow shafts, or thereabouts. I would next observe, in regard to the vanes marked z z in Figure 1, **[716]** *which form another part of my invention or improvements*, that, although I do not consider them necessary to the action of the machine, yet, in cases where the height of the column of water in the supply pipes *a* and *c c* is such as to become nearly a balance to the pressure of the external atmosphere, then by their oblique action upon the water these vanes expedite or force the water into the wheel, which in some degree becomes necessary in consequence of the water not being pressed in by the atmosphere with the same force it would when the column of water in the ascending pipes is a short one. The screw now in use for propelling steam vessels may be substituted for these vanes, or their configuration may be varied in any manner, so long as such oblique action upon the water is secured as will expedite its passage into the wheel.

"The operation of the machine having now been explained, and its general principles exemplified by the drawings, I now proceed to explain the several points following, namely:—

"Where the terms 'liquid' or 'water' are used in this my specification, I mean the same to imply either water or any other liquid not injurious to the materials used in the construction of the machine. In this sense, of course, acids are excepted. I do not confine myself to the use of iron, where other metals or other materials may be substituted. I do not confine myself to the use of pipes or tubes as channels for conveyance of the liquids, but propose to use vessels of any desired configuration. I do not in all cases propose to have a solid shaft passing through and carrying the hollow wheel, but in some cases to dispense with the same, and to cause the hollow wheel to revolve on its own hollow shaft passing through stuffing boxes. In some cases I propose also to dispense with hollow shafts for the wheel, and merely to have an opening at each side **[717]** of the nave for admitting the liquid. [*In some special cases I propose to have an entrance for the liquid into the wheel at one side thereof only, and to counterbalance the suction arising therefrom, by producing a corresponding degree of suction at the other side, without admitting the liquid at the last-mentioned side.*] Where the term 'suction' is used in this my specification, I mean and intend the same to signify the difference produced by the abstraction or partial abstraction of air from the inside, and the pressure of air externally to the supply pipes. *If any gases or elastic media, other than atmospheric air, are used, with which to charge the case, I claim the sole right to do so.* In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to substitute circular discs, with a narrow water channel between, and a valve or flexible valve or valves on the circumference; *and generally I propose to construct the wheel of every variety of configuration so long as the same is constructed* so as to have a channel or channels in the interior thereof for the passage of liquids, and *shall* be adapted to neutralize the effects of suction by having a corresponding or proportionate degree of suction at each side; nor do I confine myself to a form or configuration or manner of connecting together any other parts of the machine, but I propose to vary the same. *The manner in which I propose to obtain mechanical power, as signified in the title of the patent granted unto me, is, by using water raised by this machine as a moving power when wind is applied to this machine to raise the water, such water so raised forming a reservoir of power during the existence of calms.* In reference to the flexible valves at the ends of the hollow spokes, I prefer to make each of them of two halves or pieces lengthwise, and sewed or otherwise fastened up each side, by which means they collapse according **[718]** to their weakest form, and are thereby rendered more air-proof. In lieu of the exhausting air-pump, the machine may be primed by any more convenient and ready method. In lieu of the stuffing-boxes, joints may be made air-tight by leather, or any suitable means. In some places I propose to place the air-tight case in the liquid to be raised, dispensing altogether with the supply pipes *a* and *c c*. I also propose to place the hollow wheel horizontally, or in any other position, as may be desirable.

** Insert "in feet."

"Having now explained the manner in which my machine operates, or in which my inventions act, and pointed out that the machinery by which the said inventions act may be varied almost to an indefinite extent in the manner of its construction, I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force, [*except only when the same is used as a means of introducing liquids into compressed air*] *or other elastic fluids, as specified herein-after in my fifth claim. Now, therefore,—**

[*First, I claim as my invention and application the means of neutralizing or diminishing the effects of suction at one side of the wheel by causing the same degree (or such other proportionate degree as may be required) of suction at both sides thereof, whereby a considerable saving of power is effected.*]

"Second, I claim as my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides.

"*Third, I claim as my invention and application the means of economising the power required to move the wheel, by causing the same to be mounted on a solid shaft* **[719]** (*or a shaft of small diameter*) *passing through its centre to carry the same.*

"*Fourth, I claim as my invention and application to this machine, or to the hollow wheel, flexible and collapsible valves, that is to say, valves made of leather, or leather combined with other suitable flexible substance or substances, or other suitable flexible and collapsible substance or substances without leather.*

"[*Fifth, I claim as my invention and application the construction of machinery for raising and impelling water and other liquids by means of introducing such water or other liquids into compressed air*] *or other suitable elastic fluid* [*in virtue of centrifugal force imparted thereto by such machinery, and causing such compressed air*], *or other elastic fluid* [*to operate as the lifting, raising, impelling, or forcing power to impel such water or other liquid upwards.*]

"*Sixth, I claim as my invention the application of an exhausting air-pump to maintain a vacuum of air to such of these machines as act by the maintenance of the vacuum of air in the hollow wheel and its supply pipes.*

"*Seventh, I claim as my invention and application, where pipes or channels are used to convey water or other liquids up to the hollow wheel, to make such pipes or channels of such internal sectional area over and above the area of the opening or openings into the hollow wheel as will enable them to pass liquid to supply the wheel at a greater rate than could be done if such pipes or channels were not of such increased area.*

"*Eighth, I claim as my invention and application the use of vanes or screws whose oblique action upon the water shall impel the water more rapidly out of the supply vessels into the hollow wheel.*

[*"Ninth, I claim the application of the before-mentioned inventions both when all used in combination, or when used severally."*]

[720] The first disclaimer, dated the 13th of April, 1853, was as follows:—

"Disclaimer and memorandum of alteration entered by the said Charles Tetley with the clerk of the patents of England.

"Whereas the following part of the title of the said invention, namely, 'and also thereby to obtain mechanical power,' and part of the said specification contained in the following words, namely, 'the manner in which I propose to obtain mechanical power, as signified in the title of the patent granted unto me, is, by using water raised by this machine as a moving power when wind is applied to this machine to raise the water, such water so raised forming a reservoir of power during the existence of calms,' have been respectively objected to as not describing or referring to anything of practical value or utility; wherefore I do declare that I hereby disclaim such part of the said title of the said invention, and such part of the said specification respectively.

"And whereas it has been alleged that the making pipes or channels for the supply of water of an area greater than the area of the shaft of the wheel or the aperture of the raising apparatus was known at the date of the said letters-patent, I do hereby declare that I disclaim the part of the said specification contained in the following words, namely:—'Upon this I found one part of my invention or improvements, namely.' And I also disclaim the part of the said specification contained in the

* Insert the lines in italics at p. 719.

following words, namely:—'which form another part of my invention or improvements.' And I also disclaim the seventh claim and claiming clause contained in and being part of my said specification.

"And whereas the following passage of the said specification, 'I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to [721] substitute circular discs with a narrow water channel between, and a valve or flexible valve or valves on the circumference, and generally I propose to construct the wheel of every variety of configuration, so long as the same is constructed so as to have a channel or channels in the interior thereof for the passage of liquids, and shall be adapted to neutralize the effects of suction by having a corresponding or proportionate degree of suction at each side,' has been alleged to include a wheel such as is described in the two several specifications of Hale's patents, which patents are respectively dated the 12th of January, 1830, and the 13th of October, 1831; wherefore I hereby declare that I disclaim the words, 'and generally I propose to construct the wheel of every variety of configuration, so long as the same is constructed,' and the words 'shall be' contained in the above-recited passage of the said specification.

"And whereas it has been objected and alleged that the third, fourth, sixth, and eighth claims, contained in and being parts of the said specification, amount to and are respectively claims of and to distinct and independent inventions, I do therefore hereby disclaim such last-mentioned parts of the said specification respectively.

"And whereas no other elastic fluid is more suitable or economical than air. I therefore disclaim in the said specification that part thereof contained in the words following, namely:—'If any gases or elastic media other than atmospheric air are used with which to charge the case, I claim the sole right to do so'; and also that part thereof contained in the words following:—'or other elastic fluids, as specified herein-after in my fifth claim'; and also the words 'or other suitable elastic fluid' in and part of the fifth claim of the said specification; and also the words 'or other elastic fluid,' also in and part of the same fifth claim. And [722] in order to make the said specification, after the parts thereof herein-before mentioned shall have been disclaimed as aforesaid, consistent, I do hereby declare that I alter the said specification by expunging the word 'to' in the part of the said specification following, namely, 'to make the pipes *a* and *c c* of such internal area over and above the internal area of the hollow shafts of the wheel as will cause them, &c.' And I further alter the said specification by adding and substituting the word 'I' in the place and stead of and for the word 'to' so expunged as last aforesaid.

"And whereas the sentence and words following are contained in and form part of the said specification, namely, 'this being understood, I would now say that I prefer to make the area of such pipes as many times greater than the area of the hollow shafts as is the square root of the distance between the surface of the water to be raised and the said hollow shafts, or thereabouts'; and it has been pretended and alleged that the said last-mentioned sentence is not so certain as it might be. Now, therefore, I declare that I alter the said specification by introducing to and into the said last-mentioned sentence and part of the said specification the words 'in feet' immediately after the word 'distance' in the said last-mentioned sentence, and between such word 'distance' and the word 'between,' also contained in the said last-mentioned sentence and part of the said specification. And, in order further to make the said specification, after the parts thereof herein-before mentioned shall have been disclaimed as aforesaid, consistent, I do hereby declare that I alter the word 'fifth,' at the commencement of the fifth claiming clause contained in the said specification to the word 'third,' and also the word 'ninth,' at the commencement of the last claiming clause contained in the said specification, to the word 'fourth.'"

[723] The second disclaimer, dated the 19th of April, 1854, was as follows:—

"Disclaimer and memorandum of alteration proposed to be entered by the said Charles Tetley with the clerk of the patents of England, pursuant to an act passed in the fifth and sixth years of the reign of His late Majesty King William the Fourth, intituled 'An Act to amend the law touching letters-patent for inventions.'

"Whereas, near the end of the specification of the said letters-patent is introduced a disclaimer, by which it was supposed that a wheel described in the said specification, whether consisting of hollow spokes or of a channel or channels between discs, was, when considered apart or separate from the other machinery, disclaimed; and, since the inrolment of the said specification, a further disclaimer of certain parts thereof

has, according to the statute, been entered with and filed by the clerk of the patents of England. But it has lately been held by a court of law, that, notwithstanding these disclaimers, such wheel is claimed apart and separate from the other machinery; for which reason, and in order to make the disclaimers more certain in regard to such wheel, and to prevent a like construction being put on the said specification in regard to the separate and individual parts of which the machinery consists, I hereby alter the specification by introducing immediately before the claiming clauses, near the end of the said specification, the following words, viz. '*I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separate from the machinery described. And I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described.*' And I have found that the invention [724] claimed as the first part of my improvements, though new, has not come into general use, for which reason I wish to disclaim, and I do hereby disclaim, that part of the specification which is contained in the first claiming clause near the end of the said specification, and also the following words, which occur at an early part of the said specification, '*f f f* is a pipe of small diameter, forming a passage for air from one box to the other, by which means one exhausting pump answers for both boxes.' Also, further on in the said specification, the words 'and the pipes *f f f*;' also the word 'three,' in the same paragraph, and also the part of the drawing shewing such pipe and passages thereto; and also the following words, 'In some special cases, I propose to have an entrance for the liquid into the wheel at one side thereof only, and to counterbalance the suction arising therefrom, by producing a corresponding degree of suction at the other side, without admitting the liquid at the last-mentioned side.' And I have also found that the employing compressed air, described in my said specification, though useful in the cases mentioned, is beneficial only when in combination with the other part of my invention, and that there is consequently no advantage in my still retaining a claim to compressed air separate from and independent of my invention which remains claimed in the said specification, for which reason I disclaim the following parts of my said specification, 'except only when the same is used as a means of introducing liquids into compressed air,' and 'Third, I claim as my invention and application the construction of machinery for raising and impelling water and other liquids by means of introducing such water or other liquids into compressed air, in virtue of centrifugal force imparted thereto by such machinery, and causing such compressed air to operate as the lifting, raising, impelling, or forcing power to impel such water [725] or other liquid upwards.' And, as the last claim contained in the specification would be inconsistent and unmeaning after such disclaimer has been made, I disclaim the part of my specification contained in the following words, 'Fourth, I claim the application of the before-mentioned inventions, both when all used in combination, or when used severally.'"

The utility of the plaintiff's machine was not denied; and there was evidence of infringement. But it was sought, on the part of the defendants, to shew that the alleged invention was not new: for, that the principle had already been made known by certain specifications inrolled by one William Hale on the 12th of July, 1830, and 13th of April, 1832, and by one Morris West Ruthven on the 22nd of September, 1841.

Hale's first patent, dated the 12th of January, 1830, was for "A machine or method of raising or forcing water for propelling vessels, which machine or method is also applicable to other purposes;" and, in his specification, the inventor declared "that the nature of his said invention consisted in a vertical or horizontal air-tight paddle-box, kept constantly supplied with water, and the sides of which, by means of a paddle-wheel or propeller turning in the said water, were forcibly acted upon at all points except at an aperture where the said water escaped, and where the resistance offered to the action of the said water was less than at the other parts of the paddle box; wherefore the boat or other body to which the said paddle box was attached would be propelled in a direction from the said aperture." He then went on to describe the manner in which the said invention was to be performed, thus: "The propeller which gives motion to the water in this machine is composed of one or more curved paddles, and set at an angle to prevent any vacuum behind them, revolving at the extremity of spokes or arms round on an axis [726] nearly in the middle of the machine. The dimensions of these surfaces vary according to their number, and the area of the aperture through which the water is discharged; that is, if the propeller

has one paddle only, the area of that surface must be equal to the area of the aperture; if two are used, the area of each must be equal to half the area of the aperture; if four, then each must be equal to one fourth of the area of the aperture, and so on, that, whatever the number of paddles may be, the area of the whole must be equal to the area of the discharging aperture." The specification then went on to describe the various parts of the machine, referring to the drawings, all of which had relation to propelling vessels; and it concluded thus:—"I claim as my invention the machine hereinbefore described *whether applied vertically to raise water*, or horizontally, to force water, for the purpose of propelling vessels, or for other purposes."

Hale's second patent, dated the 13th of October, 1831, was for "Improvements in machinery or apparatus for propelling vessels, which improvements are also applicable for raising or forcing water:" and, in his specification, he thus describes he invention—"My invention consists in the inclosing of a certain kind or kinds of rotary propeller or forcer within a scrole or volute box or case, whereby the water entering into such box or case is driven by the propeller round the spiral side of the box or case, and is discharged forcibly through a tangential aperture, and thus force or propel the boat or vessel forward in which such apparatus is placed; and, secondly, such arrangements of propelling box or case, when fitted with suitable pipes, are applicable to raising or forcing water or other fluids." He then refers to the drawings in relation to the invention so far as regarded the propelling of vessels, and proceeded thus:—"Having now described the manner of con-**[727]**-structing my invention, and the application to the propelling of vessels, I will now proceed to describe its application for the purpose of raising and forcing water and other fluids. In this application of the apparatus, to the part *k* is to be affixed the pipe through which the water is to be forced in any direction it may be required, and the box or case *a* is to be placed in a well or other reservoir, either in a horizontal or vertical position, and by means of a crank or wheelwork rotary motion is to be communicated to the propeller *f*, which will force the water through the opening *k* into the pipe which is to convey it in any direction; or in place of fixing the case in the water or other fluid, there may be a suction-pipe affixed at the opening *d*, and descending into the well or other reservoir, having a common valve opening inwards: by this arrangement, when the box or case and the suction-pipe have been filled with water or other fluid, the revolution of the propeller will drive the same through the opening *k*, to which there may or may not be a conducting pipe for conveying the water to any desired place, and at the same time as the water is forced out at the opening *k* there will be a constant flow of water up the suction-pipe into the case or box *a*. Having now described the nature of my invention, and the manner of carrying the same into effect, I would have it understood that what I claim as my invention, is, the constructing the apparatus so that the propellers *f* may freely revolve within a box or case, the form of which is a continually diverging curve, as above described, when such propellers and boxes or cases are applied to the purposes of propelling vessels, or *for raising or forcing water or other fluids*, as above described."

Ruthven's patent was for "A new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus:" and he declared the **[728]** nature of his invention to consist "in causing the certain media, by which he meant to include air, gas, and water, about to be acted upon, to pass through a series of rotary fans, so arranged that each succeeding fan should act upon the media which had been previously acted upon by the next preceding fan, whether such media were gas, air, or water." He then proceeded to describe the invention, with reference to the drawings, as follows:—"Figure 1 is a side view of a series of three fans, with their appropriate cases, so arranged as to effect the object of my said invention, which in this case I have, for the purpose of this description, represented as applied to increase the power of an air-blowing apparatus. A is the first air-case, B being the air induction hole. C C C are the arms of the fans, and D D D the frame work of the bearings of the axes of the fans. E E the exit channel for the air, after having been acted upon by the fans, and by which it passes directly into the fans of the second air-case F, there to be acted upon again by the second set of fans, and driven through the exit channel G of the second air-case into the fans in the third air-case H, there to be again acted upon by the third set of fans, and finally expelled as a blast at the exit channel I of the third and last air case H. By this arrangement, it will be seen that the air just taken in at the induction hole B of the first air-case A is the same that is expelled in the form of a blast at I, and has been acted upon successively by the three sets of

fans. Figure 2 is the plan of figure 1. Figure 3 is a section of one of the air-cases with its fans, and here is shewn what could not be seen in the other figures, but which is essential to be distinctly understood, viz. that there is an inner case revolving with the fans inside of the outer case. This inner case is in this figure marked K, and coloured blue, and to it the fans are fixed. Figure 5 is a separate view of the inner [729] case, with its fans, by which it will be seen there is an opening L in the rim of the case at the front of each fan, the fans, in fact, dividing the inner case into six compartments, or any other number, dependant, of course, on the number of fans. The air which is received into the opening at the axis rushes from the several compartments out of the openings L into the outer or air-case, and thence through the exit channel of the said air-case into the succeeding fan-case. The parts marked J are the driving pulleys. Figure 4 is a longitudinal section through the first air-case A, shewing the form of the fans and the mode adopted in this case of fixing them to the inner casing: it also shews the induction hole to the second fan-case F, the exit channel E being removed. Now, whereas it is evident that no particular form of fans is involved in my said invention, provided only that the medium to be acted upon be conveyed directly from one to the other of the series of fans, as hereinbefore described, and that whether the object to be obtained is a forcible jet of water or gas, or a strong blast of air, the same principle will prevail, the apparatus being only varied to meet the known necessity of the media employed. And whereas I therefore claim as my invention increasing the power of the said media, when acted upon by rotary fans or other similar apparatus, by causing the said media to pass directly from one set of fans, with their fan-cases as aforesaid, to another, through the whole series, as many as there may be, each succeeding set of fans acting upon it in the state in which it left the preceding set in consequence of the exit channel for the air from one set of fans forming the induction hole for the air to the succeeding set of fans, as shewn by the figures in the drawing."

On the part of the plaintiff, it was insisted, that, taking his original specification together with the two [730] disclaimers, a claim was disclosed of a combination of machinery which constituted a new invention, and which was not affected by anything disclosed by the specifications inrolled by Hale, or by that inrolled by Ruthven.

The learned judge, being of opinion that the plaintiff's alleged invention had been previously disclosed by the specification inrolled by Ruthven, and the drawings annexed to it, directed a verdict to be entered for the defendants upon the second and third issues, and for the plaintiff on the others.

Collier, Q. C., in Michaelmas Term last, pursuant to leave, moved to enter a verdict for the plaintiff on the second and third issues, on the ground that the invention was new. Taking what remains of the plaintiff's specification, as explained by the disclaimers, that which he claims as his invention is clearly new. [Cresswell, J. The effect of the disclaimer is, merely to strike out from the specification those parts of machinery which are disclaimed. It cannot operate by way of a claim of the residue; nor can what remains of the specification be construed by the disclaimer.] The whole effect of the plaintiff's specification, as it now stands, is, to claim a new combination of machinery. [Crowder, J. Did not everything which the plaintiff claims exist before except the disc, or the substitute for the disc, the carrying the wheel by a hollow shaft on both sides? Willes, J. The disc, I think, was old.] It is enough to say that the plaintiff claims either the disc or the hollow shaft: in effect, he claims the whole of what the specification describes, except that which is specifically disclaimed. Hale's first patent was simply for a machine for propelling vessels. [Willes, J. Hale's second patent was the most material one.] Hale's was a totally different machine: the principle of vacuum and [731] suction did not apply at all to his wheel. [Willes, J. It had a disc, and the water was admitted at both sides.] Its purpose and its operation were wholly foreign to the raising and propulsion of water. Ruthven's was an entire abortion. It had no disc, no hollow shaft; but it was so constructed that air or water might get in at both sides. [Cresswell, J. You claim generally admitting water at both sides.] To a machine such as previously described. [Cresswell, J. Would not Ruthven's wheel be an infringement of the plaintiff's patent? In *Newton* v. *The Grand Junction Railway Company*, 5 Exch. 331, it was held, that, where a patent is granted for a combination of several things, some of which are old and some new, the question of novelty depends upon whether that which is claimed in the specification as a whole is new: and a person who, by some chemical

or mechanical equivalent, imitates a part of such combination which is new and useful, is guilty of an infringement of the patent. Crowder, J. Does the specification confine the claim to the disc or hollow shaft?] Yes; in the manner and for the purpose before described. The specification is not very artificially drawn: but the court will put a reasonable construction upon the language used, and will not be astute to discover defects in it. In substance, the wheel, as described, is claimed in combination with the other things before mentioned.

Cresswell, J. It seems to me that the plaintiff's claim must be understood as confined to the means of introducing water at both sides of the wheel. You contend that the specification does not claim the means generally, but only as previously described. My Brother Willes thinks that the matter should be discussed; but, on shewing cause, the defendants' counsel should [732] be at liberty to raise for argument any of the points which were taken by them at the trial.

Knowles, Q. C., Hindmarch, and Kemplay, in Hilary Term last, shewed cause. the result of the two disclaimers leaves only the second claim in the plaintiff's specification, which is in these terms,—"I claim as my invention and application the means of increasing the action of the machine, *by causing the liquid to enter the wheel at both sides.*" That now is conceded not to be new. It is, however, contended on the part of the plaintiff that his claim is so limited only when a wheel is used such as described in the previous parts of the specification. The former parts of the specification are thus made important. These, therefore, are not disclaimed, and, if any one of them is not new, the patent is clearly bad. If the central plate, or disc, which is confessedly old, is retained, the plaintiff was bound in his specification to state that it was old. In Hindmarch on Patents, 183, the law upon this subject is thus stated:—"If the specification describes more than the invention itself, it must clearly point out which of the things described are old and which of them are new. And, if the subject of the patent privilege be an addition to or an improvement upon an old machine or other article, the specification must not describe the whole machine or article without distinguishing between the old and the new parts: for, the proviso in the patent requires that the invention shall not only be ascertained, but ascertained with particularity; and it is impossible to contend that an invention is so ascertained by a specification, if it describes without distinction many things which are old, as well as the invention itself." For this the learned author cites *Williams* v. *Brodie*, Dav. P. C. 96, 97, *Manton* v. *Manton*, Dav. P. C. 333, 349, *Hill* v. *Thompson*, 3 Meriv. [733] 622, *Hill* v. *Thompson*, 8 Taunt. 375, 2 J. B. Moore, 424: to which may be added *Holmes* v. *The London and North Western Railway Company*, 12 C. B. 831. And, when this case was before the court of Queen's Bench,—see 2 Ellis & B. 956, 966,—Lord Campbell said: "It is quite clear that the patentee has described the wheel as part of the machinery for raising and impelling water. That is so both in the description and the diagram. Then it was proved, and is now admitted, that the wheel is not new. That being so, the claim is primâ facie bad, because primâ facie all must be taken to be claimed which is described as part of the machinery. It then lies on the patentee to shew that he has clearly pointed out what is not new; for, the rule is, that this must be done clearly. . . . Had the wheel been new, and the plaintiff had been suing for the infringement of this patent by the mere use of such wheel, this fourth claim would have furnished him with a most powerful argument to shew that the patent was infringed: and the action would have clearly lain, according to *Smith* v. *The London and North Western Railway Company*, 2 Ellis & B. 69. Even if this is not so, the exclusion is at least equivocal; and that is not enough to protect the specification: the law on this point is well explained in *Holmes* v. *The London and North Western Railway Company*, 12 C. B. 831." [Cockburn, C. J. The proper way to read the specification is, to read the whole description of the machinery, and the claim left unaffected by the disclaimers.] The central disc is twice mentioned in the descriptive part of the specification,—once at p. 712, line 1, and again at p. 713, line 2. In Hale's first patent, the water is introduced into the wheel at both sides: and the wheel there described differs from the plaintiff's only in the absence of the central disc or plate; it is carried by means of spokes instead. Hale's second patent de-[734]-scribes a machine having a central disc. And Ruthven's invention, although it proved delusive, had also all the qualities of the plaintiff's, with the exception of the central disc. And that the plaintiff claims only for the support of the wheel.

Collier, Q. C., and Chance, in support of the rule. That which the plaintiff claims

by his specification as it now stands is, not merely the wheel, but the combination of the wheel with certain machinery described, whereby certain defects in a well-known machine,—a machine for raising water by centrifugal force, are counteracted. This combination is confessedly new. Taking the specification with the disclaimers, it is distinctly pointed out that the only claim the plaintiff makes is, for the application of machinery for raising water by centrifugal force, where the same is used for introducing the water into compressed air. [Willes, J. The plaintiff seems to have done successfully what Ruthven failed to do,—each using a wheel admitting the water at both sides. Cockburn, C. J. The whole question of novelty seems to turn upon Ruthven's patent.] That was for a mere blower. It is quite impossible that the plaintiff could have dreamt that that had any application to *his* invention: it was altogether alio intuitu: it was never meant to be applied to the raising of water. [Willes, J. Take away Ruthven's second and third wheels, and you have a wheel propelling water, into which wheel the water to be acted upon is admitted at both sides.] That undoubtedly is so; but the specification filed by Ruthven clearly shews that he did not contemplate any such use of his wheel as the plaintiff suggests. [Cresswell, J. I think you must go the length of contending, that, after the plaintiff's patent, Ruthven could not have applied his invention to pumps.] It may be that Ruthven's inven-[735]-tion is applicable to a purpose which he was not aware of; and for the discovery of that it may be that a third party could not take out a patent: but the application of a property of a substance (or, as it is conceived, a new application of machinery) to a purpose useful in itself, and not before known, may be the subject of a patent: *Muntz* v. *Foster*, 2 Webster's P. C. 96, 103. [Hindmarch referred to *Minter* v. *Mower*, 6 Ad. & E. 735, 1 N. & P. 595. There, the specification of a patent described the invention to be of "an improvement in the construction, making, or manufacturing of chairs," and to consist in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acted as a counterbalance to the pressure against the back, and whereby a person sitting in the chair might, by pressing against the back, cause it to take any inclination, and yet might be supported. In an action for infringing the patent, it was pleaded that the plaintiff was not the inventor, and that the specification did not describe the invention; and it was proved that a chair had previously been sold, to which a similar leverage was applied, acting by the pressure in the same way, but having also other machinery, which prevented the inclination of the back from being shifted except when a spring was touched by the hand. The jury found, that, without such other machinery, the chair previously sold would have produced an equilibrium by the self-adjusting leverage; that the maker of it was the inventor of the machine, and found out the principle, but not the practical purpose to which it was now applied; *and that the plaintiff had discovered such purpose*. The court directed a nonsuit.] That is a totally different case: the plaintiff's alleged invention was substantially if not identically the same as Browne's. [Crowder, J. Ruthven, it seems, was mistaken in supposing that he acquired an [736] increase of power by having three wheels: but, was there anything to prevent his using one?] In *Russell* v. *Cowley*, 1 C. M. & R. 864, 1 Webster's P. C. 463, a patent was sustained for the mere omission of a mandril in the forming of iron pipes. [Cresswell, J. And the substitution of external pressure in forcing the metal through a die.]

Cockburn, C. J. The strong impression of the court is, that Ruthven's patent is fatal to the plaintiff. We need not, therefore, at present hear counsel on the effect of Hale's patents.

By desire of the court the case was re-argued in Easter Term last, upon the effect of Hale's second patent.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court:—

This was an action for the infringement of a patent. Several pleas were pleaded, on which issues were taken, and found for the plaintiff; and it is not necessary to notice them further. The two important pleas were, that the plaintiff was not the inventor of the alleged invention, and that the alleged invention was not new.

The cause was tried before Willes, J., without a jury: and he ordered the verdict on those two pleas to be entered for the defendant, giving the plaintiff leave to move to have the verdict entered in his favour, if the court should be of opinion that he was entitled to succeed in the action.

It appeared by the evidence adduced at the trial, that, in 1846, the plaintiff obtained a patent for an invention of "certain improvements in machinery for raising and impelling water and other liquids, *and also* **[737]** *thereby to obtain mechanical power.*" These latter words were afterwards struck out, in pursuance of a disclaimer entered in 1853.

The specification, as originally inrolled, described minutely the parts of the machine for which the patent was granted, and which was a pump working by centrifugal force; and, in the course of that description, several things were claimed as the plaintiff's invention: but all those claims were afterwards abandoned. The part of the machine upon which this question arises was thus described:—"In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two; *r r* I call a nave, which is hollow; and *s s* are two hollow shafts, one at each side of the wheel." Further on was this passage: "In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to substitute circular discs, with a narrow water channel between, and a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralize the effects of suction, by having a corresponding or proportionate degree of suction at each side." It then went on thus:—"I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force." He then introduced nine several distinct claims, the whole of which have since been disclaimed, save one; and the specification is now in these terms:—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separate from the machinery described." "I claim as **[738]** my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides."

This appears to us to be the only thing now claimed: and the question which we have to determine is, whether, according to the evidence, this alleged invention was new.

The defendant insisted at the trial that the plaintiff's claim was not new, but had been previously made known by a specification inrolled by one William Hale in 1830, and by another inrolled by one Morris West Ruthven in 1841. My Brother Willes was of opinion that the plaintiff's alleged invention had been previously disclosed by the specification inrolled by Ruthven, and the drawings annexed to it.

In Michaelmas Term, 1856, a rule nisi was obtained on the part of the plaintiff to enter a verdict for him, pursuant to the leave reserved.

The case was argued in Hilary Term last and again, by desire of the court, in Easter Term, as to the effect of Hale's patent: and we are now of opinion, that, for anything communicated to the public by Hale, the plaintiff's claim may be good.

But, with regard to Ruthven's patent and specification, it appears, that, in 1841, a patent was granted to him for the invention of a new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus. The machine invented, as described in his specification, consisted of three fans, with their appropriate cases. The air or other medium to be acted upon was admitted into the first, and, having been acted upon by the revolution of the fans, was driven from that into the second case, and in like manner into the third, thence to be projected, as the inventor expected, with an accumulation of force. One of the drawings annexed shewed that there was an **[739]** inner case revolving with its fans inside the outer case, and also that the air or water to be acted on and forced forwards was admitted equally at both sides. Another drawing of the inner case with its fans shewed that there was an opening in the rim of the case at the front of each fan,—the fans in fact dividing the inner case into six compartments, or any other number, dependant, of course, on the number of fans. And this inner case so divided by fans, with the openings in the rim, and admitting water at both sides, was almost identical with the wheel used by the plaintiff, except that it had not a central disc, and was attached to the axle by spokes extending from the axle to the outer edge of the opening, for the admission of air or water.

Ruthven was mistaken in supposing that, by the use of three fans, he should obtain an increase of force; and it did not appear that his machine was brought into

use. And the question is, whether, notwithstanding the information given to the public by Ruthven's specification, the plaintiff can claim to be the first inventor of "the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides."

The form of the wheel used by the plaintiff was not new, nor does he claim it as new; nor was the plan of admitting water at both sides, for the purpose of being projected forwards by centrifugal force, new,—it having been made known by the specification inrolled by Ruthven, and the drawings annexed to it. It may be true that the plaintiff first explained the full benefit obtained by so introducing it: but the discovery that a particular advantage was obtained by the use of a wheel known before, in a manner known before, cannot be called an invention or application to sustain a patent: *Losh* v. *Hague*, 1 Webster's P. C. 202, Hindmarch on Patents, 94. The method of introducing the water on **[740]** both sides, having been described by Ruthven, the plaintiff must be taken to have learnt that from him; and his claim must be read as if he had mentioned that fact in his specification, and had said,—"I claim the means of increasing the action of the machine, by causing the water to enter the wheel at both sides, as described in Ruthven's drawings." Could that have been held to be a new invention?

It appears to us, that, the raising and propelling of water by centrifugal force not being claimed as new, the wheel itself not being claimed as new, and the introduction of water at both sides of a wheel, in order to its propulsion by centrifugal force, being thus admitted not to be new,—the plaintiff could not be considered as the inventor of a method of increasing the action of the machine by so introducing it. We are, therefore, of opinion that the decision of the learned judge who tried the cause was right, and that this rule must be discharged.

Rule discharged.

TUFF *v.* WARMAN. June 9th, 1857.

[Affirmed in Exchequer Chamber, 5 C. B. N. S. 573.]

In an action for an injury to the plaintiff's vessel in consequence of a collision with a vessel under the control of the defendant,—there being conflicting evidence of negligence on the one side and on the other, the jury were told, that, if the negligence or default of the plaintiff was in any degree the direct or proximate cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant: but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it:—Held, a proper direction. —The Merchant-Shipping Act, 1854, 17 & 18 Vict. c. 104, leaves the rule of law upon this subject as it was before; the only effect of the 296th and 298th sections being, to bring the non-compliance with the Admiralty sailing regulations within the category of negligence.

This was an action in which the defendant was charged with having so negligently navigated a steam-vessel in the river Thames as to run against and damage the barge of the plaintiff.

[741] The defendant pleaded,—first, not guilty,—secondly, that he had not the control or management of the steamer.

The cause was tried before Willes, J., at the sittings in London after last Hilary Term. The facts were as follows:—The defendant was in charge of a steam vessel called the "Celt," as pilot, coming up the river, some miles below Gravesend. The plaintiff's sailing barge was proceeding with a fair wind down the river, having two men on board, one of whom was at the helm. It did not appear where the other was; but it was clear that they kept no look-out, for, the man at the helm stated that, the sail being in his way, he could not see forward without stooping, and he admitted, that, although he saw the steamer coming when a considerable distance off, he did not look out again until she was within two or three yards of him, and when it was too late to avoid the collision. The steamer, it appeared, was on her right side, according to the Admiralty regulations. The defendant stated that he was standing on the poop of the steamer, and saw the barge when about 300 yards distant, and

immediately ported his helm; that, if the barge had done the same, the collision would have been avoided; that he thought the barge put her helm a-starboard; and that, finding a collision inevitable, he put his helm hard a-port, and backed his engines, but too late. The defendant's evidence was corroborated by that of the captain and the mate of the steamer. On the other hand, two seamen, who were on board a yawl, and who saw the whole transaction, distinctly swore that the steamer's helm was not ported.

On the part of the defendant, it was insisted that the plaintiff was not entitled to recover, inasmuch as he had failed to comply with the sailing regulations enforced by the statute 17 & 18 Vict. c. 104, ss. 296, **[742]** 297, 298 (*a*)[1]; and that, assuming that the defendant had been guilty of negligence, still, if there was any negligence on the part of the plaintiff, he could not maintain the action.

In leaving the case to the jury, the learned judge told them, that, if both parties were equally to blame, and the accident the result of their joint negligence, the plaintiff could not be entitled to recover; that, if **[743]** the negligence or default of the plaintiff was in any degree the proximate of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not by the exercise of ordinary care have avoided it; that, as the people on board the plaintiff's barge were keeping no look-out, the defendant should have gone to star-board, or reversed his engines, and so avoided the collision; and he referred for an illustration to the case of *Davies* v. *Mann*, 10 Exch. 546; and he concluded thus,—"Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed to the accident. If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but, if you think that the defendant by his negligence directly caused the injury, you must find for the plaintiff."

The jury returned a verdict for the plaintiff, damages 106*l*.(*a*)[2].

Collier, Q. C., in Easter Term last, obtained a rule nisi for a new trial on the ground of misdirection "on the subject of negligence," and that the verdict was against evidence.

When the rule came on for argument, Cresswell, J., objected that the grounds

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(*a*)[1] The 296th section enacts, that, "whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam-ships and by all sailing ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

The 297th section enacts that "every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship."

The 298th section enacts, that, "if, in any case of collision, it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers hereinbefore contained (s. 295), or of the foregoing rule as to the passing of steam and sailing ships (s. 296), or of the foregoing rule as to a steam-ship keeping to that side of a narrow channel which lies on the starboard side (s. 297), the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary."

(*a*)[2] Being the amount of the penalty of the bond given by the defendant, and the sum payable to him for pilotage in respect of the voyage on which he was engaged at the time as pilot. See 17 & 18 Vict. c. 104, s. 367.

upon which the rule had been granted were not so stated therein as to comply [744] with the 33rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

Collier. It was impossible to state shortly what was the particular objection to the summing-up of the learned judge. Error pervaded the whole of it, though the part which was the most objectionable was that in which the learned judge told the jury that, "if they were of opinion that the plaintiff by his own negligence directly contributed to the accident, they must find for the defendant; but that, if they thought that the defendant directly caused the injury, they must find for the plaintiff." It was not properly a question of directly or indirectly contributing: as to the plaintiff's negligence, it is submitted that it was incorrect to put it to the jury to say whether it directly caused the accident; but, assuming that the defendant had been guilty of negligence, the proper question for them to consider was, whether the plaintiff might not by the exercise of ordinary care have avoided the collision; for, to use the language of Lord Campbell's dictum in *Dowell* v. *The General Steam-Navigation Company*, 5 Ellis & B. 195, 203, the plaintiff "cannot cast upon the defendant the necessity of taking extraordinary care." See post, p. 751.

Honyman (with whom was J. Wilde, Q. C.) now shewed cause. The jury were directed in strict accordance with the rule laid down in all the cases upon this subject. The statute 17 & 18 Vict. c. 104, has made no alteration in the law in this respect: it merely re-enacts what was the Admiralty rule before. In *Dowell* v. *The General Steam-Navigation Company*, 5 Ellis & B. 195, it was held that a plaintiff cannot recover at law for mischief done to his ship by its being struck by the defendant's ship, in consequence of the latter im-[745]-properly managed, if it appear that the plaintiff's ship was improperly managed, and that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault: though, if there be negligence on the part of the plaintiff only remotely connected with the accident, the question is, whether the defendant by ordinary care and skill might have avoided the accident. The statute 14 & 15 Vict. c. 79, s. 26, gave power to the Admiralty to make such regulations as they might think fit requiring the exhibition of lights by steam or sailing vessels: s. 28 enacted that, in case of a collision by two vessels, if it was occasioned by the non-observance of such rules, the owner of the vessel by which the rule had been infringed should not be entitled to recover for the damage, unless it appeared to the court that the circumstances justified a departure from the rule. The Admiralty made a regulation that "all sailing vessels when under sail, or being towed, approaching or being approached by any other vessel, should be bound to shew, between sunset and sunrise, a bright light, in such a position as could be best seen by such vessel or vessels, and in sufficient time to avoid collision." The plaintiff, the owner of a sailing collier vessel, declared against the defendant, the owner of a steamer, for that, by negligence of the defendant, the steamer struck the collier, which was thereby run down and sunk. The defendant pleaded not guilty. It appeared at the trial that the collision took place on a dark night; that the collier had exhibited a light, but had withdrawn it two or three minutes before the collision, and was not visible to the steamer till within two or three of the collier's lengths off: but the plaintiff contended, that, if the steamer had been managed with ordinary care and skill, the accident would not have happened. The judge told the jury, that, if there was negligence on the part of [746] the plaintiff as well as the defendant which led to the collision, the plaintiff could not recover, if the defendant could not have avoided the accident by care and skill; and that, supposing there was negligence on the part of the collier, still, if the steamer could by ordinary care and skill have avoided the collision, the defendant would be answerable. He then asked the jury, 1. Was there negligence on the part of the plaintiff with respect to the light, which led to the collision? 2. Could the defendant have avoided the collision by ordinary care and skill? 3. Was the damage occasioned by the accident the result of circumstances for which more blame attached to the one side than the other? The jury answered, 1. "We find there was fault on the part of the collier in not continuing the light till the danger was past." 2. "It is the opinion of the jury that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution; but that it was impossible to avoid the accident when the steamer was within two or three of the collier's lengths." 3. "We are much inclined to think the preponderance of blame to be with the steamer." The court held that the defendant was entitled to the verdict; for that the first answer, connected with the direction

and question, must be understood as a finding that the discontinuance of the light led to the collision, which precluded the plaintiff from recovering, both at common law and under s. 28 of the statute,—the Admiralty regulation, upon a true construction, requiring that the sailing vessel should shew the light for a reasonable time, and it not being necessary to plead the statute and regulation specially, the statute giving only a rule of evidence: and that the second and third answers strengthened the conclusion in favour of the defendant, as shewing that the discontinuance of the light made it impossible to avoid the accident **[747]** after the collier became visible, and it being therefore immaterial which party was on the whole most to blame. In giving judgment, Lord Campbell says: "By the answer to the first question, we consider the jury to have found that the master of the collier did not properly observe the regulation of the Admiralty made under the authority of the statute 14 & 15 Vict. c. 79, s. 26." "We likewise think that the jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the court of Admiralty, in a case of collision, if both vessels are in fault, the loss is equally divided: but, in a court of common law, the plaintiff has no remedy if his negligence in any degree contributed to the accident. In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and, in these cases, the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies* v. *Mann*, 10 M. & W. 546. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss. But, in the present case, the jury appear to have concluded (as they well might have done upon the evidence) that the negligence of the master of the collier, in not properly complying with the Admiralty regulation, directly contributed to the accident, although there was negligence on the other **[748]** side, and 'the preponderance of blame' was 'with the steamer.'" [Williams, J. The court there seem to treat it as a question for the jury whether there was negligence or not.] It is not possible to use words more closely following the rule laid down by the court of Queen's Bench in that case than the learned judge here did. [Cresswell, J. Suppose the plaintiff had seen the steamer coming, and had notwithstanding persisted in steering in the same direction, would he have been guilty of negligence?] No doubt he would. [Cresswell, J. Suppose he was guilty of another default, that of omitting to keep a proper look-out, would the plaintiff have directly contributed to the accident?] The question at present is, not whether the verdict was warranted by the evidence, but whether the direction was right. [Cockburn, C. J. Where the duty of one navigating a vessel is expressly pointed out by an act of parliament, and he neglects to pursue it, and in consequence his vessel is run into, can it be said that he does not contribute to the accident? Willes, J., referred to *Smith* v. *Voss*, 2 Hurlst. & N. 97. Cockburn, C. J. Why should we depart from the words of the act of parliament? The language of the 298th section is, that "if in any case of collision it appears to the court that such collision was occasioned by the non-observance of any rule," &c., the owner shall not be entitled to recover any recompense for any damage sustained by such ship in such collision. The legislature may have thought it so important that these rules should be observed, as to impose these consequences for their non-observance.] If that strict construction be adopted, it will equally apply to the case of an injury wilfully inflicted: and it can hardly be contended, that, because the plaintiff has been guilty of some negligence in omitting to comply with the requirements of the statute, the defendant might run him down with impunity. The **[749]** other point which it is insisted ought to have been left to the jury,—whether, assuming that there was some negligence on the part of the plaintiff, the defendant might by exercising ordinary care and skill have avoided the collision,—was in effect left to them. And the finding of the jury was abundantly warranted by the evidence.

Collier and Digby Seymour, in support of the rule. The importance attached by the legislature to the observance of the rules enforced by s. 296 of the Merchant Shipping Act, 1854, is shewn by the 299th section, which enacts that, "in case any

damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shewn to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." The want of a look-out on board the barge, and the omission to port her helm on the approach of the "Celt," were, if not the immediate cause of the accident, mainly instrumental or conducive to it. Is a man to be in a better position because he is so reckless as to keep no look-out, than he would have been in if he had complied with the regulations and been guilty of a mere error in judgment? That would be holding out a premium for negligence. In *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244, Parke, B. says: "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, 11 East, 60; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by [750] ordinary care he might have avoided them, he is the author of his own wrong." [Cresswell, J. Have you found the doctrine of *Butterfield* v. *Forrester*, —which was the case of a nuisance or obstruction on a highway,—applied to a case of active negligence on the part of the plaintiff?] It was extended to a case like the present in *Thorogood* v. *Bryan*, 8 C. B. 115, where it was held, that one who sustains an injury from a collision with a carriage or vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his part or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part. Not a word is said there about the plaintiff's conduct directly or indirectly causing or contributing to the accident. [Williams, J. That case has been made the subject of some damaging remarks in the last (4th) edition of Smith's Leading Cases, vol. i., p. 220 (*a*).] In the course of the argument in *Dowell* v. *The General Steam-Navigation* [751] *Company*, 5 Ellis & B. 195, 203, it was suggested that "the mere fact that a plaintiff, who has been run over by the defendant, was on the wrong side of the way, does not necessarily give a defence: but, if his being there was the immediate cause of the accident, then there is a defence." To this Lord Campbell assents, observing,—"He cannot cast on the defendant the necessity of taking extraordinary care." The proper way of leaving the question to the jury here would have been, whether the defendant could by the exercise of ordinary care have avoided the accident,—whether the plaintiff's negligence in any degree contributed to the injury: not whether it directly or indirectly caused or contributed to it. [Cockburn, C. J. Suppose the defendant saw the bargeman asleep at his helm, would he have been,—independently of the statute,—justified in keeping on his course and running into him? How does that case differ from that of a man falling asleep when driving, or of a drunken man lying on a highway?] He had no right to speculate on the bargeman's doing wrong. In the case of *The Mangerton*, 2 Jurist, N. S. 620, a sailing vessel not having ported her helm in sufficient time, and not having a light in accordance with the Admiralty regulations, was run into by a steamer: and it was held that the steamer was not to blame. Dr. Lushington there says: "Both parties are bound to act on the presumption that the statute must and will be obeyed. The vessel approaching is justified in

(*a*) "If" say the learned editors, "two drunken stage-coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This nevertheless, appears to be the result of the decision in *Thorogood* v. *Bryan*: but it may be questioned whether the reasoning of the court in that case is consistent with those of *Rigby* v. *Hewitt*, 5 Exch. 240, and *Greenland* v. *Chaplin*, 5 Exch. 243, or with the series of decisions from *Quarman* v. *Burnett*, 6 M. & W. 499, to *Reedie* v. *The London and North Western Railway Company*, 4 Exch. 244. Why in this particular case both the wrong doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood* v. *Bryan*."

supposing that the other will obey the statute." [Williams, J., referred to the case of *The Mayor of Colchester* v. *Brooke*, 7 Q. B. [752] 339, where it was held, that, if property (as, oysters) be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without doing so; for an individual cannot abate a nuisance if he is no otherwise injured by it than as one of the public: and therefore the fact that such property (so placed) was a nuisance, is no excuse for running upon it negligently.] In *Morrison* v. *The General Steam-Navigation Company*, 8 Exch. 733, it was held, that, where a vessel through sheer negligence injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty regulations by not exhibiting a light, affords no justification under the act, where the absence of the light does not in any way contribute to the accident. That, it is submitted, is the correct view. *Vennall* v. *Garner*, 1 C. & M. 21, seems very applicable here: it was there held, that, in case for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. Bayley, J., says: "The rule is, that the plaintiff could not recover, if his ship were in any degree in fault in not endeavouring to prevent the collision. Here, the plaintiff had a right to presume that the defendant's ship would do what she ought to do." So, here, the defendant had a right to presume that the plaintiff would do what the statute requires him to do, and which it was his duty to, viz. to port his helm. The jury should have been directed as in *Smith* v. *Voss*, 1 Hurlst. & N. 97, and should have been asked to say whether the collision was in any degree caused by the negligence or breach of duty of the plaintiff. [Cockburn, [753] C. J. Is not that involved in the question which was left to them, viz. whether the plaintiff by his negligence directly contributed to the accident?] The introduction of that word "directly" was calculated to embarrass and mislead the jury, and to withdraw their minds from the real question in issue. [Cockburn, C. J. Does not a man directly contribute to an accident, by putting himself by his own negligence in a position in which but for such negligence the accident would not have happened?] In some sense, no doubt, he does. Then, as to the evidence,—the finding that the plaintiff was not directly contributory to the accident, was clearly against all the evidence. It was admitted that he kept no look-out, and it was proved by all the witnesses that he did not port his helm. It is manifest, therefore, that he was guilty of gross negligence, and that that negligence must have contributed to the accident (*a*).

COCKBURN, C. J. I am of opinion that this rule should be discharged. As to the verdict being against the evidence, my Brother Willes, who tried the cause, reports to us not only that he was not dissatisfied with the conclusion the jury came to, but that he thinks the verdict was right: under these circumstances, therefore, the rule cannot be sustained on that ground. As to the other ground upon which this rule was moved, after much consideration I have satisfied myself that the direction of the learned judge was right. The first objection to the summing up is, that it was left to the jury to say whether the plaintiff had by his own negligence directly contributed to the result: and it was contended, that, looking at the 296th and 298th sec-[754]-tions of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the case as to this part of it should have been left to the jury independently of the question of the plaintiff's having been contributory to the accident. At first, it struck me rather forcibly, that, the statute having prescribed that certain things shall be done and certain regulations followed, and then providing, that, in cases of collision, where it shall appear to the court that such collision was occasioned by the non-observance of those rules, the owner of the ship by which such rules have been infringed shall not be entitled to recover any recompense whatever for any damage sustained by the vessel from such collision, unless it be shewn to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary,—prescribing these matters peremptorily and absolutely, and making provision for what shall be the consequence of a contravention of those regulations,—it was not a question whether their non-observance had caused or contributed to the accident, but that such non-

(*a*) See *The General Steam-Navigation Company* v. *Morrison*, 13 C. B. 581, *The General Steam-Navigation Company* v. *Mann*, 14 C. B. 127.

observance was a matter upon the establishing of which the plaintiff's right to recover is absolutely precluded by the statute. Upon further consideration, however, and upon the authority of the cases of *Morrison* v. *The General Steam-Navigation Company*, 8 Exch. 733, and *Dowell* v. *The General Steam-Navigation Company*, 5 Ellis & B. 195, I have felt myself constrained to come to a different conclusion. In the former of these cases, the court of Exchequer distinctly lay it down that the regulations in question have effected no change in the law, but that all persons navigating vessels are bound to exercise ordinary care and vigilance just as before; and that, if it be clearly established that a vessel having no light has been run into by another vessel by sheer carelessness and negligence in not keeping a proper look-out, [755] the party sustaining damage is entitled to compensation. That shews that all that the statute has done is to bring within the category of negligence the non-observance of the regulations prescribed by s. 296; and that, in the event of accident arising from such non-observance, the case stands precisely the same as it did before, and the question is to be tried by the ordinary rules. That being so, I think the direction was right, and that the true question in these cases is, whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that, in this case, if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that, by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict. That question was left to the jury, with such observations as suggested themselves to the learned judge. There being no misdirection, therefore, and the learned judge not being dissatisfied with the verdict, we see no ground for disturbing it.

CRESSWELL, J. I am of the same opinion upon both points. As to the first point, there was much conflicting evidence; and I should have had great difficulty in saying whether the verdict was right or wrong. We are, however, in a great measure relieved from considering that, inasmuch as my Brother Willes reports to us that he does not disapprove of the verdict. As to the question of law, it seems that the learned judge, with reference to the alleged non-compliance with the [756] Admiralty regulations, told the jury that the question was whether the plaintiff, by neglecting to comply with them, had directly contributed to the accident. That direction was objected to; and it was said that the proper question for the jury was, whether the negligence of the plaintiff was at all contributory to the accident, and that the proper test was whether by the exercise of ordinary care he might have avoided the collision. That matter is disposed of by the case of *Dowell* v. *The General Steam-Navigation Company*, 5 Ellis & B. 195. Lord Campbell, speaking of *Davies* v. *Mann*, 10 M. & W. 546, there says: "In some cases, there may have been negligence on the part of a plaintiff remotely connected with the accident, and in those cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies* v. *Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss." So here, without the negligence of the plaintiff in omitting to port his helm when he found a collision imminent, the accident possibly might not have happened; yet that negligence might not have contributed to the accident within the rule. After observing at some length upon the facts of the case, my Brother Willes, towards the close of his summing up, put it to the jury thus, —"Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed [757] to the accident." And he concludes by telling them,—"If you think that the plaintiff directly contributed to the accident, you will find for the defendant: but, if you think the defendant by his negligence directly caused the injury, you must find for the plaintiff." Those are the terms of direction which have been upheld in many cases: and I see no reason for disturbing the verdict.

Williams, J. I have arrived at the same conclusion, though not without considerable difficulty. With regard to the alleged misdirection, I must confess, after well considering the case of *Dowell* v. *The General Steam-Navigation Company*, 5 Ellis & B. 195, I am unable to distinguish the mode of directing the jury here from that which the court of Queen's Bench sustained there. The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant: but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it. So far the doctrine of the cases is perfectly plain. But then comes the question, what is meant by the negligence of the plaintiff being proximately or directly contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote: and I **[758]** certainly feel great difficulty in getting rid of that question of law by leaving it to the jury. That, however, was the course adopted in the case of *Dowell* v. *The General Steam-Navigation Company*, and followed by my Brother Willes upon this occasion. I will not attempt to controvert or dispute the propriety of that now, however much I may lament that the law is not on a more intelligible and satisfactory footing in this respect. It was further objected, that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might by exercising ordinary care and diligence have avoided the accident. It seems to me that that was in effect left to them. As to the other ground of the rule, viz. that the verdict was against evidence, I place great reliance on my Brother Willes's opinion. He expresses himself satisfied with the conclusion the jury came to; and I cannot say that I am dissatisfied.

Willes, J., concurred.

Rule discharged.

Collier, for the defendant, asked leave to appeal.

Wilde, contrà. The point has already been expressly decided in the court of Queen's Bench; and, the damages being limited by law to 100l., the case is hardly one in which the court would allow an appeal.

Cresswell, J. The amount of damages is not a matter to be taken into consideration.

Cockburn, C. J. The point is one of great import-**[759]**-ance, and one which has never yet been decided by a court of error. I think the defendant ought to be allowed to appeal.

Collier then asked leave to amend the rule.

Cockburn, C. J. Draw your points, and submit them to us, in order that we may see that they are involved in our judgment.

On a subsequent day, the following note of the proposed amendment was handed in:

"That the learned judge had misdirected the jury in this, that he ought to have told them, that, if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover, whether he contributed directly or indirectly; that, even assuming negligence on the defendant's part, the plaintiff could not recover if he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence: and that he should have further told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover."

Leave to appeal granted.

[760] Ling *v.* Croker. June 12th, 1857.

Upon a motion for a new trial in an action of crim. con., on the ground of surprise, —Semble, that the affidavit of the plaintiff's wife cannot be received for any purpose.

This was an action for criminal conversation, tried before Willes, J., at sittings at Westminster after last Hilary Term, when the jury returned a verdict for the plaintiff, damages 1000*l*.

Edwin James, Q. C., in Easter Term last, moved for a new trial, upon affidavits tending to impeach the propriety of the conclusion which the jury came to upon the subject of the handwriting of certain letters of a most disgusting character which were produced on the part of the defendant, and which were alleged to have been written by the plaintiff, whilst in the Crimea, to his wife: and also on the ground that the damages were excessive. [Willes, J. Have you any affidavit of surprise,—that the genuineness of the letters was disputed at the trial? I must confess I thought the evidence as to the handwriting was most unsatisfactory.] There is no affidavit of surprise according to the strict technical rule; but that can be supplied. The letters were, it seems, handed by the lady to the defendant's attorney as the genuine letters of her husband: and he had no reason to doubt that they were so. We have also her affidavit on the subject. [Cresswell, J. We cannot look at the wife's affidavit (*a*)[1]. Willes, J. The affidavits of the parties can at best only be received for the purpose of excluding conclusions.] If the wife's affidavit were offered for the purpose of a denial of the alleged adulterous intercourse, one could perceive the force of the objection: but here it relates to a collateral and independent fact. [Cresswell, J. That can make no differ-[761]-ence.] It is somewhat singular, that, in these cases, the law excludes the only persons who can give direct evidence. [Cockburn, C. J. It was thought expedient by the legislature to exclude them (*a*)[2], on the ground of the public scandal that would result from allowing them to be examined. Before we grant a rule on the ground of surprise, we must be satisfied that there are legitimate materials to justify a further investigation of the matter.] There is abundant evidence upon the affidavits which steers clear of the difficulty. The learned counsel read several affidavits.

Cockburn, C. J. I think sufficient ground has been shewn to justify us in granting a rule; but there should be an affidavit of surprise, as well as an affidavit verifying the plaintiff's handwriting. As to the wife's affidavit, it must not be considered that we decide upon its admissibility on this occasion. It may be left open to discussion.

Cresswell, J. As at present advised, I entertain a very strong opinion that neither the affidavit of the wife nor that of the defendant can be looked at for any purpose in cases of this sort.

Cockburn, C. J. At all events, they will not warrant us in granting a new trial, without other evidence.

E. James, Q. C., on a subsequent day, moved to postpone the argument, on the ground that the defendant would have to ask the court, when the rule came on, for leave to file affidavits in answer to the matters contained in the plaintiff's affidavits, under the 45th section of the Common Law Procedure Act, 1854 (17 & [762] 18 Vict. c. 125), and for that purpose it would be necessary to refer to the allegations in certain proceedings now pending in Doctors Commons, which would not be published until some time in July.

Cockburn, C. J. The only ground of the motion for a new trial is, that the jury came to a wrong conclusion on the subject of the plaintiff's handwriting to certain letters. What you suggest may be a very good reason for postponing the trial, in the event of the rule being made absolute; but it certainly affords none for postponing the argument.

Upon cause being shewn, it appeared that the defendant's attorney had had distinct notice before the trial that the plaintiff intended to dispute the handwriting

(*a*)[1] See *Hawker* v. *Seale*, 17 C. B. 595.
(*a*)[2] See 14 & 15 Vict. c. 99, s. 3.

to the letters in question; and exception was taken to the reception of the affidavit of the plaintiff's wife.

CRESSWELL, J. I was no party to the reading of Mrs. Ling's affidavit in the rule: and I still entertain very grave doubts whether such an affidavit ought to be listened to for any purpose.

The whole court thought that the rule was answered.

Rule discharged.

[763] ATKYNS *v.* PEARCE. June 12th, 1857.

[S. C. 26 L. J. C. P. 252; 3 Jur. N. S. 1180.]

A. went abroad in 1852, leaving his wife and three children here, with (what the jury found to be) a sufficient provision for their proper maintenance in his absence: on his return, in 1856, he found that his wife had formed an adulterous connection with another man, who lived with her, and passed by her husband's name, and he immediately removed his children:—Held, that, under these circumstances, A. was not liable for medicine and attendance furnished for his children at the wife's request, although the plaintiff was not aware of the state in which she was living at the time.

This was an action by the plaintiff, a surgeon and apothecary, to recover the amount of a bill for medical attendance upon the wife and children of the plaintiff from December, 1855, to September, 1856.

The cause was tried before the secondary of London on the 20th of May last. The facts which appeared in evidence were as follows:—The defendant left England in May, 1852, and went to Australia; and he returned to England in April, 1856. When the defendant left this country, his wife remained here with three children: on his return, he found that his wife had during his absence formed an acquaintance with a man named French, with whom she was living at Hoxton, where he was known by the name of Pearce, and by whom she had had two more children. The defendant thereupon left her, taking away with him the three elder children.

The plaintiff's claim was made up partly of attendances on the wife in her two last confinements and partly of charges for medicine and attendance upon the children; but, at the trial, he abandoned the whole of his demand except that which related to attendances upon the three legitimate children.

Evidence was given on the part of the defendant to shew, that, during his absence from England, his aunt, who was his guardian and trustee, had at his request paid to his wife the rents of certain property to which he was entitled, the sums so paid to her in the whole amounting to 477*l.*: and it was submitted, on his behalf, that the allowance made to her in his absence, **[764]** and the wife's adultery, repelled the presumption of agency, so as to make him responsible for her contracts.

The secondary left it to the jury to say,—first, whether the allowance was sufficient,—secondly, whether there was sufficient evidence of adultery. The jury found both these questions in the affirmative: and the secondary thereupon directed a verdict to be entered for the plaintiff for 7*l.* 10*s.* 3*d.*, the amount of the charge for attendances on the three legitimate children,—reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the plaintiff was not entitled to recover anything.

Pearce, on a former day in this term, obtained a rule nisi accordingly.

Raymond shewed cause. The wife is the general agent of her husband to bind him by contracts for necessaries for herself and children: *Ruddoch* v. *Marsh*, 1 Hurlst. & N. 601: and this presumption is rather strengthened where he goes abroad leaving her here to take care of his children. [Cockburn, C. J. If she acts as such agent. Cresswell, J. The plaintiff dealt with her as the wife of French. Supposing him to be her husband, did he not give credit to him?] It did not appear that the plaintiff ever saw French: nor was there the slightest pretence for suggesting that he was cognizant that the woman was living in a state of adultery, or that she had any allowance. There was, in truth, nothing to cut down the general presumption of agency. In Chitty on Contracts, 6th edit. p. 152, it is said: "A wife, with regard to certain contracts,—e.g. such as relate to necessaries for her husband's family,—is regarded

primâ facie as possessed of a general authority, arising from the duty and liability of the hus-[765]-band to provide his wife and children with necessaries" (*a*). And at p. 165, the learned author, treating of cases where the wife's adultery will not afford a defence against a claim for necessaries, says: "Where it appeared that, the defendant's wife having committed adultery, he separated himself from her, but left her in his house with two children bearing his name, and without making any provision for her in consequence of the separation, and she continued to reside in the house in a state of adultery,—it was held that the husband was liable for necessaries furnished to her in the house in which she was so left with the children; it not appearing that the plaintiff knew, or might readily have known, the circumstances under which she was living:" *Norton* v. *Fazan*, 1 B. & P. 226. Eyre, C. J., in that case, says,—"If the defendant in another action brought against him by some other tradesman shall be able to establish the notoriety of his wife's situation, he may defend himself. But, as the case stands at present, this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not found to be known to this tradesman" (*b*). If the defendant had left his children under the care of a servant, such servant would have had authority to contract in his name for necessaries for their support. [Cockburn, C. J. Not if the servant was supplied,—as the jury found the wife was here,—with am-[766]-ple means to furnish herself and the children with necessaries suitable to their station.] In *Ruddock* v. *Marsh*, the jury were told that it was no defence to the action that the defendant had regularly supplied his wife with money sufficient to have kept his house without running him into debt: and the court upheld that ruling. [Cresswell, J. If that case is to be sustained, it must be upon the supposition that the wife was acting with the husband's cognizance. Here, the husband was abroad during all the time of the adulterous intercourse. Willes, J. Suppose the husband and wife living apart, and the husband gives the wife a competent allowance, and a tradesman supplies her with goods, is the husband liable?] Probably not. [Cockburn, C. J. Does not all the authority of the wife cease when she quits her husband's roof, and goes to live with another man? Is the adultress still clothed with all the authority of a wife?] Suppose, instead of being left with the wife, the children had, as before suggested, been entrusted to the care of a servant or a governess, and she had misconducted herself,—would the parent cease to be responsible for necessaries ordered by her? [Cockburn, C. J. That is a totally different question. The authority of the wife is derived from the conjugal relation. That tie severed, the authority ceases.] It cannot be supposed that the man intended his offspring to starve. Besides, here he admits his liability by offering a compromise. The distinction between a special and a general agency is well explained in Story on Agency, §§ 17, 126.

Pearce, in support of his rule, was stopped by the court.

COCKBURN, C. J. I am of opinion that the rule to en-[767]-ter a verdict for the defendant in this case must be made absolute. It appears that the defendant, having gone to Australia, left his wife with his three children in this country; that, in his absence, the wife formed an adulterous relation with another man, who assumed her husband's name, and lived with her; and that the plaintiff during that period provided medicine and attendance for the children, having no knowledge, and apparently no means of knowledge, of the state in which the wife was living. And the question is, whether under these circumstances she had authority to bind her husband. It seems to me that she had not. The fact of her living in a state of adultery divests her of all the authority which arises out of the marital relation. But it has been ingeniously put by Mr. Raymond, that, although the wife by her misconduct might have ceased to possess the general authority which arises from the conjugal relation, yet in this case she was clothed with a special authority as the agent of her husband to take care of his children, whom he was bound by every tie to provide for. But, if any such special authority could under such circumstances be implied, in the present

(*a*) See per Lord Abinger, *Freestone* v. *Butcher*, 9 C. & P. 643, 647, *Read* v. *Legard*, 6 Exch. 636, and *Emmett* v. *Norton*, 8 C. & P. 506.

(*b*) See Addison on Contracts, 4th edit. 709, where this case seems to be put upon the only ground upon which it is sustainable.

case there arises this obstacle, viz. that no such authority was given, but that the only authority given by the husband was coupled with the allowance of a sum which the jury have found to be adequate for the supply of the children with all that was necessary for their proper maintenance. The authority was, not to pledge the credit of the husband for necessaries, but to support the children out of the fund provided for that purpose. As to the suggestion that the fund might fail, the answer is two-fold,—either the case is one for which the law has not provided; or it may be that under such circumstances there might be an implied authority, but the case has not arisen. In the absence of such neces-[768]-sity, no such authority can be implied. In any view, therefore, the wife could have no authority to pledge the credit of her husband.

The rest of the court concurring,

Rule absolute.

DELANEY *v.* FOX. June 11th, 1857.

[S. C. 26 L. J. C. P. 248. See *Reece* v. *Strousberg*, 1885, 54 L. T. 134.]

The rule that a tenant is estopped from denying the title of his landlord is not confined to ejectment, as is suggested in *Watson* v. *Lane*, 11 Exch. 769.—An eviction by title paramount puts an end to the estoppel: but, semble, that it must be an actual, and not a mere constructive, eviction.

The first count of the declaration charged the defendant with having broken and entered a certain dwelling-house and premises of the plaintiff in Bradford in the county of York, and forcibly expelled her therefrom. The second count set out certain proceedings under the Small Tenements Act, 1 & 2 Vict. c. 74, under which the alleged expulsion took place. The defendant pleaded,—first, liberum tenementum, —secondly, a special plea shewing a tenancy of the plaintiff under him, and its determination by notice. See the pleadings, ante, vol. i., p. 166.

The cause was tried before Martin, B., at the last Spring Assizes at York. It appeared that the premises in question were in August, 1855, let by the defendant to the plaintiff at a weekly rent of 2s. 6d.; that the tenancy was duly determined by a notice to quit on the 17th of December, 1855; and that the plaintiff was turned out under an order obtained under the statute on the 1st of January, 1856. There was no evidence to shew how the defendant became possessed of the premises.

In answer to this primâ facie case, the plaintiff gave [769] evidence (which was objected to, and admitted by the learned judge with some doubt), that, at the time she was let into possession by the defendant he had no title, but that the real owner was one Ellen Knowles, who, in assertion of her right, had broken into a cellar, part of the same house, but let to another tenant, and to whom she, the plaintiff, under a threat of distress, paid rent for the premises.

At the close of the plaintiff's case, it was again objected that she was estopped from disputing the title of her landlord. The learned judge doubted whether the defendant should not have shewn specially the relation between himself and the plaintiff; but he said that, if the second plea had been pleaded to the first count, that would have put an end to the case. He thereupon directed a verdict to be entered for the plaintiff on the first count,—reserving leave to the defendant to move to enter the verdict for him upon that count, and to amend if necessary; and also reserving leave to the plaintiff to move to enter a verdict for her on the second count.

Knowles, in Easter Term last, obtained a rule nisi accordingly, "on the ground that the plaintiff was estopped from shewing that the defendant had no title." Cleasby, for the plaintiff (without a cross-rule), likewise obtained leave to enter a verdict for the plaintiff on the second issue. He submitted that there was that which was equivalent to an eviction, so as to destroy the estoppel, and put the matter at large,—Mrs. Knowles, who had lawful title, having entered upon the premises: and he referred to *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571.

Cleasby now shewed cause. The case must be looked at as if the first count and the plea of liberum tene-[770]-mentum formed the whole record; and no estoppel can arise upon this issue. The defendant having given primâ facie evidence of title, the plaintiff was at liberty to meet that by shewing that the property at that time really belonged to another. The estoppel only applies during the tenancy. Here, the

tenancy had ceased. [Williams, J. It would equally cease upon a disclaimer, or by breach of a condition in a lease.] The party could not take advantage of his own act. In Co. Lit. 47 b., it is said: "If a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended: for, by the making of the lease, the estoppel doth grow, and, consequently by the end of the lease, the estoppel determines." There is no estoppel at any time as to the particular estate, and no estoppel after the expiration of the term as to the title generally. [Williams, J. I doubt whether this sort of estoppel, as now understood, where there is no deed, was known in the time of Lord Coke.] Whether the estoppel arises by matter in pais, or by deed indented, makes no difference. The estoppel never arises except in the action of ejectment. [Cresswell, J. Because it seldom happens that a man expels his tenant: he generally brings ejectment.] All that the tenant is estopped from denying is, that the landlord had title to the possession: but there is no estoppel as to the particular title he had. The estoppel is a strict thing: *Doe d. Higginbotham* v. *Barton*, 11 Ad. & E. 307, 3 P. & D. 194. [Williams, J., referred to *Treport's case*, 6 Co. Rep. 14 b.] Here we shewed the defendant's title put an end to by the act of Mrs. Knowles. [Cresswell, J. His possession is not put an end to by the act of Mrs. Knowles. The possession is in you.] Lord Coke says,—Co. Litt. 323 a.,—"Albeit the disseisor hath once gotten the attornment of the tenants, and payment of their rents, yet may they refuse **[771]** afterwards for avoiding of their double charge." [Willes, J. There was no evidence that the plaintiff was evicted by Mrs. Knowles.] Mrs. Knowles, claiming title, entered by breaking into the cellar. [Willes, J. The cellar was no part of the plaintiff's occupation.] It is clear that the plaintiff attorned to Mrs. Knowles, in order to prevent herself from being turned out. [Williams, J. There was no threat of eviction by Mrs. Knowles, but merely a claim of rent.] In *Watson* v. *Lane*, 11 Exch. 769, the defendant was tenant to the plaintiff (who was owner of the equity of redemption), under a lease whereby the defendant covenanted to deliver up to the plaintiff, at the expiration of the term, the premises and all fixtures therein: the term expired on the 1st of April, 1855; and, on the 10th, the plaintiff demanded possession, which was not given. On the 13th, the mortgagee gave notice to the defendant to pay the rent and deliver up the premises to him: the plaintiff having sued the defendant for a breach of his covenant in not delivering up the fixtures, —it was held that the defendant was not estopped from setting up the title of the mortgagee, and that the plaintiff could not recover the value of the fixtures, but only the actual damage sustained by him in consequence of their detention from the 10th to the 13th of April. Pollock, C. B., there says: "The question is, whether the plaintiff is entitled to recover the full value of the fixtures, or only such damage as he has actually sustained. It is contended that the defendant has no right to diminish the claim by setting up the title of a third person. Now, the doctrine which does not permit the title of another person to be set up is, I apprehend, peculiar to the action of ejectment. I do not say so without authority, for *Ogle* v. *Atkinson*, 5 Taunt. 759, 1 Marsh. 323, expressly decided that a warehouseman who has received goods on behalf of a consignee, may nevertheless refuse **[772]** to deliver them to him, if they are the property of another person. Heath, J., there said, 'It is peculiar to the action of ejectment, that he who is intrusted with the possession of land must deliver it back to his lessor; but that rule extends to no other action.' The main ground of that rule is, the extreme importance of possession, which lengthened out creates a title, and in a certain time an indefeasible right. The question then comes to this, what has the plaintiff lost? for, to that extent he ought to be indemnified. The defendant's lease expired a few days before the mortgagee asserted his right. After the expiration of the lease, the plaintiff demanded possession of the premises. The defendant did not deliver up possession, but, before any action was brought, the mortgagee gave notice of his title, and required the rent to be paid to him. The defendant afterwards bought the fixtures; but that circumstance appears to me to make no difference, for the question is one of principle. The defendant is in the same situation as if an ejectment had been brought, judgment obtained, and execution issued on the 13th of April, and he had been turned out of possession by title paramount. The estoppel on the tenant merely amounts to this, that he is estopped from disputing the title of his landlord to the extent of the interest granted by the lease, but he is not estopped when the lease has terminated." And Martin, B., says: "The defendant's lease having expired on the 1st of April, on the 10th the plaintiff demanded

possession. If an action of ejectment had then been brought, the defendant would have had no defence against the plaintiff: but, upon the 13th of the same month, the mortgagee gave the defendant notice to pay the rent and deliver up possession of the premises to him." There is no authority that a landlord can enter after the expiration of a term without shewing title. [Cockburn, C. J. You admit **[773]** that he may bring ejectment: that involves title.] That is a mere fiction. [Cockburn, C. J. You want to shew that the landlord never had any estate at all, and so you get rid of the estoppel altogether. You admit that you could not do that in ejectment. Why should a different rule prevail, because here the tenant brings trespass against the landlord for acting in assertion of his title?] In *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571, 577, Pollock, C. B., says: "If a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that, according to good sense, is capable of being well pleaded as an expulsion." That is a sufficient authority to shew, that, it having been clearly proved that Mrs. Knowles had title to enter and evict the plaintiff, what took place in point of law amounted to an eviction, so as to afford an answer to any action by the defendant. That being so, the court will hardly permit an amendment the effect of which would be to cast upon the plaintiff a totally different case

Manisty and Brett, in support of the rule. This is the case of a tenant who is seeking, in collusion with a third person, to call in question her landlord's title. The rule is clear, that the tenant is estopped from denying his landlord's title to demise, though he may shew that his title has expired: and there is no pretence for saying that this doctrine is confined to ejectment: see the authorities collected in the notes to *The Duchess of Kingston's case*, 2 Smith's Leading Cases, 4th edit., 651 et seq., and the notes to *Veale* v. *Warner*, 1 Wms. Saund. 325, and to *Walton* v. *Waterhouse*, 2 Wms. Saund. 418. [Cockburn, C. J. We only think it necessary to hear **[774]** you on the subject of the eviction.] There was no evidence whatever of an eviction. The cellar was no part of that which was let to the plaintiff. There was no evidence whatever to raise the question which was alluded to, but not decided, in *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571. [Williams, J. In the notes to *Moss* v. *Gallimore* (Dougl. 279), in 2 Smith's Leading Cases, 4th edit. 479, it is said: "It should seem that the cases on this subject might be reconciled to ordinary principles without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee, either actual or constructive (for instance, an attornment to him under threat of eviction, see *Doe d. Higginbotham* v. *Barton*, 11 Ad. & E. 307, 3 P. & D. 194, *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571), dispute the mortgagor's title to either the land or the rent (which is no more than any tenant may do upon an eviction by title paramount)."] The principle, it is submitted, is that the mortgagor has ceased to be entitled to receive the rents. [Willes, J. The mortgagor has an implied authority from the mortgagee to distrain, until the latter interferes by giving notice.] In *Doe d. Bullen* v. *Mills*, 2 Ad. & E. 17, 4 N. & M. 25, it was held, that, if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title. [They were here stopped by the court.]

Cockburn, C. J. I am of opinion that this rule must be made absolute. I think the plaintiff was estopped from denying the title of the defendant, upon the common-law principle that one who derives possession of land under another shall not be permitted to question **[775]** his right to give him possession. Mr. Cleasby has attempted to distinguish this from the cases where the question ordinarily arises, on the ground that it is not an action of ejectment, but of trespass, and he says that the estoppel is confined to the first-mentioned description of action,—for which he relies upon something which fell from Pollock, C. B., and Martin, B., in *Watson* v. *Lane*, 11 Exch. 769. But that must be construed with reference to the particular circumstances of the case. The defendant had entered into a covenant to deliver up the premises at the end of the term, together with the fixtures, and the action was brought for not delivering up the fixtures. The court took a distinction between the right to recover possession of the premises, and the right to damages for breach of the covenant to deliver up the fixtures: and, with regard to what is there said by the Lord Chief Baron, he was

evidently meaning to distinguish between an action for the recovery of the land and an action for not delivering up the fixtures. Looking at it upon principle, I see no distinction in this respect between ejectment and trespass. If the landlord were suing in ejectment, it is clear that the tenant would be estopped from denying his title. So, here, the tenant having wrongfully held over after the expiration of the notice, the landlord avails himself of the statute to resume possession, and the tenant brings trespass: I do not see why the same principle should not apply. There can be no substantial difference between the landlord's asserting his title by bringing ejectment at the immediate expiration of the term, and his asserting it in defence of an action of trespass at a future period. On the other hand, it is true, that, though the tenant is estopped from denying that his landlord ever had title, it is, nevertheless, competent to him to shew that his title is determined; and that he may do in many ways, amongst others, by [776] shewing an eviction, actual or constructive,—as is said in the case of *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571. It is, however, unnecessary to determine that here. But it is plain, that, to admit evidence of a constructive eviction, might operate seriously to the injury of the landlord; for, he might be deprived of an advantage which the law gives him, by his tenant's agreeing to attorn to another upon a mere threat of an ejectment. Here, there was nothing which can be construed as a constructive eviction, even if that would suffice, though, as at present advised, I think it would not. Mrs. Knowles, it is true, broke into the cellar; but that formed no part of the premises which were let to the plaintiff. And it appears that the whole proceedings in this action were without the active co-operation of the plaintiff, which are conducted by an attorney introduced by Mrs. Knowles.

Cresswell, J. I also think that the rule to enter a verdict for the defendant should be made absolute. I think there was sufficient evidence given to sustain the plea of liberum tenementum. It was proved that the defendant had let the plaintiff into possession; and that was a primâ facie case of seisin in fee. As to the question of eviction, I entirely concur with the Lord Chief Justice, that the mere circumstance of the tenant's consenting to pay rent to Mrs. Knowles did not amount even to a constructive eviction. I also fully concur in the reasons he has assigned for doubting whether a constructive eviction can be considered as a determination of the landlord's title. An expression of opinion to that effect is thrown out by the court of Exchequer in *Watson* v. *Lane*; but there was no decision upon the point.

Williams, J. I am of the same opinion. It is firmly [777] established by a long series of cases that a tenant cannot be permitted to dispute the title of his landlord so long as that title continues. That rule, however, is subject to this qualification, that the tenant may shew that the title has expired. *Doe d. Higginbotham* v. *Barton*, 11 Ad. & E. 307, 3 P. & D. 194, professes to have been decided as an example of that doctrine, though it may be doubted whether it fall within the rule or not. Reference has been made to the doctrine of constructive eviction. That is no departure from the rule above stated. It may be, that, if an eviction takes place, the tenant may dispute the landlord's title, because the possession which was given by him no longer continues. It is said that attornment may be treated as equivalent to eviction, inasmuch as it would be an idle ceremony for the tenant to walk out and then walk in again. I agree with my Lord Chief Justice and my Brother Cresswell that the facts of this case do not give rise to the application of the doctrine, if it be sustainable. The dictum of Heath, J., in *Ogle* v. *Atkinson*, has reference to chattels, and not to the possession of land.

Willes, J. I am of the same opinion. The defendant gave primâ facie evidence of title. The plaintiff then proposed to displace that proof by shewing that a third person had title to the freehold prior to the demise to her, and that consequently the defendant could not have the title he alleged in his plea. I apprehend the plaintiff was estopped from shewing those facts, because they tend to impeach the title of the landlord at the time of the commencement of the demise. It is said, however, that the estoppel had ceased at the time of the entry. That is not quite so clear. Since the time referred to by Mr. Cleasby, it has been held that the estoppel continues so long as the tenant remains in [778] possession. It is competent to the tenant to shew that his landlord's title has expired: but that has not happened in this case. It is then said that there is another exception to the rule which precludes the tenant from disputing his landlord's title, viz. where the tenant has been evicted by title paramount. No such eviction was proved here. All that appears is, that another person was

evicted from the cellar, which was not demised to the plaintiff, and that the plaintiff, apprehending that she would be turned out, attorned to the person claiming title. I very much doubt that even an eviction, if proved, would be sufficient. The doctrine suggested in *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571, would, I apprehend, lead to great danger of collusion. As to the case of mortgagor and mortgagee, I regret that it has been treated by the courts of law differently from others. It is, however, too late now to set that right. I am clearly of opinion that there was an estoppel in this case, and that the defendant is entitled to the verdict upon the plea of liberum tenementum.

Rule absolute accordingly.

[779] ANDREWS *v.* BELFIELD. June 11th, 1857.

A. having applied to B., a coach-maker, to build for him a carriage of a particular description, the latter at his request sent him a drawing, which A. returned with objections. B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approbation, adding, —"if you order, every attention shall be paid to any particulars you may think proper." A. in answer wrote,—"I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built and forwarded to A., who found many faults in it, and rejected it:—Held, that, the order having been given and accepted on the express condition that the carriage should meet the approval of A. "on the score of convenience and taste," the latter was entitled (acting bonâ fide, and not from mere caprice,) to reject it.

This was an action for money payable by the defendant to the plaintiff for a carriage bargained and sold and sold and delivered, and for money found due upon an account stated. Plea, never indebted.

The cause was tried before Willes, J., at the last Spring Assizes for Surrey. The facts were as follows:—The plaintiff is a coach maker carrying on an extensive business at Southampton. The defendant is a gentleman resident at Torquay. The action was brought to recover the sum of 93l., the sum contracted to be paid by the defendant for a poney-phaeton built for him by the plaintiff under the following circumstances:

In August, 1855, the defendant called at the plaintiff's shew-rooms at Southampton, and inspected some carriages, but, seeing none that he approved of, it was arranged that drawings should be sent to him. A drawing was accordingly submitted to the defendant, and returned with several objections. On the 15th of September, the plaintiff wrote to the defendant as follows:—

"Southampton, Sept. 15, 1855.

"Sir,—Your's with drawings inclosed came duly to hand this day. In reply to your's, I am quite sure you must know as well as myself that it is totally impossible, in making a drawing on a flat surface, to correctly give the drawing to scale of a carriage, more especially **[780]** that of a phaeton, which is excessively round in the sides. The best proof I can give of it is, that you complain that the drawing is too high: now, the height on which yourself and lady decided, on trial, was 2ft. 3in. You will find by a ½ inch scale to the foot, the drawing is considerably lower than this, instead of higher, and the front wheel is the height wished, 2 ft. 2 in. The wing is drawn a little too long, which accounts for the objectionable appearance; and the head a trifle too long: but the carriage would be made from the general appearance of the drawing, adapted to the size of the horses and the other requirements of the party ordering. You ask what would be the difference in height when loaded. It is utterly impossible to answer this, as it would of course depend on the load in it,—whether two, four, or six persons: but it would vary from two to four inches. A light hind skeleton rumble would, no doubt, look very light, and correspond very nicely with the front coach-box. The iron coach-box-stay would have been more

correctly shewn, had it been brought more like the pencil-marks: but the draughtsmen do not study these minor matters, well knowing that the coachmakers put them to rights in the practical carrying out of the design. The carriage can either be hung on the springs as shewn in the drawing, or on eliptic springs, with equal ease: and the eliptic one rather the less complicated of the two. I believe I have now answered the whole of your queries, and can only add, that, should I be favoured with your kind order, I will endeavour to build you a handsome light carriage, suitable for the work required, and of the proper size for the horses.—I remain, &c.,

"RICHARD ANDREWS."

On the 17th of September, the plaintiff again wrote as follows:—

[781] "Southampton, Sept. 17, 1855.

"Sir,—I very much regret that the drawing sent does not seem to meet your approbation, as I sent expressly to London for it from the best carriage-draughtsman in England, and it was made expressly to meet your views. I am sorry that I cannot furnish you with any thing better. If you order, every attention shall be paid to any particulars you may think proper, as to height of body from ground, height of wheels, &c., bearing in mind that the body will be about three inches higher than the wheel. The sitting in the rumble and the guard to the hind pannel shall also be put, and any other suggestions you may offer shall be executed in the best possible manner consistent with the size of the horses and style of the carriage. You will please, in case you order, mark any thing you think proper on the drawing, and return it to me.—I remain, &c.,

"RICHARD ANDREWS."

On the 26th, the defendant wrote to the plaintiff as follows:—

"Stoodleigh, Sept. 26, 1855.

"Sir,—I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste. Having premised thus much, I will state that the general style of the carriage shewn in the drawing originally sent by you, and now returned, meets my approbation, subject, however, to the correction of the faults in detail with [782] which it abounds, and to the modifications named before. The carriage is to be adapted to ponies 13.2 high; and the rumble should not be a box one, as shewn, but a skeleton one, corresponding in some degree with the driving-seat. At the foot of the rumble should be also attached a leather guard, made in the manner of a dashing-leather, to protect the hinder pannel of the carriage. Special attention must also be given to the position of the rumble, in reference to the head of the carriage, to obviate inconvenience in getting in and out when the head is down; and this without curtailing the head, so as to make it conveniently low for getting in and out of the carriage when it is up; and in this position the outline should not be much curved. It is also to be furnished with German shutters, which should be capable of being readily detached. The wheels are to be retained as nearly as possible of the height shewn in the drawing. The body kept as near to the ground as practicable, and under no circumstances higher then shewn. The driving-seat should be so arranged as to appear to be independent of, and not to be supported by, the dashing-leather; and the carriage is to be fitted with all needful appliances, including lamps and a patent drag, which last is to be so arranged as to admit of its being drawn up from either the body of the carriage or the driving-seat, at pleasure. The colour and the lining to be those already selected. I will also add as a suggestion the expediency of using eliptical hinder springs, in lieu of those shewn. The above appears to me the only instructions which, in the absence of a correct drawing, I am able to give, and which I conclude from your letter are sufficient for your purpose, but which I shall be happy to give more in detail on every point which you may desire; and have only now to request that you will proceed with my order with as little delay [783] as may be, and for which I understand 93*l.* to be the credit price, and to include packing and

all other items which are usually charged as extras. When you are ready for the crest, I will send it: and the drawing you will of course retain for reference, if required.—Yours, &c., "J. BELFIELD."

A short time afterwards, the defendant sent the plaintiff a letter, without date, as follows:—

"Mitford Vicarage, Friday.

"Sir,—I have received the drawing of the carriage, on which I wish to make the following remarks:—Assuming the scale to be ½ in. to the foot, it would appear to be higher from the ground than was proposed: but, as it is possibly shewn in the position which it takes when unloaded, I should wish to know what is the intended height when loaded, and what is the lowest point to which, with the present wheels, it can be kept down. The iron-work for the support of the driving seat must be incorrectly shewn, as it would seem to pass through the dashing-leather. The rumble requires a leather guard at the foot, which should come as high as the bottom of the cane, to prevent the pannel being scratched by the foot: and the seat of the rumble would appear to be but nine inches at most from the head when down, and therefore almost impossible to sit in in that position. The back and end of the wing, as shewn when the head is off, is very ugly; nor do I quite understand it, unless that portion of the back above the wing is moveable, as it is not shewn in the drawing with the head above it, which must project when down. The rumble also, as drawn, rather hangs back, which is the fault that I spoke of as being so common. Are the half springs shewn at the back so good as whole springs? I should like also to see the form of the head when open, as so much of the [784] character of a carriage depends on this. I do not mind the wheels being rather further apart, if that will facilitate any of the alterations to which I have alluded.—Yours, &c., "J. BELFIELD.

"P.S. What would be the effect of an open rumble instead of a box one? Would it not make the carriage look lighter, and so balance it?"

The carriage was completed, and forwarded to the defendant on the 17th of March, 1856. On the 22nd he wrote to the plaintiff, as follows:—

"Paignton, March 22, 1856.

"Sir,—The phæton has arrived; and I am extremely sorry to be obliged to inform you that it proves to be neither in conformity with my order nor in accordance with the drawing furnished. Putting all minor matters of detail (which are numerous) aside, and waiving for the moment all question of taste, its size alone renders it wholly unsuitable to ponies of 12.2 high, for which, if you will see, it was especially ordered; added to which, I regret to perceive that scarcely a single instruction conveyed in that letter appears to have been attended to. How these mistakes, annoying, doubtless, to you, but tenfold more so to me, should have arisen, is not for me to conjecture. But I have, of course, no alternative than to return the carriage to you, which I presume you would desire that I should do by the same means as that by which it came, and which shall be done on receipt of your reply. And I have only to add that this most untoward circumstance only gives me additional reason to regret that I was not in the first instance furnished with a drawing on a scale, in accordance with my particular request, by which this most unfortunate result would have been wholly obviated.—Yours, &c., "J. BELFIELD."

[785] In reply to this letter, the plaintiff reminded the defendant, that, in his letter of the 26th of September, he had stated the ponies to be 13.2 high, and not 12.2: and, after some angry correspondence, the present action was brought. It appeared that the size of the fore-wheels was 2 ft. 1 in., and that of the hind wheels 3 feet; and that, in lieu of the leather guard to the rumble, the plaintiff had put wood.

On the part of the defendant, it was insisted, that, according to the terms of the contract, the defendant had reserved to himself unqualified power to reject the carriage if not built according to his taste, however capricious that might be, provided it was done bonâ fide.

For the plaintiff, it was submitted, that the defendant was bound to take the

carriage if it was such as in the judgment of the jury no reasonable man ought to have objected to.

The learned judge (although he thought it a question for the court) asked the jury whether the intention of the parties was that the defendant should have the right to reject the carriage if not built in conformity with his taste, and whether it was one which a reasonable man ought to have objected to: and he referred to the case of *Dallman* v. *King*, 4 N. C. 105, 5 Scott, 384: and further he left it to the jury to say whether the mention of the leather guard in the defendant's second letter amounted to a condition, or was merely a suggestion.

The jury returned a verdict for the plaintiff, observing that they thought that the mention of the leather guard was matter of suggestion only.

The learned judge reserved leave to the defendant to move to enter a nonsuit, on the construction of the contract: and it was arranged that the plaintiff should take back the carriage at once, without prejudice, and that, in the event of the verdict standing, the damages [786] should be reduced to 15*l*.,—the costs to be taxed on the higher scale.

M. Smith, Q. C., in Easter Term last, accordingly obtained a rule nisi to enter a nonsuit, "on the ground that the defendant had the right to reject the carriage if it did not meet his approval on the score of convenience and taste, and, the carriage being rejected, the plaintiff was not entitled to recover;" or for a new trial on the ground of misdirection on the part of the learned judge "in leaving to the jury whether the terms in the letter that there should be a leather guard was a condition, or a suggestion only, enabling the plaintiff to substitute wood."

Edwin James, Q. C., and Hawkins, now shewed cause. The work having been executed as nearly as possible in exact compliance with the defendant's order, the defendant could have no right capriciously to reject it: and, whether or not the carriage was such as a reasonable man ought to have accepted, as well as what was the real meaning of the letter as to the leather guard, were properly questions for the jury. [Cresswell, J. What pretence is there for saying that the leather guard to the rumble was less a condition than any other part of the order? The defendant chose to have leather.] *Dallman* v. *King*, 4 N. C. 105, 5 Scott, 384, is exactly in point. There, it was agreed that the lessee should spend 200*l*. in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner; the lessee to be allowed to retain the sum out of the first year's rent of the premises: and it was held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. Tindal, C. J., there said: "The gist of the agreement is, that the work should be done in a substantial manner; the approval [787] of the lessor was added for the purpose of enabling him to ascertain that the work had been done. It never could have been intended that he should be allowed capriciously to withhold his approval; that would have been a condition which would go to the destruction of the thing granted, and, if so, according to the well-known rule, the thing granted would pass discharged of the condition." So, here, it never could have been intended that the defendant should be admitted capriciously to reject the carriage, though it should have been built in strict accordance with his directions, merely because of some slight deviation from what he chose to set up as his standard of elegance and taste.

M. Smith, Q. C., and Karslake, in support of the rule. The defendant by his contract reserved to himself the power to reject the carriage if when finished it did not meet his approval as well on the score of workmanship as of convenience and taste. However fastidious his taste might be, he had a right to reject the carriage, and that without assigning any reasons, provided he was acting bonâ fide. There is nothing illegal or unreasonable in such a contract, especially with reference to an article of luxury like a carriage. In *Taylor* v. *Brewer*, 1 M. & Selw. 290, the plaintiff had performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" and it was held, that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. And Bayley, J., said: "The fair meaning of the resolution is this, that it was to be in the breast of the committee whether he was to have anything, and, if anything, then how much." The [788] same principle prevails in *Bryant* v. *Flight*, 5 M. & W. 114, and *Grafton* v. *The Eastern Counties Railway Company*, 8 Exch. 701. So, in *Milner* v. *Field*, 5 Exch. 829, a build

ing agreement contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the latter, that the works were performed according to the specifications; and it was held that the certificate was a condition precedent to the right to payment, and that the want of it was a good answer to the action. [Willes, J. A similar decision was come to by this court in *Morgan* v. *Birnie*, 9 Bingh. 672, 3 M. & Scott, 76.] In *Moffatt* v. *Dickson*, 13 C. B. 543, certain plans and drawings were to be prepared by the plaintiff subject to the approval of a committee, and subsequently of the commissioners in lunacy and secretary of state, pursuant to the 8 & 9 Vict. c. 126; and it was held that the plaintiff was not entitled to recover anything until the drawings had been approved of by the several parties whose approval was by the statute required. Who but the defendant himself was to judge whether or not the carriage was built according to his taste? [Willes, J. The jury could only judge according to the general conventional rules of taste.] Precisely so. With respect to the latter branch of the rule, it clearly ought not to have been left to the jury to say whether the addition of the leather guard to the rumble was a condition or a mere suggestion; that was matter of construction for the judge.

Cresswell, J.(*a*). I am of opinion that this rule should be made absolute to enter a nonsuit. The plaintiff's letter of the 17th of September, 1855, conclusively shews that down to that time no contract had been **[789]** made between him and the defendant. A drawing of a carriage had been made and submitted to the defendant, but the defendant did not approve of it. In that letter, the plaintiff writes:—"If you order, every attention shall be paid to any particulars you may think proper as to height of body from ground, height of wheels, &c." Down to this time, therefore, all was open. On the 26th, the defendant sends this reply:—"I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." He then goes into details. Another drawing seems to have been afterwards sent to the defendant, and returned by him with further remarks and objections. Now, taking into consideration the fact that the plaintiff knew that the defendant was dissatisfied with the drawings, and that the order for the carriage was given only conditionally on its being executed in a manner which should meet the defendant's approval, "not only on the score of workmanship, but also that of convenience and taste," it seems to me, that, unless that conditional order was fulfilled by the delivery of a carriage which should be built in accordance with the taste and convenience of the defendant,—assuming always that the defendant acted bonâ fide, and not capriciously, —the defendant was not bound to accept it. On that ground, therefore, I am of opinion that the rule should be made absolute.

Williams, J. I am of the same opinion. Upon **[790]** reading the correspondence between the parties, I cannot arrive at any other conclusion than that the plaintiff, when he consented to put the carriage in hand upon the terms of the defendant's letter of the 26th of September, was content to take upon himself the risk of producing a vehicle which should satisfy the somewhat nice and fastidious taste of the defendant, and that the latter should have the privilege of rejecting it if it did not please him.

Willes, J. I am of the same opinion. There was no evidence to shew that the defendant's refusal to accept the carriage was other than bonâ fide. Upon further consideration, therefore, I think the order was conditional, and subject to its being executed in a manner which should be in conformity with the defendant's taste.

Rule absolute accordingly.

(*a*) The Lord Chief Justice, for private reasons, took no part in the discussion.

HOLMES *v.* ONION. June 6th, 1857.

[S. C. 26 L. J. C. P. 261.]

The defendant engaged the services of one S., a thatcher, for a certain period, at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having during the period thatched some stacks of wheat, &c. for the plaintiff, for which work the defendant claimed and received payment:—Held, that the defendant was responsible to the plaintiff for injury to the wheat, &c. occasioned by the negligent manner in which S. did the work.

The declaration stated that the plaintiff was possessed of certain stacks of wheat, &c., and, at the request of the defendant, employed him for certain reward to thatch the same, that the defendant undertook to thatch and did thatch the said stacks, and that the plaintiff paid him a reasonable reward in that behalf.

The defendant pleaded,—first, a denial of the retainer and of the defendant's undertaking,—secondly, that the defendant did not thatch the said stacks,—thirdly, that the plaintiff did not pay the said reward,—fourthly, not guilty; whereupon issue was joined.

[791] The cause was tried before Pollock, C. B., at the last Cambridgeshire Assizes, when the following facts appeared in evidence:—The defendant, who was a harness-maker, hired one Simpkin, who was a skilful thatcher, to do for him such thatching as he could procure during a period of six weeks, paying him for his services 6s. per week besides his board and beer, and finding him medical attendance in case any thing ailed him during such service; and also providing him with a pony and a boy to assist him, in the event of his being sent beyond three miles to work. Simpkin afterwards, and within the six weeks, engaged himself to thatch some wheat, barley, and oat stacks for the plaintiff, the latter not knowing of his arrangement with the defendant. Simpkin after having commenced the plaintiff's work, and, drawing money from him on account, left it; and, the plaintiff meeting the defendant, the latter told him that Simpkin was his (the defendant's) man, and that, if he (Simpkin) did the thatching, he (the defendant) must be paid for it. At the plaintiff's request, the defendant sent another man, named Clemens, to assist in the thatching; and Simpkin afterwards went back and completed the stacks which he had begun. Both Simpkin and Clemens were paid by the defendant; and the defendant afterwards sent in a bill to the plaintiff for the work so done, and sued the plaintiff for it in the Newmarket county-court, when the plaintiff paid the money into court, and the defendant afterwards took it out. The wheat and oats subsequently proving to be considerably damaged by wet, this action was brought.

At the close of the plaintiff's case, his Lordship was called upon to nonsuit him, on the ground that there was no evidence to go to the jury. This his Lordship declined to do.

Several witnesses were then called on the part of the **[792]** defendant, to shew that the work had been properly done, but that the damage had arisen from the improper building of the stacks, and the inferior quality of the straw supplied by the plaintiff for the thatching.

The case then went to the jury upon the question of damages, which they assessed at 5*l*. The Lord Chief Baron thereupon directed the verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter it for him for 5*l*.

O'Malley, Q. C., in Easter Term last, moved for a new trial, on the ground that the damages were insufficient, or, failing that, to enter a verdict for the plaintiff for 5*l*., pursuant to the leave reserved at the trial. [Crowder, J. The case having gone to the jury with your assent, you are bound by their assessment of the damages. All you can ask is, that a verdict may be entered for the plaintiff for the 5*l*.]

The rule was accordingly drawn up "to enter a verdict for the plaintiff for 5*l*., pursuant to leave reserved, on the ground that there was no evidence of the defendant's liability for negligence."

The Lord Chief Baron reported to the court, as follows:—

"It appeared to me that the plaintiff made his bargain to thrash with Simpkin, not with Onion, who claimed to be paid because Simpkin was taken from his service,—as, if a man were to hire a gentleman's coachman to drive, the gentleman would not

be liable for his bad driving, if he was no party to the bargain or hiring: and his insisting on being paid for the man's leaving his service would not make a contract under which he would be liable for his bad driving. And I thought there was no evidence that the defendant was **[793]** so employed as to be responsible for the carelessness of Simpkin: and I directed a nonsuit. But, if the court should be of opinion that the evidence established that fact, -not if there was merely some evidence of it, —I reserved liberty to the plaintiff to move to enter a verdict for him for 5l., the damages ultimately found by the jury. Any amendment is to be made that the court thinks ought to have been made at the trial."

David Keane now shewed cause. The defendant clearly is not responsible for the negligence of Simpkin. [Cresswell, J. If the defendant bargained to do the work by his servant,—hiring him out for his profit, -he would be responsible.] The plaintiff selected this man to do the work. The case resembles that of *Chanter* v. *Hopkins*, 4 M. & W. 399, where, on a sale of a specific ascertained chattel, the seller was held not to warrant it fit for the purpose for which it was brought. [Cresswell, J. It is much more like the case of *Quarman* v. *Burnett*, 6 M. & W. 499, which would seem to shew that Simpkin would be the defendant's servant, and the defendant the person contracting with the plaintiff.] The result might have been different in that case, if the defendants had themselves selected the particular driver. [Cockburn, C. J. If I hire of a job-master a carriage and horses, and desire him to send a particular servant to drive them, is the job-master therefore absolved from all responsibility for any negligence his servant may be guilty of? Is he not bound to have reasonably competent persons to do his work?] No doubt, the defendant would be responsible if the plaintiff had not himself selected the hand to do the work. [Cresswell, J. Suppose a man sends a valuable horse to a smith to be shod, and says to him, "Do not entrust the job to an inferior hand, but shoe him yourself, or let your foreman do it," and the smith or his **[794]** foreman accordingly shoes the horse, and in doing it lames the horse,—is the smith not liable?] Possibly he would be: but that is hardly a parallel case.

Couch and H. Mills, in support of the rule. It is clear upon the evidence that the defendant took upon himself the entire services of Simpkin for the six weeks, upon the chance of deriving a profit from his skill as a thatcher. Upon what pretext, therefore, can it be said that he is not responsible for the consequences of Simpkin's negligence? It clearly is no answer to say that he is not a thatcher. As well might any contractor who employs various tradesmen to do work under him, claim immunity against the consequences of their acts, because he does not profess to be a mason, or a bricklayer, or a carpenter. Besides, it is not the fair result of the evidence here that Simpkin was specially selected by the plaintiff: for, when he left the work unfinished, the defendant sent another man, Clemens, who was permitted to thatch some of the stacks. [They were here stopped by the court.]

Cockburn, C. J. I think it is very plain, looking at all the evidence together, that, although the plaintiff had originally employed Simpkin to do the thatching for him, Simpkin was at that time the servant of the defendant, with whom he had entered into a contract under which the defendant was to have the benefit of his entire services for a period of six weeks. The defendant, on being made aware that Simpkin had agreed to thatch for the plaintiff, tells the latter that Simpkin is his man, and that, if he does the work for the plaintiff, he (the defendant) will expect to be paid for it. To this the plaintiff assents; and, in the result, the defendant is, by means of process of the county-court, paid for the work. There is this further cir-**[795]**-cumstance, which is a strongly corroborative fact to shew that the defendant had entered into a contract with the plaintiff to do the work by his servant, viz. that, Simpkin neglecting the work during its progress, and the plaintiff informing the defendant of it, the defendant sends him another man, whose services the plaintiff accepts, paying the defendant for them. Although true it is, that, where a man employing a tradesman selects a particular servant or workman to do the job, the master may be relieved from responsibility for the consequences of the man's incompetency, it is, I think, going too far to say that he is relieved from all responsibility if the servant is guilty of negligence. I am of opinion that the jury here were not only warranted in finding for the plaintiff, but that they would have done wrong if they had found the other way. I therefore think the rule should be made absolute.

Cresswell, J., concurred.

WILLIAMS, J. I am entirely of the same opinion: and I desire only to add that I do not dissent from the law as laid down by the Lord Chief Baron, but only from his application of it to the facts of this case. He says: "If a man were to hire a gentleman's coachman to drive, the gentleman would not be liable for his bad driving, if he were no party to the bargain or hiring; and his insisting on being paid for the man's leaving his service would not make a contract under which he would be liable for his bad driving." I entirely agree with that. But, to make the case thus put analogous to the present, the bargain should have been between Holmes and Simpkin, and not between Holmes and Onion.

WILLES, J., concurred.

[796] COCKBURN, C. J. I agree with my Brother Williams, that, if the facts had been like those suggested in the case put by the Lord Chief Baron, they would have warranted a different conclusion.

Rule absolute.

IN THE MATTER OF AN ACTION OR SUIT PENDING IN THE COUNTY COURT OF LANCASHIRE HOLDEN AT LIVERPOOL, BETWEEN F. S. HULL AND OTHERS AND JOHN M'FARLANE AND OTHERS, Committee of Management of the Liverpool United Legal Friendly Burial Society. June 4th, 1857.

[S. C. 27 L. J. C. P. 41; 3 Jur. N. S. 1262.]

The trustees of a burial society, who by the constitution of the society are not and cannot be members, are not "persons interested" within the meaning of the 41st section of the Friendly Societies Act, 18 & 19 Vict. c. 63, so as to enable them of their own accord to institute proceedings against the society in the county court, for the purpose of controlling them in the proposed alteration of their rules.—The county-court having entertained such an application, this court issued a prohibition.

The plaintiffs are the trustees of a society called the Liverpool United Legal Friendly Burial Society. The defendants,—all of whom were members of the society, and beneficially interested in the funds according to the rules thereof as ordinary members,—were the committee of management. The trustees were not and could not according to the rules of the society be members thereof, or have any interest therein save as trustees of the funds and property thereof.

The 116th rule provides for the mode of altering, amending, or rescinding the rules; and rule 111 prescribes the notices to be given for any meeting convened for that purpose, and requires that the substance of the proposals to be made at the meeting shall be specified in the notice: and the 105th rule requires that all meetings of the members shall be held in some convenient place in Liverpool.

The defendants, as the committee of management, conceiving that certain alterations and amendments of the rules would be beneficial to the society, in con [797] formity with the 111th rule, convened a special general meeting, of which the following notice was duly advertized:—

"To the members of the Liverpool United Legal Friendly Burial Society.

"A special general meeting of the members of the society will be held in the Clarendon Rooms, South John Street, Liverpool, on Thursday, the 5th of March, 1857, at 3 o'clock in the afternoon, for the purpose of obtaining the consent of a majority of the members present at such meeting, to rescinding some of the present rules of the society, and to the making and passing certain new rules, and also for making and passing certain amendments and alterations in the present rules."

The notice then gave the numbers of the several rules proposed to be altered and amended, with what purported to be the substance of the proposed alterations and amendment, the numbers of the rules proposed to be expunged, and what purported to be the substance of ten proposed new rules.

A meeting was held according to the above notice, which was attended by a large body of the members of the society, when the alterations and amendments were agreed to by a large majority: and the rules so altered and amended were afterwards submitted for approval to the registrar of friendly societies.

The plaintiffs thereupon commenced a suit against the defendants in the Liverpool county-court, the particulars of complaint wherein were as follows:—

"In the county-court of Lancashire holden at Liverpool.

"Between F. S. Hull, W. Rathbone, and T. Martin, plaintiffs, and John M'Farlane, C. J. Browne, J. H. Stanley, [798] B. Roberts, T. Trewitt, J. Barry, W. Mudge, J. Pennington, J. Marsh, J. Heron, T. Greenwood, and P. Cullen, defendants.

"Issued under the Friendly Societies Act, 1855, 18 & 19 Vict. c. 63.

"The following are the particulars of the complaint of the above-named plaintiffs:—

"1. That the defendants are the committee of management of 'The Liverpool United Legal Friendly Burial Society,' the rules whereof have been duly certified under the 18 & 19 Vict c. 63.

"2. That the plaintiffs are the trustees of the said society.

"3. That the 116th of the said rules provides 'that no new rules shall be made, nor any of the rules herein contained, or hereinafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society, called specially for that purpose'

"4. That the 105th of the said rules provides, 'All meetings of the members shall be held in some convenient place in the borough of Liverpool, subject to the rules in that behalf provided.'

"5. That the 111th of the said rules provides, 'Notices of all meetings shall be conspicuously posted by placards through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat.'

"6. That the said society consists of from 30,000 to 40,000 members, who are principally working men, their wives and children; and the adults in benefit who are entitled and vote at public meetings of members number about 15,000.

[799] "7. That the defendants as such committee aforesaid, recently called a special general meeting of members, to appoint a committee to alter the existing rules of the society, and to pass new ones, although no such committee could be appointed by virtue of the rules of the society.

"8. That the defendants afterwards called a special meeting of members, to be held at the Clarendon Rooms, in Liverpool aforesaid, although the place is capable of holding one hundred persons only.

"9. That the plaintiffs protested against such meeting and the proposed alteration of the rules; but the defendants proceeded with the meeting, and submitted divers new rules and alterations, some whereof were contrary to law.

"10. That the defendants subsequently called another meeting at the same place, and certain alterations in the existing rules, and additions thereto, were passed by the persons then assembled; but the registrar has not certified the same.

"11. The plaintiffs charge that the notices calling the said meetings do not, nor does any one of them, contain the substance of the proposals to be made at the said meetings, within the meaning of the said 111th rule, and that the place of meeting aforesaid was not a 'convenient place,' within the meaning of the said 105th rule.

"12. That the defendants have improperly expended divers large sums of the society's money in and about the said meetings and amendments and alterations, for printing, advertizing, deputations to London, and other things, and certain moneys are still owing in respect thereof.

"The plaintiffs seek an order of this honorable court, that the said meetings may be declared void and of no effect,—that the defendants may be restrained by the [800] injunction of this honorable court from procuring the certificate of the registrar of friendly societies in England that the proposed alterations and amendments are according to law, and from taking any steps or proceedings for procuring or obtaining such certificate, and from putting in force or acting upon the said alterations and amendments until the said 111th rule has been duly complied with in regard thereto, —that the defendants be ordered to pay to the plaintiffs as such trustees, and for the use of the said society, all such moneys as have been expended by the defendants out of the funds of the said society as aforesaid, and, for this purpose, if necessary, that an account thereof may be taken, and that they be restrained from paying out of the funds of the society the moneys still owing as aforesaid, and that the defendants may be also ordered personally to bear their costs of and incidental to the present

proceedings, and to pay the plaintiffs their costs out of pocket of and incidental thereto. The plaintiffs also seek such further or other relief as the circumstances of the case may require and this honorable court may please to grant."

The suit came on for trial before the judge of the county-court at the return of the summons on the 21st of April last, when the defendants appeared by counsel, and objected to the jurisdiction of the said county-court to hear or determine the said cause; but such objection was overruled, and the hearing was proceeded with; and on the 30th of April the judge delivered judgment to the effect following,—He declared all the meetings in the bill of complaint mentioned illegal, and all the proceedings at the same null and void: he condemned the defendants to the payment forthwith of all costs of the action personally, and not to be reimbursed by the society: he ordered them to render an account to the court, within one [801] week, of all the moneys expended in calling the said meetings or incident thereto, and of the deputations to the registrar in London; and that the defendants should also within fourteen days pay into court an amount equal to the said expenditure, out of their own pockets, to abide the further order of the court; and, in default of compliance with the said order, or any part thereof, the defendants were all to be committed to the county gaol for two months.

There was no evidence adduced at the trial beyond the notice of the meetings before mentioned, and the alterations in the rules.

Upon an affidavit of the above facts, and stating that none of the defendants owed any money to the society, or had ever possessed themselves of any funds belonging thereto, and that the only remuneration for their loss of time and labour in attending the meetings and transacting the business of the society, was 2s. 6d. each per meeting: that the plaintiffs had not, nor had any of them, any voice or vote in the making, altering, or rescinding of the rules of the said society, or any right or authority to interfere therein, nor had the plaintiffs, or any of them, any interest in the subject-matter thereof, and had no right to be present at the society's meetings, without leave; that, in framing the notice of the intended meetings, the committee attended to the suggestions thereon of the registrar when the matter thereof was before him prior to the meeting of the 5th of March being called, and that the notice was prepared under the direction of the committee fairly and with the bonâ fide intention of complying with the 111th rule, and that none of the members of the society were in any way misled by it, nor did the dissentients at the meeting object that the substance of the alterations intended had not been fully noticed therein,

[802] Brett moved for a prohibition, to injoin the county-court judge from further proceeding in the plaint. The judge of the county-court had no jurisdiction to entertain the complaint in question. By former Friendly Societies Acts, disputes between the society and any of its members were (10 G. 4, c. 56, s. 27) to be settled by reference to arbitrators, whose decisions were to be enforced by justices, or (9 & 10 Vict. c. 27, s. 15) by reference to the registrar. But now, by the 40th section of the 18 & 19 Vict. c. 63, it is enacted, that, "every dispute between any member or members of any society established under this act or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal: provided, that, where the rules of any society established under any of the acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall be referred to and decided by the county court, as hereinafter mentioned." And by s. 41 it is enacted, that, "in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the [803] rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make

such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chancery in respect either of its ordinary or its special or statutory jurisdiction: and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal." The plaintiffs here are not persons interested in the matter: they are not members of, nor have they any interest in, the society: their functions are determined by s. 17. This is not a matter which constitutes one of their duties as trustees. Besides, they are not professing here to act for the whole society, but only for a party of its members against another party of its members. Further, it is submitted that the judge of the county-court has exceeded his jurisdiction in decreeing that the defendants shall pay costs: there is nothing in the statute authorising him to give costs. This is a matter that even a court of equity would not have entertained: it is a suit by trustees, who are strangers in interest, against their cestuis que trust. Besides, a court of equity would have had no power to declare the rules null and void: *Clough* v. *Ratcliffe*, 1 De Gex & S. 164. [Willes, J. I think that case has been overruled in a recent case where the Lords Justices held that a court of equity may entertain a suit merely to declare a will valid.] The order is also excessive in decreeing that the defendants shall pay out of their own pockets the expenses of the meetings and deputations to the registrar in London.

[804] Mellish shewed cause in the first instance (*a*). The jurisdiction of the county-court depends upon the 40th and 41st sections of the 18 & 19 Vict. c. 63, the words of which are very large: it plainly was the intention of the legislature to give to the county-court the entire jurisdiction which had before been exercised by the court of Chancery. The real question is, whether the trustees are the proper parties to bring the suit. This is in substance a suit by the society against the committee of management. The 18th section of the act makes it the duty of the trustees to bring all actions or suits relating to the funds of the society: it enacts that "all real and personal estate whatsoever belonging to any such society established under this act or any of the acts hereby repealed, shall be vested in such trustees for the time being, for the use and benefit of such society and the members thereof; and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustee or trustees, their respective executors or administrators, according to their respective claims and interests; and, upon the death or removal of any such trustee or trustees, the same shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great **[805]** Britain and Ireland, which shall be transferred into the name or names of such new trustee or trustees: and, in all actions or suits or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in his or their proper name or names, as trustees of such society, without any further description." The 19th section is somewhat singularly worded: it enacts that "the trustee or trustees of any such society are hereby authorised to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which he or they are such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in his or their proper name or names, as trustee or trustees of such society, without other description; and no such action, suit, or prosecution shall be discontinued or shall abate by the death of such person, or his removal from the office of trustee, but the same shall and may be proceeded in by or against the succeeding trustee or trustees as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the

(*a*) The affidavit upon which cause was shewn stated, among other things, that "the trustees had no interest in the society, save that they considered it their duty to watch and see that its funds were not improperly expended; and they believed that the moneys expended in and about the calling and holding of these meetings, and the deputations to London to see the registrar, were illegally and improperly expended."

action or suit or prosecution had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such society." [Cockburn, C. J. The 41st section evidently applies to a different class of persons from those mentioned in the 19th, viz. persons interested in the funds of the society.] The words "any person interested in the matter," were manifestly inserted in the 41st section merely for the [806] purpose of preventing the necessity of joining all the members. The proposed new rules greatly increase the powers of the governing body, and diminish those of the society at large: and the judge of the county-court came to the conclusion that there had been illegal expenditure of the funds of the society, and that further illegal expenditure thereof was threatened. [Cockburn, C. J. Would a court of equity have had power to declare the rules null and void?] It is submitted that it would. [Cockburn, C. J. The difficulty I feel is, that the trustees do not represent the society. It must be assumed that the general body of the society think the rules well changed; but that the trustees, quâ trustees, think fit to object. The dissentient members have taken no steps in the matter. But the trustees ex mere motu seek to set aside what has been done by the meeting. They have no interest in the funds of the society.] They have a duty cast upon them to see that the funds are not misapplied. They have an interest also; for they might be responsible for the illegal application. As to the costs, the county-court judge clearly has a general power to award costs in all cases coming before him. [Williams, J. Costs might have been awarded under the 13 & 14 Vict. c. 115, s. 22.]

Brett, in support of the application. The trustees have no interest whatever in the disposition of the funds of the society. [Cockburn, C. J. Could the trustees justify the payment of moneys under new rules made in contravention of the former rules?] It would not be competent to any member of the society to question the propriety of the rules when certified and inrolled in pursuance of the statute.

Cockburn, C. J. I am not desirous of expressing any opinion of my own in this case; for, though I en-[807]-tertain some doubt whether the trustees had not such an interest in the matter as to enable them to institute the proceedings, I find the rest of the court are of a different opinion; and my doubts are not so cogent as to induce me to desire that the matter should be delayed for more consideration.

Cresswell, J. I am of opinion that the rule for a prohibition should be made absolute. It appears that many provisions are introduced into the statute to facilitate the settlement of disputes amongst the members of the society. The trustees, no doubt, are actuated by the best motives. But it seems that a desire had arisen on the part of a large body of the society to effect an alteration in its rules. By the constitution of the society, it appears, there could be no alteration without the consent of the majority of members present at a meeting convened in a particular way. Now, there is no suggestion that there is anything in the alteration which has been made, that is at all inconsistent with the purposes of the society: but it is said that the meetings at which the alterations were proposed and assented to were held at inconvenient times and places. It does not, however, appear that any member of the society complains of the alterations, or apprehends any injury arising from them. But it seems that the trustees thought the society were not acting wisely in the course they were pursuing, and that, if a larger meeting had been convened, some of the members might possibly object. It does not appear even now that there is any objection on the part of any member of the society. There is no dispute between the society and any person interested, and therefore I think the judge of the county-court was acting without jurisdiction, and that his order cannot be enforced.

[808] Williams, J. I am of the same opinion. The question turns exclusively upon the 41st section of the 18 & 19 Vict. c. 63. The 19th section (which is substantially copied from the previous acts) was merely introduced for the purpose of removing all difficulty as to who should be plaintiff or defendant in suits respecting choses in action of the society. It gives no additional force to the provision in s. 41. The last-mentioned section confines the jurisdiction of the county-court to cases where the application is made by a "party interested" in the matter. The affidavits here shew that the applicants are mere trustees of the society, not being members or having any pecuniary interest therein, nor being put in motion by any of the members. The question is, whether, under such circumstances, they can be said to be "persons interested" within the meaning of the statute. If it had appeared that there was any controversy between them and the members of the society as to their mode of

dealing with its funds, that might have been a matter to be settled under s. 41. But it does not appear that there exists any such controversy: and the only question is, whether they are interested, from their mere position as trustees. If the trustees had not thought fit to interpose, the new rules would have been binding upon the society and upon them. The question is whether it was any part of the duty to interfere in the matter. It appears to me that it was not, and that they exceeded their province in instituting the proceedings in the county-court, and therefore that the injunction should go.

WILLES, J. I am of the same opinion. The 41st section of the 18 & 19 Vict. c. 63, makes it a condition precedent to the jurisdiction of the county-court, that the proceedings should be instituted by "a person interested in the matter." Now, the trustees clearly are [809] not interested personally: and they can only be interested for the society as trustees, when directed by the society to institute the suit. It is admitted here that they have proceeded entirely of their own head. I therefore think the judge of the county-court had no authority to entertain the matter, and that the rule for a prohibition must be made absolute.

Rule absolute.

JEWELL *v.* PARR. June 12th, 1857.

A. sued B. upon two bills of exchange and a promissory note, and obtained a verdict, subject to a bill of exceptions. A venire de novo was awarded, and, upon the second trial, the evidence obtained by B. under a commission to Paris induced A. to abandon the second bill, and he had a verdict on the other bill and the note, subject to a second bill of exceptions. Proceedings were afterwards instituted in chancery, which resulted in a decree or order that the bill of exceptions should be abandoned, and the second bill given up to B., and the cause re-tried, striking out the count upon that bill. Upon that trial B. succeeded:—Held, that, on the taxation of the costs at law, B. was not entitled to the costs of the commission as "costs in the cause,"—the evidence taken thereunder not being applicable to any part of the record as it then stood.

This was an action to recover the amount of two bills of exchange for 100*l.* each, dated respectively the 18th of December, 1848, and the 30th of November, 1849, both drawn by one J. F. Allen upon and accepted by the defendant, and payable respectively at three months after date, and also of a promissory note for 60*l.*, dated the 22nd of August, 1848, drawn by the defendant payable to Allen, all indorsed by Allen to the plaintiff. The declaration contained three counts,—the first upon the promissory note, the second upon the bill dated the 18th of November, 1848, and the third upon the bill dated the 30th of November, 1849.

The cause was tried before Maule, J., at the second sitting in London in Easter Term, 1854, when a verdict was found for the plaintiff. A bill of exceptions having been tendered to the ruling of the learned judge, which [810] resulted in a venire de novo, the cause came on for trial again before Jervis, C. J., at the sittings at Guildhall after Michaelmas Term, 1855, when, the evidence of one Laurier, taken under a commission at Paris, having been read, the plaintiff's counsel consented to a verdict being entered for the defendant as to the second count of the declaration; but he insisted that the defendant had failed to prove either of his pleas as to the first and third counts: and his Lordship directed a verdict to be entered for the defendant as to the second count, and for the plaintiff on the first and third counts.

A bill of exceptions was again tendered as to the ruling of the Lord Chief Justice so far as the same related to the first and third counts. In making up the record on that occasion, the plaintiff's costs were taxed and allowed at 118*l.* 8*s.*, and the defendant's costs of the issue upon which he succeeded, including the costs of the commission, were taxed and allowed at 97*l.* 5*s.* 4*d.*

Before the arrival of the day appointed for argument of the bill of exceptions, an appeal in a suit depending in chancery,—which was instituted by the defendant, to restrain the plaintiff from proceeding at law upon the bills and note, and which came on for hearing before Vice-Chancellor Wood, who dismissed the bill with costs, except so far as related to the bill of the 18th of December, 1848, which he directed should be given up to the defendant's attorney,—came on to be heard before the Lords

Justices; and on the 3rd of June, 1856, the Lords Justices made an order that the petition of appeal should stand over until this action had been re-tried, upon certain terms, amongst others, that the declaration should be amended by striking out the second count, that the defendant should be at liberty to add a plea to raise any question as to the negotiability of bills when overdue, and that the proceedings upon the bill of exceptions should be abandoned.

[811] The record was accordingly amended, and a new plea (the sixth) added, founded upon the doctrine of *Charles* v. *Marsden*, 1 Taunt. 224

The cause came on for trial upon the record so amended, before Willes, J., at the sittings in London after Trinity Term, 1856, when a verdict was found for the defendant upon the issue joined on the sixth plea. The learned judge (by consent) directed the verdict to be entered for the plaintiff on the first, second, eighth, and ninth pleas, and for the defendant on the sixth; and the jury were discharged as to the third, fourth, fifth, and seventh pleas.

The appeal again came on to be heard before the Lords Justices on the 20th of February, 1857, when a decree was made in favour of the plaintiff in the suit (defendant at law), and that the plaintiff (at law) should not be allowed any costs in the action respecting the issues on the pleas denying Allen's indorsements, notwithstanding the same had been found in his favour, and that he should pay the plaintiff the costs of suit.

On going before the master to tax the costs of the action, it was objected, on the part of the plaintiff, that, the defendant having been allowed the costs of the commission to examine Laurier at Paris on the taxation of costs in January, 1856, and as such costs had been set off against the plaintiff's costs of that (second) trial, he was not entitled to have them again taxed; that the evidence taken under the commission was not applicable to the now state of the record, the defendant having on the last trial succeeded only upon an entirely new plea, not in any degree supported by such evidence.

The master was of opinion that the taxation of the costs of the trial of December, 1855, went for nothing, such taxation being a mere formal matter, necessary as a preliminary to the sealing of the bill of exceptions, and [812] that the costs were now to be taxed as if no such former taxation had taken place, in the same manner as if a venire de novo had been awarded upon the argument in the court of error; but he held, that, as the evidence taken under the commission in his judgment had reference exclusively to the bill of exchange dated the 18th of December, 1848, which formed no part of the record as then before him, he could not allow the costs thereof, although equitably the defendant might be entitled to them; and, accordingly, the costs of the commission were disallowed solely on the ground of the evidence being inapplicable to the present state of the record.

Hayes, Serjt., on a former day in this term, obtained a rule nisi for a review of the taxation. He submitted that the expense of the commission would never have been incurred if the plaintiff had not sued upon the bill of the 18th of December, 1848, his claim on which was not abandoned until the second trial; that the defendant had by means of that evidence successfully defended himself against that claim; that the third trial might be considered as a new trial on the record in its amended state, and not a fresh action; and, consequently, that the costs of the commission must be taken to be costs in the cause.

Wood now shewed cause. The short answer to this application is, that the master had no power, upon the record as presented to him, to allow the defendant the costs of the commission, inasmuch as there was no issue to which it could be applicable. In *Curling* v. *Robertson*, 8 Scott, N. R. 288, 7 M. & G. 525, 2 D. & L. 307, the costs of the examination of a witness upon interrogatories, which were not produced in evidence at the trial, were held to have been properly disallowed. The master could only look at the interrogatories to see if the [813] evidence was relevant to any issue upon the record. Besides, these costs have already been taxed and allowed to the defendant as the costs of the issue on which he succeeded on the second trial. If he is placed in any difficulty, it is solely in consequence of his having abandoned his bill of exceptions.

Hayes, Serjt., in support of his rule. In *Curling* v. *Robertson*, the interrogatories were not used. Here, the evidence was produced, and the plaintiff thereupon retired from the contest as to the second bill, to which that evidence applied. The taxation

alluded to was a mere formal matter, for the purpose of perfecting the bill of exceptions. The costs of this commission were necessarily and properly incurred, and are costs in the cause, and as such the defendant is entitled to them. [Cockburn, C. J. It is clear that you are not entitled to the costs of the second trial. How do you take the costs of the commission of that predicament?] They are costs in the cause. [Cockburn, C. J. On the same ground, you might call all the costs of the second trial costs in the cause. Instead of subpœnaing witnesses in support of your case, you send out a commission to Paris.] There is no analogy between the costs of a commission and costs of witnesses. The costs of the commission are not ordinary costs of the trial. The legislature has made a special provision for them. The plaintiff ought not to be allowed to place himself in a better position by abandoning one of his counts than he would have been in if the record had gone down as it originally stood. [Cockburn, C. J. You should have interposed and asked to have these costs reserved to you as a matter of condition when before the Lords Justices. Cresswell, J. The costs you claim were taxed and allowed to you as costs of the issue upon **[814]** which you succeeded on the second trial. By what magic do they now become costs in the cause?]

COCKBURN, C. J. Brother Hayes, I think you are out of court.

The rest concurring,

Rule discharged.

End of Trinity Term.

COMMON BENCH REPORTS. New Series. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, and in the EXCHEQUER CHAMBER, from Trinity Vacation, 1857, to Hilary Term, 1858. By JOHN SCOTT, Esq., of the Inner Temple, Barrister-at-Law. Vol. III. London, 1858.

[1] Cases Argued and Decided in the Court of Common Pleas, in Trinity Vacation, in the Nineteenth and Twentieth Years of the Reign of Victoria.

The judges present at these sittings, were,—Cresswell, J., Williams, J., and Willes, J.

Memoranda.

In the course of the last Trinity Term, the Right Hon. James Stuart Wortley resigned the office of Solicitor-General.

Henry Singer Keating, Esq., one of Her Majesty's Counsel learned in the Law, was shortly afterwards appointed Solicitor-General, and received the honor of Knighthood.

In March last, Mr. Serjt. Wrangham, Mr. Serjt. Shee, and Mr. Serjt. Byles were respectively appointed Queen's Serjeants.

[2] In Trinity Vacation, the following gentlemen were appointed Her Majesty's Counsel learned in the Law: The Hon. Edmund Phipps, of the Inner Temple; Charles Wordsworth, Esq., of the Inner Temple; John Locke, Esq., of the Inner Temple; Allan Maclean Skinner, Esq., of Lincoln's Inn; John Walter Huddleston, Esq., of Gray's Inn; Robert Lush, Esq., of Gray's Inn; John Monk, Esq., of the Middle Temple; William Forsyth, Esq., of the Inner Temple; Henry Manisty, Esq., of Gray's Inn.

Mr. Serjt. Pigott received a patent of precedence, to take rank next after John Locke, Esq.

Pugh *v.* Stringfield and Another. June 18th, 1857.

[S. C. 27 L. J. C. P. 34.]

Where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action follows the nature of the contract, and must be brought in the names of all the covenantees. P., D., and G. had severally advanced moneys to one F. on mortgage of three several parcels of land, and had severally brought actions against F. For putting an end to the actions, and securing these several debts, an indenture was prepared and executed, to which F. was a party of the first part, P. of the second, D. of the third, G. of the fourth, and certain other persons of the fifth part. By this indenture, F. covenanted to complete certain buildings on the mortgaged premises respectively, according to certain plans, and P., D., and

G. covenanted to advance him a certain sum during the progress of the works. The defendants thereupon gave P., D., and G. a guarantee, stating, that, in consideration of the arrangements entered into by them, and their covenanting to advance the moneys mentioned to F. for the purpose of enabling him to complete the buildings, they guaranteed that F. should perform his covenants with them in the indenture, —"the joint and separate liability of the defendants not to exceed 100l.:"—Held, that P. alone could not maintain an action against the defendants upon the guarantee, the interest of the three therein being joint, and not several.

This was an action upon a guarantee.

The declaration stated, that, before the making of the defendants' promise thereinafter mentioned, the plaintiff had advanced to William Few divers sums of money upon mortgage of certain messuages or tenements [3] upon certain parcels of land situate at Kentish Town and Camden Town, in the county of Middlesex, and Robert Dobbing had also advanced other moneys to the said William Few upon mortgage of other messuages or tenements on other parcels of land also situate at Kentish Town and Camden Town aforesaid, and James Gardner had also advanced other moneys to the said William Few upon mortgage of other messuages or tenements on other parcels of land also situate at Kentish Town and Camden Town aforesaid, and certain arrangements had been entered into between the plaintiff and the said Robert Dobbing and James Gardner and other parties respectively with the said William Few touching their said several mortgages and properties, and which arragements were expressed, contained, or referred to in an indenture which had at the time of the making by the defendants of their promise thereinafter mentioned been prepared and made, or intended to be made, between the said William Few of the first part, the plaintiff of the second part, the said Robert Dobbing of the third part, the said James Gardner of the fourth part, and E. M. Dimmock and R. Burbey of the fifth part, whereby, after reciting, amongst other things, that the several persons parties thereto of the second, third, and fourth parts, had theretofore from time to time advanced and lent to the said William Few divers large sums of money, for the purpose of enabling the said William Few to erect and build the said messuages or tenements and dwelling-houses so situate upon the said parcels of land in Kentish Town and Camden Town aforesaid, and which parcels of land were recited to be and were in fact held under several leases or agreements for leases thereof respectively granted to him the said William Few; and also reciting, that, upon accounts being taken and settled between the said several parties thereto of the first, second, third, [4] and fourth parts, of the moneys that had been from time to time advanced and lent to the said William Few by the said parties of the second, third, and fourth parts respectively, it appeared that the said William Few was indebted to the plaintiff in the sum of 23,733l. 16s. 10d., or thereabouts, and that the said William Few was also indebted unto the said Robert Dobbing in the sum of 1700l., or thereabouts, and that the said William Few was indebted unto the said James Gardner in the sum of 450l. or thereabouts, and the re-payment of the said several sums of money, with interest thereon, had been respectively secured by the said William Few to the plaintiff, Robert Dobbing, and James Gardner, by several indentures of mortgage and agreements for mortgage respectively; and after reciting further as therein mentioned, and also that divers actions had been brought against William Few by the several parties thereto of the second, third, fourth, and fifth parts, having respectively relation to the several dealings and transactions between the said several persons parties thereto, and that an arrangement had been entered into and agreed upon by the said several persons parties to the said indenture, for the purpose of settling their disputes, and by a memorandum of agreement bearing date the 11th of October, 1856, and made between the said William Few of the one part, and the said E. M. Dimmock of the other part, the said E. M. Dimmock, being therein described as acting on behalf of himself and of the said R. Burbey, and also on behalf of the said parties thereto of the second, third, and fourth parts, it had been agreed, amongst other things, that the said E. M. Dimmock should, on the execution of the covenant thereinafter mentioned (meaning thereby the then being recited indenture), pay to certain creditors of the said William Few, including the defendants, the sum of 1000l., in certain proportions, and that the said William [5] Few should, as therein mentioned, execute an assignment to the said E. M. Dimmock, or as he should direct, of the equity of redemption of and in the said several pieces of ground, messuages and

tenements, and should covenant (with sureties as in the reciting agreement mentioned) to complete and finish to the satisfaction of the surveyor of the plaintiff and the said Robert Dobbing and James Gardner, and according to his specification and conditions, on or before the 10th of January then next, the said several messuages or tenements situate on the property at Kentish Town and Camden Town aforesaid, and then mortgaged to the plaintiff and the said Robert Dobbing and James Gardner respectively as aforesaid, including as therein mentioned; and also reciting that the said William Few had, in pursuance of the agreement contained in the said recited memorandum of the 11th of October, 1856, by several indentures assigned or otherwise assured unto the several parties thereto of the second, third, and fourth parts all the estate, right, title, interest, equity of redemption, benefit, claim, and demand of him the said William Few, of, in, or to the said several pieces or parcels of land, messuages or tenements and premises respectively whereof they were such mortgagees respectively as aforesaid, subject, nevertheless, to the several rents and covenants, conditions, and agreements of the several leases and agreements for leases under which the same were held; and also reciting that the said William Few had, in further pursuance of the said recited agreement, supplied sureties who had been approved of by the said E. M. Dimmock, who, by a memorandum or guarantee bearing even date therewith (meaning thereby, amongst others, the defendants' guarantee thereinafter mentioned), severally guaranteed and agreed that the said William Few should duly and properly perform the covenants on his part for the com-[6]-pletion and finishing of the several messuages and tenements in Kentish Town, &c., thereinafter contained, it was by the then being recited indenture witnessed, that, in pursuance of the said agreement, and for the considerations therein mentioned, the said William Few covenanted and agreed to and with the said parties thereto of the second, third, and fourth parts, their respective executors, administrators, and assigns, that he the said William Few, his executors or administrators, would, on or before the 10th of January which would be in the year 1857, complete and finish to the satisfaction of such surveyor for the time being who might be jointly appointed by the parties thereto of the second, third, and fourth parts, their respective executors, administrators, or assigns, and pursuant to and in accordance with the plans, specification, and conditions already prepared by Mr. G. Low, the surveyor then acting on behalf of the parties thereto of the second, third, and fourth parts, and signed by him the said William Few, the said several messuages or tenements situate and being at Kentish Town and Camden Town aforesaid, and comprised in the said several indentures of mortgage, including the making of all roads and pavements, and laying out gardens to the extent of making paths therein (subject, nevertheless, to the proviso for reference to arbitration thereinafter contained): and it was thereby agreed and declared by and between the several parties thereto of the first, second, third, and fourth parts, their respective executors, administrators, and assigns, that he the said William Few, his executors or administrators, should be entitled to require from such surveyor, when the said several messuages or tenements were so respectively finished and completed, a certificate of the compliance by him the said William Few as therein mentioned: and by the said indenture the said parties thereto of the second, third, and fourth parts did jointly, [7] and every of them did thereby for himself severally, and for his respective heirs, executors, administrators, and assigns, covenant and agree to and with the said William Few, his executors and administrators, in manner following, that was to say, that they the said parties thereto of the second, third, and fourth parts, and their respective executors, administrators, and assigns, should and would advance to the said William Few, for the purpose of enabling him to complete the said messuages or tenements and premises at Kentish Town and Camden Town aforesaid the sum of 1557*l.*, such sum to be advanced as the work should proceed, in weekly payments, upon the certificate of the said surveyor, and each of such certificates to be applicable to the work done towards the completion and finishing of the said messuages or tenements and premises during the seven days next preceding the date thereof: and by the said indenture it was further agreed, that, if any dispute or question should arise between the said parties thereto, or between any one or more of them and the executors or administrators of the other or others of them, or between their respective executors or administrators, touching any clause, covenant, matter, or stipulation in the said indenture contained, or the construction thereof, or any other matter arising out of the said indenture, the same should be referred to arbitration, as therein provided for: and thereupon, the said indenture having been so prepared

as aforesaid, the defendants made and signed a memorandum or agreement in the words and figures following, that is to say:—

"London, 24th October, 1856.

"Gentlemen,—In consideration of the arrangements entered into by you with Mr. William Few, of, &c., builder, and of your covenanting to advance to him, for the purpose of enabling him to complete and finish certain messuages or tenements situate at Kentish Town [8] and Camden Town, Middlesex, according to the plan, specification, and conditions already prepared, and signed by the said William Few, and which covenant and agreement are respectively contained in a certain indenture of even date herewith, made between the said William Few of the first part, Charles Pugh of the second part, Robert Dobbing of the third part, James Gardner of the fourth part, and E. M. Dimmock and R. Burbey of the fifth part, we, the undersigned John William Springfield and John Groves Cooper, of, &c., do hereby jointly and severally guarantee and agree that the said William Few shall duly and properly perform and fulfil the covenant entered into by him with you, and contained in the said indenture of even date herewith, for the completion and finishing, upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said indenture of even date herewith mentioned, it being, nevertheless, agreed and declared that our joint and separate liability under or by virtue of this guarantee or agreement shall not exceed the sum of 100l.—We are, gentlemen, your obedient servants,

"John W. Springfield,
"J. Groves Cooper.

"To Messrs. Charles Pugh, Robert Dobbing, and James Gardner."

Averment, that the said persons to whom the said memorandum or agreement was addressed were and are the plaintiff and the said Robert Dobbing and James Gardner, who are all yet alive, and that the said William Few, and the arrangements, covenants, agreement, indentures, messuages, and tenements, were and are the said William Few, and the arrangements, covenants, agreement, indentures, messuages, and tenements respectively aforesaid: Breach, that, although all things [9] had happened and been done and all times had elapsed reasonable and necessary to entitle the plaintiff to have the said covenant and agreement performed by the said William Few, and also to have the defendants' said guarantee and agreement performed by them, yet the said William Few had wholly neglected and failed to perform his said covenant so entered into by him with the plaintiff, and contained in the said indenture, for the completion and finishing the said last-mentioned messuages or tenements, and the plaintiff had thereby sustained damage to a greater amount than the sum of 100l.; and although all things had been done and happened, and all times had elapsed, reasonable and necessary to entitle the plaintiff to have and receive of and from the defendants the said sum of 100l., yet the same had not been paid to the plaintiff: and the plaintiff claimed 100l.

To this declaration the defendants demurred, the ground of demurrer being, "that Messrs. Dobbing and Gardner ought to have been joined as co-plaintiffs." Joinder.

Atherton, Q. C. (with whom was W. Brandt), in support of the demurrer. The memorandum declared on being in terms an undertaking by the defendants with the plaintiff and Dobbing and Gardner, it is not competent to the plaintiff to sue alone for the breach of it. The general rule, as laid down in *Eccleston* v. *Clipsham*, 1 Wms. Saund. 153, and the notes thereto, is that, though a covenant be joint and several in the terms of it, yet, if the interest and cause of action be joint, the action must be brought by all the covenantees. That rule, no doubt, is subject to an exception, that, though the covenant is in terms with several jointly, yet, if the beneficial interest of each is several, and there is no interest to any two, one may sue in respect of a breach [10] affecting his several interest. The rule is laid down in similar terms in 1 Chitty on Pleading, 7th edit. p. 9. This case does not fall within the exception. There is no such clear and distinct separate interest in the plaintiff as to entitle him to sue alone. It appears that one Few, for whose benefit the memorandum of guarantee was signed, having obtained advances of money from three several persons,—the plaintiff, Dobbing, and Gardner,—to whom respectively he had granted mortgages of several premises, and being in want of further advances, entered into an arrangement with the plaintiff

and Dobbing and Gardner and two other persons named Dimmock and Burbey, under which he was to receive further advances: and the guarantee was given for the due carrying out that arrangement by Few. It is clear that the consideration for the defendants' promise was not in part and severally moving from the plaintiff and Dobbing and Gardner, but from all three of them in common. Part of the arrangement as shewn on the face of the deed undoubtedly is a covenant by Few with the three mortgagees to complete and finish, to the satisfaction of their surveyor, the premises mortgaged to them respectively, and any breach of that covenant would have given to each a separate cause of action. The defendants guaranteed to the plaintiff, Dobbing, and Gardner the due performance of Few's engagement, subject to this stipulation, that their joint and separate liability under or by virtue of the guarantee should not exceed the sum of 100l. How is that sum to be divided? Is each to have a separate action for 33l. 6s. 8d.? or are the defendants liable to each to the extent of 100l.? [Cresswell, J. You say that Few's covenant is several, but that the guarantee is joint?] Exactly so: the guarantee is joint, though to a certain extent it has reference to a separate covenant. The consideration for the **[11]** guarantee consists of two parts,—the first is the arrangements entered into by the plaintiff, Dobbing, and Gardner, with Few, and these are for the most part joint,—the second is the covenant for the further advances, which is entirely joint: it is not the less joint, because it is also several. Few would have been guilty of a breach of his covenant to complete the premises, if he failed to complete either of them. If the action had been brought by the three, they would, on proving the breach, have recovered the 100l. in which they have a joint interest, and then they could have divided it.

Field, contrà. It is submitted that the action is well brought in the name of Pugh alone in respect of the damage which he has sustained from the breach of Few's covenant. In a case not very dissimilar to this,—*Keightley* v. *Watson*, 3 Exch. 716,—Pollock, C. B., says: "I consider that the inquiry really is, as to the true nature of the covenant; at the same time bearing in mind the rule, —a rule which I am by no means willing to break in upon,—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint." And Parke, B., says: "It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several in-**[12]**-terests, it is therefore necessarily not to be construed as a joint covenant." There, the words of the covenant were ambiguous, and consequently the right of action was held to follow the interest, which was several. So, in *Withers* v. *Bircham*, 3 B. & C. 254, 5 D. & R. 106, by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed that C. covenanted with A. and B., and their executors, to pay the annuities or either of them, when the grantors should make default in payment: A. died: and it was held, that, the interest in the annuities being several, the covenant was also several, and that, the annuity granted to A. being in arrear, his executor might maintain an action against C. Here, Few covenants with Pugh, Dobbing, and Gardner, and their respective executors, administrators, and assigns: and the same expressions occur throughout. *Servante* v. *James*, 10 B. & C. 410, 5 M. & R. 299, is hardly distinguishable from the present case. There, a covenant was entered into by the master of a vessel with the several part-owners and their several and respective executors, administrators, and assigns, to pay certain moneys to them and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names: and it was held that this was a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. "The covenants in question," says Bayley, J., "are made with the several part-owners of the vessel, and their several and respective executors, administrators, and assigns: which latter words would be quite inoperative if the right to sue were in all the parties jointly.

Again, the covenant to pay the money is not to pay it to the owners generally, but to pay it to them **[13]** and their and every of their several and respective executors, &c., at a certain place, in such parts and proportions as were set against their several and respective names. He was not to pay it so that the banker might make distribution, but was to make the distribution himself; and, if he paid in the proportions of some and not others, each of those would be injured in respect of the non-payment of his share. In case of the death of one part-owner, by the words of the covenant his personal representative might sue. If the covenant were joint, the executor of the survivor only could maintain an action; but such a construction would be quite at variance with the words their several and respective executors, &c. In *Palmer* v. *Sparshott*, 4 M. & G. 137, 4 Scott, N. R. 743, by an agreement between A. of the one part, and B. and C. of the other part,— reciting that B. and C. had assigned certain property to A. for 150l. a-piece, and that it had been agreed that A. should retain 50l. out of each of the purchase-moneys,—the defendant, in consideration of the two several sums of 50l. and 50l. so retained, promised B. and C. to indemnify "them and their and each of their estates" from the costs of a certain action: and it was held that C. might sue A. alone upon this promise, without joining B. Tindal, C. J., there said: "It appears to me that this case falls within the principle, that, where a man covenants with two or more jointly, yet, if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint; as established in *Windham's case*, 5 Co. Rep. 7 a., and others. Here, the agreement was certainly joint in its terms, but the interest of the parties was distinct and separate. Each party had, in effect, advanced the sum of 50l.; each had sustained **[14]** a separate damage; and each therefore might sue without joining his co-promisee." In *Jones* v. *Robinson*, 1 Exch. 454, the declaration stated that the plaintiff and A. B. carried on business in co-partnership, and, in consideration that the plaintiff and A. B. would sell the defendant the business, and would become trustees for him in respect of all debts, &c., due to the plaintiff and A. B. in respect thereof, the defendant promised the plaintiff to pay him all money he had advanced in respect of the co-partnership and for which it was accountable to the plaintiff: the declaration then averred that the plaintiff and A. B. did sell the business to the defendant, and that, at the time of the promise, the plaintiff had advanced a certain sum, and alleged for breach non-payment of that sum: and, upon motion in arrest of judgment, it was held that it was not necessary to join A. B as a co-plaintiff, and that the declaration was good. "It is true," said Parke, B., "that no stranger to the consideration can sue; but, in the present case, the separate interest of the plaintiff in the partnership fund is the consideration upon which the promise is founded; and this case does not fall within the rule for which the defendant contends," viz. that, in actions ex contractu, all the parties from whom the consideration moves must be joined Here, the interest of the plaintiff and of Dobbing and Gardner was several, the damage which would result from Few's breach of covenant was several, and consequently the remedy must be several. No cause of action could arise to Pugh because Few had omitted to perform that part of his covenant which had relation to the completion of the premises in mortgage to Dobbing and Gardner respectively, and e converso. [Williams, J. How would the defendants deal with three actions brought against them at the same time in respect of the breach of this covenant? How would he **[15]** plead?] It would be a question of damages, not of pleading. [Willes, J. Each set of premises might have advanced towards completion in different proportions. Having ascertained the proportion in one action, the plaintiff would not be bound by it in the next, or the next action.] There may arise difficulties in dealing with this contract, but nevertheless it is the contract into which the parties have entered. The defendants engagement is not that they will pay Pugh 100l., but they guarantee to Pugh, Dobbing, and Gardner, to that extent, that Few shall perform the covenant he has entered into. [Cresswell, J. If the defendants' liability is limited to 100l., it cannot be in the way in which you propose to construe the contact. The difficulty that construction presents shews that it cannot be the true one.]

Atherton was heard in reply.

Cresswell, J. It appears to me, that, consistently with the cases which have laid down the rule as to when covenants are to be joint or several, our judgment upon this demurrer must be for the defendants. If it could have been contended that the

guarantee was for three sums of 100l., one to each of the three parties, the case might have been different. But Mr. Field at once admitted that he could not so contend. The difficulties of dividing the single sum shew plainly that it must have been intended to be a joint and not a several contract.

The rest of the court concurring,

Judgment for the defendants.

[16] DUFF *v.* MACKENZIE. July 4th, 1857.

[S. C. 26 L. J. C. P. 313; 3 Jur. N. S. 1025. Referred to, *Cator* v. *Great Western Insurance Company of New York*, 1873, L. R. 8 C. P. 559.]

An insurance was effected on "master's effects, valued at 100l., free from all average." Some of the articles thus insured were totally lost by the perils insured against, but others were saved: Held,—distinguishing the case from *Ralli* v. *Janson*, 6 Ellis & B. 422,—that the assured was entitled to recover in respect of the goods which had been so totally lost: the word "effects" being obviously employed to save the enumeration of the different articles of which the subject-matter of insurance consisted.

This was an action brought in respect of a total loss, on a policy of insurance on "master's effects," valued at 100l., "free from all average." The declaration averred a total loss by a peril insured against, viz. fire.

The defendant pleaded that the said effects insured by the said policy were not wholly destroyed and lost, as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after last Hilary Term. It appeared that the plaintiff was master of the ship "Lion," of Scilly; that, during the period covered by the policy, the "Lion," being off St. Vincent, took fire, and was totally destroyed, the captain and crew escaping on board a Dutch galliot: that the plaintiff succeeded in saving a portion (about one third) of his effects, the remainder being lost.

The subjoined lists of the articles lost and saved respectively, with their respective values, were put in as the foundation of the plaintiff's claim:—

"The following is a list of the articles lost by me from fire on board of the brig 'Lion,' of Scilly, of which I was master, Feb 2nd, 1856:—

	£	s.	d.
"Feather-bed	5	0	0
Barometer	2	5	0
1 book of charts	12	10	0
1 three Channel chart		12	6
1 general chart of the Mediterranean		14	0
A chart of the world		12	0
A chart of the coast of Newfoundland		12	0
A chart of the Scilly Isles		4	6
[17] 1 spy-glass	1	10	0
½ dozen silver tea-spoons	1	12	6
Water filter		10	6
2 chests	1	6	0
Set of casters		4	6
1 bag of slops, consisting of 8 blue shirts, 10 pairs of duck trowsers, and ½ dozen knives	4	11	0
Clothing, consisting of trowsers, coats, oil-cloths, sea boots, bedding, &c.	25	0	0
Chronometer (damaged)	5	0	0
½ dozen wine glasses		4	6
Three metal table-spoons		4	6
Two chairs	1	5	6
Carried forward,	£63	19	0

	£	s.	d.
Brought forward,	£63	19	0
1 time-piece	1	10	0
Books of different titles	6	10	0
Six table-cloths, and one table-cover	1	13	6
1 parallel ruler and one scale		8	6
Two dividers		2	6
1 quadrant rendered useless by throwing about	4	10	0
1 writing desk injured; repairs		5	0
Tell-tale	1	5	0
½ dozen knives and forks		6	0
	£80	9	6

"List of effects saved from the late brig 'Lion,' of the port of Scilly:—

	£	s.	d.
"Watch	4	0	0
Chronometer	35	0	0
Two suits of clothes	4	0	0
And various other items	2	0	0
	£45	0	0"

[18] On the part of the defendant it was insisted, that, inasmuch as the insurance was expressly made "free from all average," and a portion of the subject of insurance had been saved, the plaintiff was not entitled to recover: and reliance was placed upon the case of *Ralli* v. *Janson*, 6 Ellis & B. 422, where it was held by the Exchequer Chamber,—reversing the judgment of the court of Queen's Bench,—that, where memorandum goods of the same species, shipped in packages, are insured, and it is not expressed, by distinct valuation or otherwise, in the policy, that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there be no stranding, though one or more entire package or packages be entirely destroyed, or otherwise totally lost, by the specified perils.

Upon the authority of that case, though with very great reluctance, his Lordship directed a nonsuit; but he reserved leave to the plaintiff to move to enter a verdict for him for 67l. 10s. or for 62l. 10s., if the court should be of opinion that the clause of warranty against average in the policy did not disentitle the plaintiff to recover.

Bovill, Q. C., in Easter Term last, obtained a rule nisi accordingly.

James Wilde, Q. C., in Trinity Term, shewed cause. The policy is upon "master's effects" valued at 100l., "warranted free from all average." It is submitted, that, upon the true construction of this instrument, the assured could only recover in respect of a total loss: and that, a portion of the subject-matter of insurance having been saved, there has been no total loss. The case of *Ralli* v. *Janson* has settled the law **[19]** upon this subject. Formerly, it was held, upon the authority of *Davy* v. *Milford*, 15 East, 559, that, where the goods are contained in separate packages, there might be a total loss of part, though some of the packages might be saved. *Ralli* v. *Janson*, however, decides that there is no foundation for the distinction supposed to arise from the goods being contained in separate packages,—although it leaves it still open to contention, that, where there are several distinct subjects of insurance in the body of the policy, or by declaration of interest by indorsement, the assured is entitled to recover as for a total loss if all of one species of goods insured should be lost. In that case, the insurance was upon 2688 bags of linseed. The vessel, having met with a hurricane, in the course of which it became necessary to throw part of the goods overboard to lighten her, was ultimately driven into the Cape of Good Hope, where 1023 bags were found to be in such a state from sea-damage that a large portion of the linseed in them was thrown into the sea as rotten and worthless, and the rest was sold, and only realized a few shillings, and, if sent on in the vessel, would have lost the character of linseed before arrival in England. The plaintiffs insisted that they were entitled to recover in respect of this loss, notwithstanding the terms of the memorandum, by which seed, &c., were warranted free from average, unless general,

or the ship should be stranded, on the ground that the loss was not in its nature an average, but a total loss. In giving the judgment of the court, Jervis, C. J., says: "It was not denied, that, if the linseed had been shipped in bulk, and an equal or even greater portion of it had been lost in a similar way, the warranty would have exempted the underwriters from liability. This is now too clear to admit of any serious doubt. But it was said that the fact that the cargo was shipped in bags [20] made a difference, and that, by reason of the shipment having been made in that form, the warranty must be held to apply, not to the whole cargo, as in the case of a shipment in bulk, but to each bag as being a distinct object capable of separate insurance and valuation, and that as 1023 entire bags had been lost, there was a total loss of each of those portions of the cargo; and the warranty against particular average consequently inapplicable. If this proposition be sustainable, that the warranty is upon each bag, and not upon the cargo consisting of all the bags, either upon the natural construction of the memorandum, or in any sense in which it has been construed by former decisions binding upon us, the plaintiffs are entitled to recover. As to its natural construction, there is no difficulty. The memorandum was introduced for the protection of the underwriters against partial losses of the subject-matter insured. It is framed in general terms, and must therefore, according to the well-known rule of construction, be applied to the whole of each subject-matter falling within its terms, except such construction be limited or controlled by reference to other parts of the policy. Thus, in the particular case of seed, the warranty applies in terms to all seed loaded on board the vessel, without restriction to seed loaded in bulk or in any particular manner, unless it appear by the terms of the policy, as, for instance, by separate valuation, that it was intended to distinguish one portion of the seed from another, and to make a separate insurance upon each portion, as well as a joint one upon all. There is for this purpose no difference in point of reason between the total loss, by the same perils, of part of a cargo loaded in bulk, and part of the same cargo loaded in bags, each being equally a total loss of part, but equally a partial loss of the whole. The fact of the cargo being in bags only renders it more practicable to value and [21] insure each bag-full separately: but, in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly, it does not of itself shew that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag, any more than it would apply to each separate particle of a cargo loaded in bulk. If the case were free of authority, therefore, we should have felt no difficulty in holding that the memorandum applies to the whole of each species of which the cargo consists, whether in bulk or in packages, unless the packages be separately valued or otherwise separately insured, which in the present case they are not. The plaintiffs below, however, insist that it has been established by authority, and is settled law in this country, that, if a cargo of perishable goods, warranted free of particular average, be made up of several packages, each capable of a distinct valuation, and any one package of these be entirely lost, there is a total loss of such package, for which the underwriters are liable, notwithstanding the warranty, and though the rest of the cargo arrive in safety." His lordship cites and observes upon the following authorities, *Lewis* v. *Rucker*, 2 Burr. 1167, *Davy* v. *Milford*, 15 East, 559, *Hedburg* v. *Pearson*, 7 Taunt. 154, 2 Marsh. 432, *Cologan* v. *The London Assurance Company*, 5 M. & Selw. 447, *Hills* v. *The London Assurance Corporation*, 5 M. & W. 569, *Navone* v. *Haddon*, 9 C. B. 30, *Glennie* v. *The London Assurance Company*, 2 M. & Selw. 371, Stevens on Average, 5th edit. 224, 225, *Dyson* v. *Rowcroft*, 3 Bos. & P. 474, Arnould on Insurance, 1038, Valin, Commentaire sur l'Ordonnance de la Marine du mois d'Août, 1681, liv. iii., tit. vi., des Assurances, Art. 47 (vol. 2, p. 113), Emérigon, Traite des Assurances, cap. 12, §§ 45, 46 (2nd volume of the edition by Boulay-Paty, pp. 8 20), Pothier, Du Contrat d'Assurance, No. [22] 163, Phillips on Insurance, §§ 1536, 1773, Code de Commerce, 369, Dictionnaire du Contentieux Commercial, tit. Delaissement, n. 45, and concludes as follows: "We are of opinion, that, where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed or otherwise lost by the specified

perils." Here, the policy being general, on "master's effects,"—which are not to be distinguished from other goods,—the whole forms one subject-matter of insurance, and there can be no partial loss. [Cockburn, C. J. If your argument be tenable, the assured would have no claim, if, in escaping from the wreck, he saved a suit of clothes, or even a single garment!] The same absurdity might equally have been suggested in *Ralli* v. *Janson*. This is a valued policy: the underwriters have consented to a valuation of the whole subject-matter of insurance, but not to a valuation of any part thereof by any one else. That being so, it is impossible that this can be held to be a separate insurance of articles which are never mentioned.

Bovill, Q. C., and Archibald, in support of the rule. The very terms of this policy, it is submitted, imply that there are several distinct subjects of insurance: and there is nothing in the decision of the court in *Ralli* v. *Janson* to disentitle the plaintiff to recover as for a total loss of those "effects" which were entirely lost. The rule as laid down in Magens on Insurances, p. 74, § 61, is as follows:—"Ever since the year 1749, **[23]** it has been the custom in England, as it was before in other countries, as mentioned in § 14 [*a*], that no particular average shall be paid by the insurers, under 3 per cent.: even general averages are not paid at Hamburgh, if the damage be less than that; but, in London, those averages that are general, are satisfied, be they ever so small. We must here remark, that almost all ordinances seem deficient in not fully explaining when and after what manner the damage shall be deemed to exceed 3 per cent. We shall, to elucidate this matter, descend to particular circumstances. If in a chest containing one hundred pieces of linen, three are deducted for damage, and as such allowed to the buyer, the loss ought to be recoverable from the insurers, whether that chest was in a policy by itself, or amongst a parcel of an hundred chests: for, why should not a person who has insured and paid an equal premium for an hundred chests have the same advantage as he that is insured but for one! Suppose a merchant has shipped 101 chests of goods, No. 1 to 101, of which, on arrival, three chests are by sea or other accident so spoiled as to be worth nothing: if the damage be calculated as on the whole value of 101 chests, it will not exceed 3 per cent., and is by most insurers thought not to be recoverable by the insured, especially if the insurance be made without expressly declaring in the policy the particular sum insured on each chest. We cannot help thinking, however, that, if such a case came to be rightly explained to a jury of merchants, the insurers would be condemned to pay the value of these three chests, in the same manner as they would, if it had been expressed how much was insured on each chest, or as if the 101 chests had been insured in five different and distinct policies: as, for example, No. 1 to 20, in one policy,—21 to 40, in a second,—41 to 60, in a third,—61 to 80, in a fourth,—and 81 to 101, in a fifth. The insurers in this case, **[24]** supposing a loss or damage of one chest of the goods specified in each of the three first policies, must unquestionably have paid the average, which would have amounted to 5 per cent., because the loss of a chest would have been one in twenty: and, further, it might be considered as quite a different thing to find whole chests spoiled. The law or custom by which the insurers are not obliged to pay any particular average under 3 per cent. was probably established in order to free them from the vexation of being called upon for every trifling damage that might happen to a few pieces in a chest or bale. We are of opinion, that, notwithstanding an insurance is made under the general name of 'merchandises,' at least each different parcel or kind of goods ought to be considered by itself, and the insurers made liable for what damage exceeds 3 per cent. in such a parcel. However, as we have as yet no settled rules in this point, the best way is, to set matters out of dispute by explications in the policy: and no reasonable insurer ought to object to any division or fixing particular values on parcels of bale goods. If a person ships 1000 pieces of long-ells divided into 50 bales of 20 pieces, each piece worth 1l., he may say 1000l. on 50 bales, at 20l. per bale, and then the insurer will be liable for 3 per cent. damage on each bale. But no insurer ought to admit any division in the value of goods of another nature, such as, sugar, hemp, oil, when the exemption of 5 or 10 per cent. average is from other considerations." [Cresswell, J. The first part of that is overruled by *Ralli* v. *Janson*.] It is: but the latter part is quite in point here. Mr. Stevens, treating of the memorandum, —Stevens & Benecke on Average (Boston edition of 1833), p. 399, —says: "Various clauses are inserted in policies to guard the assured against the effect of the words which are the subject of this article. The following are generally made use of, viz. where **[25]** several species of colonial produce are insured, it is usual to insert,—'to pay

average on each species, as if separate interests, separately insured;' on manufactured goods in bales, trunks, or cases, &c., 'to pay average on each package, as if,' &c.; on sugar, 'to pay average on each ten, fifteen, twenty hhds.' (as the agreement may be), 'succeeding numbers, as if,' &c., and in like manner. It is now, indeed, considered so much agreeable to usage, where goods are insured direct from the place of growth or manufacture, that, if the clauses, 'to pay average on each species' of produce, or 'on each package' of manufactured goods, are not inserted, yet a liberal construction is put on the omission, and the policy is acted on as if they were. The reason is this, that no objection would have been made to it when the insurance was effected, and in consequence it is considered in practice as a mere verbal omission of the broker, and treated as such: agreeably to the opinion of Magens, who says, 'In an insurance made generally on goods, each different parcel or kind of goods ought to be considered by itself.'" Benecke says, edit. 1824, p. 474, —"It has frequently been asked whether the warranty 'free from average under 3 per cent., or under 5 per cent.' liberates the underwriter from the total loss of a part, if such loss amounts to less than 3 or 5 per cent. upon the whole quantity of goods valued in one sum: for instance, if 101 chests of goods (each of them being supposed of the same value) be insured together, and three chests be totally damaged, so as to be worth nothing, whether the loss be recoverable from the underwriter? This question admits no longer of any doubt, since it has been determined that underwriters are liable for the total loss of a part, and consequently such loss is not considered as an average loss. If, therefore, the three chests are either gone to the bottom, or completely destroyed by fire, or rendered en-[26]-tirely useless by the effect of sea-water, this will not be an average loss, but a total loss pro tanto: but, if they remain of any value, however small, it will be an average loss, and the underwriter discharged. In the same manner, if of twenty-one hhds. of sugar insured in one valuation, one is completely washed out, so as to be literally worth nothing, it will be a total loss of a part: but, if any sugar remain in it, it will be a particular average." For this, the learned author refers to *Davy* v. *Milford*, 15 East, 559. [James Wilde, Q. C. Which is expressly over-ruled by *Balli* v. *Janson*.] The argument on the other side leads to such manifest absurdity, inasmuch as it must be contended that the loss is not total if anything, however small, —a pair of spectacles, or an artificial tooth, were saved, that the parties never could have intended that such a construction should be put upon their contract. In *Lewis* v. *Rucker*, 2 Burr. 1167, 1170, Lord Mansfield says: "If part of the cargo, capable of a several and distinct valuation at the outset, be totally lost; as, if there were 100 hhds. of sugar, and ten happen to be lost, the insurer must pay the prime cost of these ten hhds., without any regard to the price for which the other ninety may be sold." The opinion of Lord Ellenborough in *Davy* v. *Milford*, 15 East, 559, is confirmed by this court in *Hodburg* v. *Pearson*, 7 Taunt. 154, 2 Marsh. 432. And in *Hills* v. *The London Assurance Corporation*, 5 M. & W. 569, 576, Lord Abinger says, "That was the case of a loss on a policy of insurance upon sugar, where each hogshead was separately valued and insured; and therefore a loss of one was properly held to be a total loss of that hogshead. But, on the other hand, in the case of *Hodburg* v. *Pearson*, where a part of each hogshead was saved, the jury having stated their opinion that the loss was an average one, and found accordingly, the court held that they were right in so doing. The law had been [27] settled in many cases before, that, where the insurance is upon each package separately, it is to be treated as a total loss upon each package lost; but, when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no average loss; and there cannot in such a case be any total loss of a portion only of the cargo" (*a*). In Arnold on Insurance, vol. 2, p. 1038, the rule is distinctly laid down, in accordance with all the authorities, as follows: "It is an undoubted doctrine in the English law of marine insurance, that, if a cargo of perishable goods be made up of several distinct packages, each capable of a separate valuation, and one or more of these be entirely lost, there is an absolute total loss upon every such package, though the rest of the cargo may come to hand only partially damaged, and the whole may have consisted of articles warranted free from average" (*b*). [Williams, J. That doctrine is distinctly repudiated by the Exchequer

(*a*) But see the remarks of Jervis, C. J., upon this case, in giving judgment in *Balli* v. *Janson*, 6 Ellis & B. 436, 437.

(*b*) This passage is expunged from the 2nd edition, and the decision in *Balli* v. *Janson*, adopted in lieu of it: vide vol. 2, p. 1058.

Chamber in *Ralli* v. *Janson:* see 6 Ellis & B. 441.] Be that as it may, the present case steers clear of the doctrine for the first time laid down in *Ralli* v. *Janson*. This is an insurance, not upon goods of a like species, but upon "master's effects," which must necessarily be of various kinds,—the general term being employed to describe them, in order to avoid unnecessary prolixity in enumerating the several articles in detail.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

[28] This action has been brought on a policy of marine insurance on goods on board the ship "Lion," for a voyage from Catania, in Sicily, to any port in the United Kingdom. The goods insured were described in the policy as "master's effects;" and the memorandum as to average was, "free from all average." Some of the goods thus insured were totally lost by the perils insured against, but others were saved.

At the trial, before my Lord Chief Justice, it was contended, on the part of the plaintiff, that he was entitled to recover in respect of the goods which had been lost, as for a total loss of each article. On the part of the defendant, it was answered, that he was exempted by the average memorandum, because the loss was only a partial loss of the subject insured: and it was argued that the present case must be governed by the recent decision of *Ralli* v. *Janson*, 6 Ellis & B. 422. The Lord Chief Justice reserved the point, but, in deference to that authority, directed a verdict to be entered for the defendant; giving leave to the plaintiff to move to enter a verdict for 67*l.* 10*s.* damages.

Having heard and considered the argument upon the rule granted in pursuance of that leave, we are of opinion that the present case is distinguishable from *Ralli* v. *Janson*, and that the rule to enter the verdict for the plaintiff must be made absolute. In that case, the Exchequer Chamber thought, that, as the insurance was on goods generally, and by the memorandum "seed" was warranted free from average, it was necessary, in the natural construction of the terms of the instrument, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the court could not apply the warranty to each bag in which the seed happened to be packed, as a distinct object.

But no such difficulty, we think, occurs in the pre-[29]-sent case. The articles which constitute the "master's effects" have no natural or artificial connexion with each other, but, of necessity, must be essentially different in their nature and kind, in their value, in the use to be made of them, and the mode in which they would be disposed on board. The word "effects" is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, &c., at which they happened to consist. And, although it is stipulated by the warranty that these effects shall be free of all average,—or, in other words, that the insurer shall not be liable for any amount of sea-damage to them short of a total loss,—we think, looking at the nature of the subject of insurance, and the terms of this exemption, it is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the "effects" consist. Suppose, instead of the general description of "masters effects," the body of the policy had enumerated them, and then the memorandum had said, "the chronometer, the sextant, the hat, and the great-coat above mentioned, to be free from average," &c.,—might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And, if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance.

The more strict construction leads to the very harsh and absurd consequence, that, if the assured happens to be successful in rescuing any portion of the articles insured, —even the clothes he may be wearing, –from [30] the perils of the sea, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost. This result is so startling that we find it impossible to believe the parties could have intended it. And it may be added, that the contract, so construed, would be quite at variance with the object for which, as it is well known, the memorandum as to average was introduced into policies, viz. that, since it may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually

specified in the memorandum, receive in the course of a voyage,—whether it arose from the nature of the articles themselves, or from the perils insured against,- the insurers thereby expressly provide, that, as to some kinds of goods, they will not be answerable for any average or partial loss, and, as to others, that they will not be liable for such loss not amounting to a certain per centage on the goods.

Rule absolute (*a*).

WILKINSON *v.* HYDE. [1858.]

[S. C. 27 L. J. C. P. 116; 4 Jur. N. S. 482. Referred to, *Calor* v. *Great Western Insurance Company of New York*, 1873, L. R. 8 C. P. 559.]

An insurance was effected for "240l., on goods so valued, against total loss only." The policy contained the usual memorandum against particular average under 3 or 5 per cent. The goods thus insured consisted of property of various descriptions in separate cases and packages, some of which were by a peril insured against totally lost, and others saved:—Held, on the authority of *Duff* v. *Mackenzie*, ante, p. 16,—that the assured was entitled to recover in respect of the packages so totally lost.

This was an action upon a policy of insurance.

The declaration stated that F. G. Goodliffe and A. Smart, as agents for the plaintiff, on the 21st of September, 1855, according to the usage and custom of merchants, caused to be made a certain policy of insurance purporting thereby and containing therein that [31] the said F. G. Goodliffe and A. Smart, as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from London to Natal, including risk of craft to and from the ship, &c., upon any kind of goods and merchandizes, and also upon the body, tackle, &c., and other furniture of and in the good ship or vessel called the "Annabella," &c., beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship as above, upon the said ship, &c., and so should continue and endure during her abode there, upon the said ship, &c., and further until the said ship with all her ordnance, tackle, &c., and goods and merchandizes whatsoever, should be arrived at as above, upon the said ship, &c. until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed: and it should be lawful for the said ship, &c. in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to that insurance: the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at 240l., on goods so valued, against total loss only: touching the adventures and perils which they the assurers were contented to bear and did take upon them on that voyage, they were of the seas, &c., &c.: and it was agreed by them the assurers that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London: and so they the assurers were con [32]-tented and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of 60s. per cent.: And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5l. per cent.; and all other goods, also the ship and freight, were warranted free from average under 3l. per cent., unless general, or the ship should be stranded: Averment, that the said policy of insurance and memorandum were so made by Goodliffe and Smart as the plaintiff's agents, and for his use and benefit, of which the defendant, afterwards, to wit, on, &c., had notice; and thereupon, in consideration that the plaintiff, at the request of the defen-

(*a*) See the next case.

dant, had then paid to the plaintiff a certain sum of money, to wit, a sum after the rate aforesaid, as a premium or reward for the insurance of 120l. of and upon the said goods in the said ship or vessel in the said voyage in the said policy of insurance mentioned, and had then promised the defendant to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendant then promised the plaintiff that he the defendant would become and be an insurer to the plaintiff of the said sum of 120l. upon the said goods in the said ship or vessel in the said voyage in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned on his part and behalf as such insurer of the said sum of 120l. to be performed and fulfilled; and the defendant then **[33]** became and was an insurer to the plaintiff, and then duly subscribed the said policy of insurance as such insurer of the said sum of 120l., upon the said goods in the said ship or vessel in the said voyage: That divers goods of different kinds and descriptions, and in separate cases and packages, were shipped by the plaintiff in and on board of the said ship or vessel in the said policy of insurance mentioned, to be carried and conveyed therein on the said voyage, which goods were of the kinds and descriptions, and in the cases and packages following, that is to say, one case marked A W 26, containing one waggon, four wheels, and three packages of fittings for the waggon,—one other case marked A W 27, containing one tent,—three other cases marked A W 28, 29, 30, containing clothes and wearing apparel,—one other case marked A W 31 containing circular saws, -seven other cases marked A W 32, 33, 34, 35, 36, 37, 38, containing tools and metal castings,—one other case marked A W 39 containing an iron anvil,—one other case marked A W 40 containing an iron vice,—one other case marked A W 41 containing two pieces of steel,—one other case marked A W 42 containing iron agricultural implements,—one other case marked A W 43 containing a cart-wheel,—one other case marked A W 44 containing a package of iron,—one other case marked A W 45 containing iron rods,—one other case marked A W 46 containing an iron axle,—one other case marked A W 47 containing a harrow bar,—two other cases marked A W 58, 59, containing hardware, -four other cases marked A W 80, 81, 82, 83, containing window sheet-glass,—ten kegs marked A W 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, containing nails,—one bundle marked A W 60 containing spades, shovels, and crowbars,—nineteen other bundles marked A W 61 to 79 containing iron wire, -also five bars of iron and seven bundles of iron: That the plaintiff, at the time of the **[34]** shipping of the said goods, and from thence until the time of the loss thereinafter mentioned, was interested in the said goods in the said policy of insurance mentioned, and so shipped on board the said ship as aforesaid, to a large value and amount, to wit, the value and amount of all the moneys by him ever insured or caused to be insured thereon: That the said ship or vessel with the said goods on board thereof afterwards departed and set sail from London aforesaid on her said voyage towards Natal aforesaid, and that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, and before her arrival at Natal aforesaid, and during the continuance of the risk insured by the said policy, all the said goods except the said case of circular saws, marked A W 31, and except two of the said cases of window sheet-glass, were totally lost by the perils of the seas, and never did arrive at Natal aforesaid: And that each of the said cases and packages with goods therein was of great value, and that the value of the goods so totally lost amounted to a large sum of money, to wit, 233l. 16s. 9d., and that the value of the said case of iron saws that was not lost was a small sum, to wit, 10l. 14s. 1d., and the value of the said two cases of window sheet-glass that were not lost was a small sum, to wit, 3l. 1s. 6d., and thereupon a large sum of money, to wit, 113l. 3s., became and was due and payable by the defendant to the plaintiff under and by virtue of the said policy,—of all which the defendant had due notice, and was requested by the plaintiff to pay him the said sum in respect of the said goods so wholly lost as aforesaid, and which sum the defendant then ought to have paid according to the form and effect of the said policy of insurance and his said promise and undertaking so by him made as aforesaid: Yet that the defendant had disregarded his said promise, and had not paid the same, or any part thereof: and the plain-**[35]**-tiff averred that he had duly performed all conditions precedent to entitle him to support this action: and he claimed 150l.

The defendant pleaded,—thirdly, that the policy was made upon goods against total loss only, and, at the time of the making of the policy, the plaintiff and his agents

knew, and the defendant did not know, that the goods which were to be the subject-matter of the policy were of different kinds and descriptions, and to be packed in separate cases and packages, and that, in consequence thereof, the defendant might under the policy be called upon to indemnify the plaintiff for a total loss of part of the goods, not being a total loss of the whole; and that this was a material fact affecting the rate of premium, and the nature of the risk, and that it was concealed from him.

Second replication to the third plea,—that the said insurance was proposed by the plaintiff to the defendant on goods against total loss only, as mentioned in the policy, and not otherwise, and that no inquiry was ever made by the defendant of the plaintiff as to whether the goods were to be all of the same or different kinds or descriptions, or to be packed in separate cases or packages; and that the plaintiff did not communicate to the defendant that he intended to ship goods of different kinds and descriptions, and to be packed in separate cases and packages, because he believed that the defendant well knew, that, under the terms of the policy, the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and packages; and that this was the true meaning and effect of the policy; and that the defendant reasonably might and could and ought to have known that it was the true intent and meaning of the policy that the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and packages, and that [36] the plaintiff did not know that the fact stated in the plea was a material fact affecting the rate of premium and the nature of the risk.

The plaintiff also demurred to the third plea, on the ground "that it was not material or necessary to have informed the defendant that the goods were of different kinds and descriptions, and packed in separate cases and packages, in order to give validity to the policy." Joinder.

The defendant demurred to the second replication to the third plea, assigning for cause "that it was immaterial that the defendant made no inquiries as to the fact concealed." Joinder.

Bovill, Q. C. (with whom was Mellish), in support of the demurrer (*a*)[1]. This case must be governed by *Duff* v. *Mackenzie*, ante, p. 16. The policy is "on goods," valued at 240*l*., and is against "total loss only," with the ordinary memorandum of warranty against average under five and three per cent. [Williams, J. The special words "against total loss only," render the memorandum useless.] The memorandum may serve to shew the sense in which the word "goods" is used. Under this policy the plaintiff shipped a number of cases and packages of miscellaneous goods, apparently the equipment of an emigrant. The vessel was wrecked, [37] and all the goods lost, with the exception of a case of circular saws and a case of window sheet glass: and the question is, whether that is a total loss of the packages which were actually lost, or an average loss only. By the contract, the assured was not precluded from shipping goods of any description he pleased; nor was he bound to disclose of what the several packages consisted. Upon the authority of *Duff* v. *Mackenzie*, the plaintiff is clearly entitled to recover as for a total loss the value of the packages which were lost; and the case is wholly unaffected by *Ralli* v. *Janson*, 6 Ellis & B. 422.

Blackburn, contra (*a*)[2]. *Duff* v. *Mackenzie* proceeded upon a distinction which is wholly inapplicable here. This is an insurance against total loss only, that is, a total loss of the subject-matter of insurance. The assured, in the event of a total loss, was

(*a*)[1] The points marked for argument on the part of the plaintiff, were,—

"That he is entitled to recover the value of the packages totally lost; that it was not necessary to have informed the defendant that the goods were of different kinds and descriptions, and packed in separate cases and packages; that the defendant ought to have known that the true intent and meaning of the policy was that the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and packages; and that there was no concealment of a material fact."

(*a*)[2] The points marked for argument on the part of the defendant, were,

"1. That, the policy being on goods against total loss only, and it being admitted on the count that the total of the goods were not lost, there is no cause of action disclosed, and the defendant is entitled to judgment on the whole record, whether the plea or the replication be or be not good:

"2. That, if the insured could by packing his goods in a particular manner increase

to receive 240l., all or nothing. It is impossible to conceive a mode of expressing that meaning more clearly than that here adopted. In *Duff* v. *Mackenzie*, the court suggest that the word "effects" was obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, &c., of which they happened to consist. "Suppose," they say, "in-[38]-stead of the general description of 'master's effects,' the body of the policy had enumerated them, and then the memorandum had said, 'the chronometer, the sextant, the hat, and the great-coat above mentioned, to be free from average,' &c.,—might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And, if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance." [Williams, J. Would the judgment have been different in that case, if the insurance had been upon "effects" merely?] It would have been bad if it had not. *Ralli* v. *Janson* in reality decides this case. Indeed all the authorities on the subject are one way, with the exception of *Davy* v. *Milford*, 15 East, 559, which must now be considered as over-ruled. According to the doctrine there laid down, if part of the goods insured had been corn and part iron, the memorandum would have applied to the former, and not to the latter: if the whole of the corn had been lost, the assured would have been entitled to recover, though the iron were not lost. Wherever the right to abandon exists, it must be of the entire subject-matter of insurance. Emerigon, vol. ii., c. 17, § 8, p. 248, says: "Le Guidon de la Mer, ch. 7, art. 7, 8, et 9, distingue le cas où l'on a fait assurer diverses espèces ou sortes de marchandises, d'avec le cas où l'assurance porte sur le même genre de marchandises, telles que fruits, sel, grains, victuailles, ou autre provisions. Dans le premier cas, si l'une des marchandises était perdue ou avariée audela de la moitié, on pouvait en faire délaissement aux assureurs, et retenir l'autre. Dans le [39] second cas, où il s'agit d'un même genre de marchandises, l'assuré (est-il dit) ne pourra faire delais de ce qui est gâté, et retenir ce qui est sain: mais faudra qu'il fasse delais de tout l'espèce. Notre Ordonnance, en l'art. 47, a établi une règle plus simple. On ne pourra, dit-elle, faire délaissement d'une partie et retenir l'autre. Car, comme l'observe M. Valin, ibid., le contrat d'assurance, étant individu, ne peut souffrir aucune division. Mais, quelque simple que cette règle paraisse, elle a besoin de quelque interprétation. 1. Je me fais indéfiniment assurer 10,000 liv. sur facultés, ou sur telles et telles marchandises, chargees dans un tel navire, sans rien distinguer: cette assurance est une: unica assecuratio omnium mercium. Je ne puis delaisser mes sucres, et retenir mes indigos. De Luca, de Credito, disc. 108, No. 11: Casaregis, disc. 1, No. 110: Valin, dicto loco; Pothier, No. 131. 2. Si par une police, je fais assurer mes sucres, et par une autre mes indigos; ou si, par la même police, je fais assurer distinctement et séparément telle somme sur mes sucres, et telle autre somme sur mes indigos, je pourrai, le cas écheant, retenir l'un de ces objets et delaisser l'autre, parceque ce sont deux assurances distinctes l'une de l'autre: duæ assecurationes: De Luca et Casaregis, d. locis; Valin, art. 47; Pothier, n. 132. Le sieur Peyronet, de Bordeaux, armateur du navire le Saint-Marc, s'était fait assurer par une même police, 24,000 liv., savoir, 6000 liv. sur le corp, et le reste sur les facultés. Dans le cours du voyage, le navire fut déclaré innavigable. L'assuré aurait pu, suivant la jurisprudence alors en vigueur, faire abandon du corps et des facultés: mais comme les faculés et le corps avaient été distingués dans la police, il se borna a presenter requête en abandon du corps, et en paiement des 6000 liv. assurees sur icelui. Les assureurs contestaient cette requête, soutenant que l'assuré aurait dû abandonner également la cargaison. Cette ex-[40]-ception fut rejettée; et par sentence de notre amirauté, rendue le 16 mars, 1752, les assureurs furent condamnés à payer le somme demandée. 3. Si je fait assurer une somme confusément et sans distinction sur corps et facultés, et que le navire fasse naufrage, je ne puis retenir, en tout ni en partie, les marchandises sauvés, et délaisser le corps naufragé." [Williams, J. The view which you take goes to shew that the

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the risk of the underwriters, he ought not to have concealed, that, at the time of the insurance, he intended so to pack them; and that the plea is good:

"3. That the replication is not sufficient, the insured being bound to disclose all material facts in his knowledge, without inquiry."

decision in *Duff* v. *Mackenzie* was wrong: which we cannot admit. Willes, J. There are many rules as to abandonment in the French law, which are not received here.] In Arnould on Insurance, 2nd edit. vol. 2, pp. 1158-1160, it is said: "Where a gross sum is insured in a single policy upon a general class comprising several particular subjects, without specifying on which, or to what amount on each, —the insurance is one and entire, and the abandonment, consequently, must extend to the whole class. Thus, if 1000*l.* be insured 'on goods' generally, and the goods in fact consist partly of sugars and partly of indigoes, the assured cannot, in case of wreck, or other constructive total loss, abandon his sugars, and retain his indigoes, or vice versâ (*a*)[1]. If, however, a specific and distinct sum be insured on each kind of commodities, —as '1000*l.* on the sugars, and 1000*l.* on the indigoes,'—in such case, either of these two subjects may be separately abandoned. It has been said by a high authority in the law of marine insurance, that, if the several kinds of commodities are each separately valued in the policy, they may each be separately abandoned, even though a specific and distinct sum may not be insured upon each: Marshall on Insurance, 612. Accord-**[41]**-ingly, in the United States, where one gross sum was insured 'on 150 boxes of sugars, valued at 6000*l.*, 5 hampers of mace, valued at 5000*l.*, and 4 tons of logwood, valued at 250*l.*,' it was held, that, under such a policy, the assured might abandon each article separately (*a*)[2]. This rule is doubted by Mr. Phillips, who contends that the insurance in such case is one and entire, though the valuation is distinct, and that, consequently, the abandonment ought to be entire also (*b*). In this country, however, there seems little doubt that the rule as laid down by Mr. Marshall is that to be acted upon, especially in cases where perishable commodities are shipped in separate packages; when, as we have seen, the insurance is in practice taken to be distinct on each species, even without a special clause to that effect (*c*). Chancellor Kent, after noticing the doubt raised by Mr. Phillips, thus cautiously lays down the rule,—Comm. vol. 3, p. 329, edit. 1844,—'Unless the different sorts of cargo be so distinctly separated and considered in the policy as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured.'" In *Humphreys* v. *The Union Insurance Company*, 3 Mason, U. S. 429, 440, the insurance was on "cargo," with the usual memorandum exempting the underwriter from particular average on "salt, fish, fruit, grain," &c. The shipment consisted of a certain number of boxes of lemons and oranges: the whole of the latter were lost, but a portion of the former were saved; and it was held, that the underwriters were not liable as for a total loss of the oranges. Mr. Justice Story says: "The **[42]** fifth and last point is, whether the plaintiff is entitled to recover for a total loss of the oranges. The argument is, that the memorandum is not designed to exclude losses where there is a total destruction of any specific separated portion, as, a box, hogshead, or bale of the memorandum articles; and, à fortiori, not where there is a total destruction of the whole of any single memorandum article. The present insurance is upon cargo generally, and the memorandum in express terms exempts the underwriter from particular averages or partial losses on 'salt, fish, fruit, grain,' &c. &c. The memorandum does not designate oranges particularly by name, but they are comprehended merely because they fall under the general description of 'fruit.' In the present case, there were 1100 boxes of lemons, and 299 boxes of oranges on board. Of the lemons, 806 boxes were saved; and, supposing there was, upon the facts stated by the auditors (*a*)[3], a total loss of the oranges, still there is no pretence to say that the whole of the memorandum article 'fruit' was lost. The argument, there-

(*a*)[1] Emerigon, ch. xvii., § 8, vol. 2, p. 249, edit. 1827. So decided in the United States, in case of a general insurance on a cargo consisting of beef, butter, soap, candles, apples, and potatoes. *Guerlain* v. *Columbian Insurance Company*, 7 Johns. 527; cited Phillips on Insurance, vol. 2, p. 359, 3rd edit.

(*a*)[2] *Diedericks* v. *The Commercial Insurance Company of New York*, 10 Johns. 234.

(*b*) Phil. Ins. vol. 2, p. 370. He adheres to his opinion in the 3rd edit. pp. 360, 361.

(*c*) See Stevens on Average, 237, 5th edit. But see *Ralli* v. *Janson*, 6 Ellis & B. 422.

(*a*)[3] To whom it had been referred to report and state the loss, —a proceeding equivalent to a reference to an arbitrator to state a case for the opinion of the court upon questions of law.

fore, if it is to stand at all, must stand upon the ground that the loss of the whole of any one article falling under the description of 'fruit' in the memorandum, is a loss for which the underwriters are liable. It is not distinguishable in principle from the case of the loss of a whole hogshead of sugar, in policies where sugar is warranted free from particular average (*b*). The case of *Dyson* v. *Rowcroft*, 3 B. & P. 474, seems to me to be perfectly correct in principle, but it turned altogether **[43]** upon different principles. The insurance was on fruit; and, in the course of the voyage, the fruit was so much damaged by the perils of the seas that it was rotten, and was necessarily thrown overboard at an intermediate port, into which the ship was driven. The loss was completely total by the destruction of the fruit before it arrived at the port of destination. That case applies to the present no further than it has a tendency to prove that there was in contemplation of law a total loss of the oranges by the events of the voyage. That point has not been much contested at the argument, and may be passed over without further observation." And, observing upon *Davy* v. *Milford*, 15 East, 559, this distinguished jurist says: "The insurance in *Davy* v. *Milford* was not on each parcel of flax separately, but on the aggregate as a totality. The memorandum warrants the underwriter free of particular average on the thing insured. It binds him only to a total loss of the thing insured. It seems to me that the error of the reasoning is, in considering the insurance as a separate insurance on each distinct parcel, and not as an insurance on the aggregate. This is a departure from the policy." If that be good law, how can the several packages here insured under the general description of "goods" valued at a given sum, be taken divisim? In *Brooke* v. *The Louisiana State Insurance Company*, 4 Martin, N. S. 640, 681, 5 Martin, N. S. 530 (cited, 2 Phillips on Insurance, 3rd edit. 642), mules were insured from St. Iago, in Mexico, to the island of Cuba, "against stranding and total loss:" the assured claimed for a loss of part of the mules by perils of the sea, the remainder having arrived; and the court were, upon the first argument of the case, in favour of the claim, but, on a rehearing before the same and another judge, the decision was the other way. Matthews, J., on the last occasion, says,—5 Martin, 546,—"The clear, evi-**[44]**dent, and ordinary meaning of the written clause in the policy, on which the present suit is founded according to just grammatical and legal construction, limits the liability of the defendants to indemnify for such loss only as amounts to an entire physical destruction of the whole cargo, or perhaps a total loss as to the value." [Willes, J. This is all perfectly reconcileable with the judgment of the Exchequer Chamber in *Ralli* v. *Janson*.] Assuming that the court are against me as to the construction of the policy, if, at the time of making the policy, the assured had in his own mind determined what the subject-matter of the insurance should consist of, it was his duty to communicate it to the underwriters: *Middlewood* v. *Blakes*, 7 T. R. 162. And, if the plea be good, the replication clearly affords no answer to it.

Bovill, in reply, was stopped by the court.

Williams, J. Notwithstanding the learned argument of Mr. Blackburn, I am of opinion that it is impossible to distinguish this case from *Duff* v. *Mackenzie*, ante, p. 16. If the defendants are dissatisfied with the law as laid down in that case, they must have recourse to the Exchequer Chamber, where it will be set right, if wrongly expounded by us. Applying the doctrine of that case here, as soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated. The words "against total loss only" cannot mean "total loss of the whole subject of insurance," taken collectively, as Mr. Blackburn contends. The object is simply to get rid of the common average memorandum,—to exempt the underwriters from responsibility except in respect of a total loss of the subject-matters of insurance each taken separately. I see no more reason why the different sorts of "goods" **[45]** should be enumerated, than that "master's effects" should be separately described. The underwriter who "insures "goods" has no right to expect that they shall be all of one species. I cannot entertain a shade of doubt that the plaintiff is entitled to recover.

Willes, J. I am of the same opinion. I am unable to distinguish this case from *Duff* v. *Mackenzie*. The material words of the policy are,—"240l., on goods so valued, against total loss only." The only effect of these latter words is, to strike out the usual

(*b*) See *Lewis* v. *Rucker*, 2 Burr. 1167: and see *Hellburg* v. *Pearson*, 7 Taunt. 154, 2 Marsh. 432; and the judgment in *Ralli* v. *Janson*, 6 Ellis & B. 432, 433.

memorandum: the goods are warranted against general average. It is now established by *Ralli* v. *Janson*, that, if the goods are all of one species, the warranty against particular average extends to the whole subject of insurance, though it may be contained in different packages. But the court carefully abstained from saying what would have been the case if the goods had been of different kinds. It was proper to exclude that, because it appeared from the cases cited from the American courts that the assured was held to have no claim on account either of a partial destruction of the value of the article, or a destruction of a part of the article, whether it be shipped in bulk or in separate packages, unless the policy indicate that a loss is to be adjusted on each package; in other words, unless each package is separately valued and insured, —see *Humphreys* v. *The Union Insurance Company*, 3 Mason, 429, though it is now held the other way in America: see *Brooke* v. *The Louisiana Insurance Company*, 4 Martin, N. S. 640, 681, and 5 Martin, N. S. 530. In *Humphreys* v. *The Union Insurance Company*, the goods were all of one species, viz. fruit: part of the cargo, consisting of oranges, was totally lost; the residue, consisting of lemons, was saved: and it was held that the warranty against particular average on "fruit" exonerated the un**[46]**derwriters. In *Brooke* v. *The Louisiana Insurance Company*, the subject-matter of insurance was a number of mules, and the insurance was against total loss only; and it was ultimately held that nothing short of a physical total loss of the whole number insured would render the assurers responsible. That is in accordance with the judgment of the Exchequer Chamber in *Ralli* v. *Janson*, and goes to the same extent, no further. With regard to the passage cited from Emérigon, it is impossible to apply the reasoning of the French law as to abandonment to a totally different branch of the law of insurance in England. In *Duff* v. *Mackenzie*, the insurance was upon "master's effects," free from all average; and some of the articles comprised in that general term having been saved, the assured was held entitled to recover the value of others which were totally lost,—on the ground that a person insuring "master's effects" must be assumed to know that the things so described must consist of articles of various kinds and descriptions. Mr. Blackburn has very ingeniously attempted to argue that there is a distinction between an insurance on "master's effects," and on "goods" generally. But I think it is too subtle a distinction to be adopted into our mercantile law. The meaning of the words here used is,—"I agree to insure (to the extent stipulated) any cargo you may choose to put on board." Both parties must be assumed to know that "cargo" may consist of goods of different species. It seems to me that that brings the present case technically as well as substantially within the decision in *Duff* v. *Mackenzie*, to which I am disposed to adhere. If that decision is thought erroneous, the parties must go elsewhere to set it right.

Byles, J. I am of the same opinion. Since the case of *Dacy* v. *Milford*, 15 East, 559, it seems, that the **[47]** expression "total loss" is an ambiguous one; it may mean a total loss of the whole subject-matter of insurance, or a total loss of part. Mr. Blackburn here insists that the total loss in this policy means such a loss as shall involve the physical destruction of the entire subject of insurance. Consistently with *Duff* v. *Mackenzie*, I think it is impossible to hold otherwise than that the declaration in this case is good, and the plea no answer to it.

Judgment for the plaintiff.

Sophia Gomm, Demandant; John Parrott, Tenant. July 4th, 1857.

[S. C. 26 L. J. C. P. 279; 3 Jur. N. S. 1150; 5 W. R. 882. Discussed, and commented on, *Hill* v. *Campbell*, 1875, L. R. 10 C. P. 233.]

Inspection, under the 14 & 15 Vict. c. 99, s. 6, can only be had in a case where a discovery could have been obtained by filing a bill in equity. A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a bonâ fide purchaser for value, without notice of the marriage, the balance of authorities being assumed to be in favour of the position that a bill for discovery could not be sustained in such a case.

This was an action brought to recover dower to which the demandant claimed to be entitled out of certain woodland called the Ouve Wood and Tatnals, in the parishes

of Buckland and Aston Clinton, in the county of Buckingham, as the widow of the late James Gomm, deceased, her late husband, her claim arising under the purchase deed and conveyance to her said late husband.

Lush, in Trinity Term last, obtained a rule on behalf of the demandant, calling upon the tenant to shew cause why the demandant or her attorney should not be at liberty to inspect and take extracts from a certain deed of conveyance by way of mortgage from one James Gomm, of the lands in respect of which the dower was claimed in this action, being the deed of conveyance first mentioned in the affidavit of the tenant, hereinafter mentioned. The affidavits upon which the rule [48] was founded, were those of the demandant and of the tenant, which had already been used at Chambers upon a similar application. The affidavit of the former stated that she had been informed and believed that the tenant had become the purchaser of the said two woods, or one of them, and on such purchase the deed of conveyance to her said late husband was delivered to, and was then in the possession of, the tenant; and that she was advised that it was material and necessary that her attorney should have an inspection of, and, if necessary, take extracts from, such conveyance, as also of the subsequent deeds of conveyance relating to the said two pieces of woodland; and that she could not safely proceed to trial without such inspection.

The other affidavit stated, that the hereditaments and premises mentioned or referred to in the pleadings in this cause, were, as the deponent believed, about thirty-five years ago conveyed to or in trust for one James Gomm; that the same hereditaments and premises were a few days subsequently to such purchase conveyed by the said James Gomm and another to certain persons, to secure the re-payment of a certain sum of money then advanced and lent by them to the said James Gomm, to enable him to pay the purchase-money for the same hereditaments and premises, and, in default of re-payment of the same by the said James Gomm to the said trustees of the principal money and interest, upon trust for sale of the same hereditaments by the said mortgagees; that the deponent was informed and believed that default was made in re-payment of the money so advanced, and that the said trustees, with the concurrence of the said James Gomm, shortly after such mortgage, sold and conveyed the same to a bonâ fide purchaser for the valuable consideration in such deed mentioned, the said James Gomm being a party to and executing the conveyance, and entering into the usual [49] covenant against incumbrances; that the trustees under the will of such last purchaser again sold the same hereditaments and premises for a valuable consideration, and such hereditaments and premises were, with the exception next thereinafter mentioned, then absolutely vested in and belonged to the deponent, for and by reason of a valuable consideration, and had been so vested for some years without claim or interruption, save as above mentioned; that one half of the field called Tatternolds in the affidavit of the demandant was not the deponent's property, nor had he any interest whatsoever in such half, the fee-simple thereof and therein being vested in another party, who held the same under a similar title to that under which the deponent held the other half; that the deponent never had any notice or knowledge that the said James Gomm was ever married, or had left any widow, or that the same hereditaments and premises were subject to dower, or to any claim for dower, until application was made to him by the demandant's attorney within the last twelve months; and that, in case an order should be made in this case in the terms asked for, he would be exposing the title of a person not party to the suit, and might thus prejudice his interest, without his knowledge.

Wigram on Discovery, 81, 82, *Orey* v. *Leighton*, 2 Sim. & Stu. 234, *The Earl of Portarlington* v. *Soulby*, 7 Sim. 28, and *Williams* v. *Lambe*, 3 Bro. C. C. 264, were referred to.

J. B. Maule shewed cause. The short answer to this rule is, that it is calling upon the tenant to expose the title of a third party. Besides, as to a portion of the property, the tenant is a bonâ fide purchaser for value, without notice. All the cases are collected in Sugden's Vendor and Purchaser, 13th edit. 644, where it is said: "The title of a purchaser for valuable consideration [50] without notice, is a shield to defend the possession of the purchaser,—*Patterson* v. *Slaughter*, Ambl. 292,—not a sword to attack the possession of others,—*Strode* v. *Blackburne*, 3 Ves. 225. It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned,—*Medlicott* v. *O'Donel*, 1 Ball & B. 171: and it now seems to be settled that it will avail against a legal title. In *Burlace* v. *Cooke*, 2 Freem. 24,

Lord Nottingham held the plea to be good against a legal estate; but, in the subsequent case of *Rogers* v. *Seale*, 2 Freem. 84, he is reported to have been of a different opinion, and to have decreed accordingly. But both these cases appear to be very ill reported. In *Parker* v. *Blythmore*, 2 Eq. Ca. Abr. 79, Prec. in Ch. 58, the Master of the Rolls thought the plea good against a legal estate. But, in *Williams* v. *Lambe*, 3 Bro. C. C. 264, upon a bill filed by a dowress against a bonâ fide purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower: that he thought, where the party is pursuing a legal title, as dower is, the plea did not apply, it being only a bar to an equitable, not a legal claim. In a later case, *Jerrard* v. *Saunders*, 2 Ves jun. 454,—Lord Rosslyn considered it impossible that *Rogers* v. *Seale* could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title." The judgment of Lord Rosslyn in that case fully sustains the principle now contended for (*a*).

Lush, in support of his rule. That which the de-[51]-mandant seeks to have an inspection of, is, the deed by which her husband first conveyed away the property out of which she claims dower. *Williams* v. *Lambe*, 3 B. C. C. 264, was the case of a bill for dower, stating that the plaintiff was lawfully married to William Williams, and continued his wife to the time of his death; that William Williams, being seised of lands, &c., during the coverture, in February, 1783, sold the same to the defendant, who entered into possession of the same; and that Williams died in May, 1786, leaving the plaintiff his widow: the bill therefore prayed a discovery of the lands, and that the defendant might assign to her one third part as her dower. The defendant pleaded to the discovery and relief, that he was a purchaser of the estate (subject to a mortgage), for valuable consideration, without notice of the vendor being married: and the plea was overruled,—the Lord Chancellor saying "that he thought, where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim." The note to that case by Mr. Belt points out the distinction, which it is submitted is a sound one, between it and *Jerrard* v. *Saunders*:—"Notwithstanding what is said to the contrary, in *Bassett* v. *Nosworthy*, Finch. 102, approved, as it seems to be, by Lord Loughborough, C., 2 Ves. jun. 457, 458, and notwithstanding what is said by Mr. Sugden at the conclusion of his work on Vendors and Purchasers, pp. 667, 668 (5th edit.), so much respect is due to Lord Thurlow's judgment in marking the distinction within stated, that the editor questions whether the point has been sufficiently considered. The editor, in particular, much questions whether Lord Loughborough was aware of the present determination, when he threw out the general propositions above adverted to in this note (2 Ves. jun. 458). Mr. Beames, who is eminently versed in the doctrine of pleas, both at law [52] and in equity, distinctly treats Lord Thurlow's decision here as unimpeachable, notwithstanding he had a few pages before quoted the dicta to the contrary in *Bassett* v. *Nosworthy* (vide Elem. Pl. 245, 234); and it is very satisfactory to the editor to find his own sentiments corroborated by the observations of Mr. Roper, contained in his modern treatise on the law of Baron and Feme, vol. i., 446, 447 (2nd edit. p 451). That gentleman, speaking of the principal case, says,—'This decision, though quarrelled with, is, as it would seem, sound and proper; for, when it is admitted that dower is a mere legal right, and that a court of equity, in assuming a concurrent jurisdiction with courts of law, professedly acts upon the legal right, that court, in analogy to law, where such a plea would not be looked at, decides that in this instance the same equitable plea is also inadmissible. This analogy, it is obvious, does not hold where the widow applies for equitable relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice, cannot, as it would seem, be resisted. In the first case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right which the defendant cannot at law resist by such a mode of defence: in the second case, she applies to the equity of the court to take away from him a defence which at law would protect him against her demand.' The editor has also to observe that Lord Redesdale, in the last edition (3rd) of his treatise (p. 38), does not question the decision in the principal case; with regard to which the profession should also be referred to 1 Ball & B 171," *Medhurst* v. *O'Donel*.

(*a*) And see Spence's Equitable Jurisdiction of the Court of Chancery, vol. 2, p. 733, and note (*c*).

Here, the plaintiff is asserting a strictly legal right. In *Curtis* v. *Curtis*, 2 Bro. C. C. 620, which was the case of a bill filed by a widow, against the heir of her husband, for dower, the Master **[53]** of the Rolls says: "Generally, there are no damages in real actions, but so favorable was the law to this particular action, that it provided a special relief for the widow, by giving her damages." And at the conclusion of his judgment, he adds: "I agree most fully in thinking that the widow labours under so many disadvantages at law, from the embarrassments of trust-terms, &c., that she is fully entitled to every assistance that this court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." That was followed by *Williams* v. *Lambe*, which has never been overruled. *Jerrard* v. *Saunders*, 2 Ves. jun. 454, was not a case of dower. Every purchaser must know that the estate is liable to that sort of incumbrance: he is bound to inquire into the fact of marriage, and therefore cannot be said to be a purchaser without notice. Sir James Wigram, in his treatise on Discovery, 2nd edit. p. 81, enumerating the exceptions to the cases in which a plaintiff in equity was entitled to exact from the defendant a discovery as to matters material to his case, says,—"So, formerly, if the defendant were a purchaser without notice of the plaintiff's claim." "But," he adds, "later decisions seem to consider a purchaser for value without notice, as not entitled to any greater privilege than a party having any other ground of defence" (*a*)[1]. That learned author does not put it on the ground of the peculiar nature of the action of dower. In *Medlicott* v. *O'Donel*, 1 Ball & B 171, adverting to an argument which had been urged at the bar, that the plea of purchase without notice did not apply to the case of an equitable estate, Lord Chancellor Manners says, —"I have always thought that he who had the **[54]** best right to call for the legal estate, is entitled to this defence:" and he refers to *Williams* v. *Lambe*. [Williams, J. Was *Medlicott* v. *O'Donel* cited in *Joyce* v. *De Moleyns*, 2 Jones & Lat. 374?] It was not (*a*)[2]. The same distinction is taken in *Collins* v. *Archer*, 1 Russ. & M. 284, where Sir John Leach, M. R., says: "The defendant states by his answer that he is a purchaser for valuable consideration, without notice of the plaintiff's prior charge. Following the case of *Williams* v. *Lambe*, and the general principle of a court of equity, I am of opinion that that defence is of no avail against the legal title." In Story's Equity Jurisprudence, 6th edit. §§ 630, 631, the learned author, speaking of *Williams* v. *Lambe*, says: "This decision has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated with great apparent force, upon the following reasoning. It is admitted, that dower is a mere legal right; and that a court of equity, in assuming a concurrent jurisdiction with courts of law upon the subject, professedly acts upon the legal right; for, dower does not attach upon **[55]** an equitable estate. In so acting, the court should proceed in analogy to the law, where such a plea, of a purchase for a valuable consideration without notice, would not be looked at; and therefore as an equitable plea it should also be inadmissible. But this analogy will not hold where the widow applies for equitable relief, as, for the removal of terms out of her way, or for a discovery. In the latter cases, the equitable plea of a purchase for a valuable consideration without notice, cannot be resisted. In the former case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right, which the defendant cannot at law resist by such a mode of defence. In the latter case, she applies to the equity of the court, to take away from him a defence which at law would protect him against her demand."

(*a*)[1] Referring to *Grey* v. *Leighton*, 2 Sim. & Stu. 234, *The Earl of Portarlington* v. *Soulby*, 7 Sim. 28, and Sugden's Vendors and Purchasers, 304.

(*a*)[2] In *Joyce* v. *De Moleyns*, it was held by Sir E. Sugden, C., that a purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title. That case is observed upon by Lord Cottenham, C., in *Fraser* v. *Jones*, 17 Law J., Chan. 353, thus:—"But then comes the question which I should not have had much difficulty about if it had not been for the case of *Joyce* v. *De Moleyns*, which raises a proposition that I believe is raised for the first time: because the case of *Wallwyn* v. *Lee*, 9 Ves. 24, which is supposed to have been an authority for it, is very distinguishable: but it raises, undoubtedly, a question, and one that is perhaps extremely difficult to deal with against the authority on which that case was pronounced: at least, it is one that requires careful consideration before I should feel justified in overruling a decision so much considered as the case of *Joyce* v. *De Moleyns* appears to have been"

"Other learned minds have, however, arrived at a different conclusion, and have insisted, that, upon principle, the plea of a purchase for a valuable consideration, without notice, is a good plea in all cases, against a legal as well as against an equitable claim; and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support as any other claimant; and that he has a right to say, that, having bonâ fide and honestly paid his money, no person has a right to require him to discover any facts which shall shew any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognized exception seems to be that of dower, if that can be deemed a fixed exception." And in a note to this passage, it is said: "The authorities are both ways. The case of *Williams* v. *Lambe*, 3 Bro. C. C. 264, *Collins* v. *Archer*, 1 Russ. & M. 284, and *Rogers* v. *Seale*, 2 Freem. 84, are in favour of the doctrine that [56] the plea is not good against a legal title. Against it is the decision in *Burlace* v. *Cooke*, 2 Freem. 24, *Parker* v. *Blythmore*, 2 Eq. Abr. 79, Prec. in Ch. 58, *Jerrard* v. *Saunders*, 2 Ves. jun. 454, and *Payne* v. *Compton*, 2 Y. & C. (Exch.) 457, 461, *Blain* v. *Harrison*, 11 Illinois R. 384. Mr. Sugden, in a very late edition (1826) of his work on Vendors and Purchasers, ch. 18, pp. 762, 763, maintains that the authorities in favour of the sufficiency of the plea against a legal title preponderate; and that, therefore, we may venture to assert that it will protect the purchaser against a legal as well as against an equitable claim. On the other hand, Mr. Beames, Mr. Belt, and Mr. Roper maintain the opposite doctrine: Beames, Pl. Eq. 234, 245; 3 Bro. C. C. 264, n.; 1 Roper on Husband and Wife, 446, 447 (2nd edit. 451). See also *Medlicott* v. *O'Donel*, 1 Ball & B. 171; Mitford, Pl. Eq. 274, by Jeremy, and note (*d*); 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*h*); 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note. In a case of such conflict of learned opinions, a commentator's duty is best performed by leaving the authorities for the reader's own judgment. See Park on Dower, ch. 15, pp. 327, 328, and the reporter's note to 1 Russ. & M. 289." Although there is this conflict of authorities, it is submitted that the demandant is, upon general principles, entitled to a discovery as to the contents of the deed in question, in order to prove her case. [Cresswell, J. The deed of which you seek to have an inspection is not part of your title. It is true you want it for the purpose of proving your case: but it is a deed in which you have no interest. Have you any authority for giving discovery of a deed under which the tenant holds? The deed in question proves that the tenant takes the land in fee from the husband.

CRESSWELL, J. I think, as the case is one of so much [57] difficulty that Story declines to decide it, it is incumbent on us to take time to look into the authorities.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:

In this case, the demandant in an action in dower obtained a rule calling on the tenant to shew cause why her attorney should not have inspection of, and if necessary take extracts from, a certain deed. The rule was founded on an affidavit made by the demandant, stating that she is advised and believes that her claim to dower arises under the purchase-deed and conveyance to her late husband, and that she has been informed and believes that the tenant has become the purchaser of the property out of which she is suing for dower, and that, on such purchase, the deed of conveyance to her husband was delivered to and is now in possession of the tenant, and that she is advised that it is material and necessary that her attorney should have the inspection, &c.

The tenant has made an affidavit in answer, from which it appears that some years ago he became a purchaser of the lands in question for value, and without notice that they were in any way subject to dower. And it was thereupon contended before us, on shewing cause on his behalf, that, inasmuch as previous to the passing of the Common Law Procedure Act, 1854, a discovery could not have been obtained by filing a bill in equity in such a case, no inspection could be compelled under that statute. And the only question is, whether such a discovery could have been so obtained or not.

On referring to the authorities, it appears that this is a point which has been much controverted. In the case [58] of *Williams* v. *Lambe*, 3 Bro. C. C. 284, on a bill filed by a dowress, Lord Thurlow overruled a plea of a bonâ fide purchase, without notice of the marriage: and his Lordship said that he thought, where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable,

not to a legal claim. And the same point was decided by Leach, M. R., in *Collins* v. *Archer*, 1 Russ. & M. 284; and his Honor said, that, following the case of *Williams* v. *Lambe*, and the general principle of a court of equity, he was of opinion that the defence was of no avail against the legal title.

On the other hand, in *Jerrard* v. *Saunders*, 2 Ves. jun. 454, Lord Loughborough held that the plea could stand against a legal as well as an equitable title. In Roper on Husband and Wife, 2nd edit. p. 461, the author approves of the doctrine of *Williams* v. *Lambe*. But a contrary view is taken in a note to this passage by the learned editor, Mr. Jacob (*a*). And Lord St. Leonards, in his treatise on Vendors and Purchasers, *c.* [59] 18, also expressed his opinion in favour of Lord Loughborough's, and against Lord Thurlow's ruling; and afterwards, as Chancellor of Ireland, decided the case of *Joyce* v. *De Moleyns*, 2 Jones & Lat. 374, accordingly. A subsequent case of *The Attorney-General* v. *Wilkins*, 17 Beavan, 285, has occurred before Romilly, M. R., and his decision was in accordance with that of Lord St Leonards. And his Honor stated the principle to be, that, when you once establish that a person is a purchaser for value, without notice, a court of equity will give no assistance against him; but the right must be enforced at law.

It appears, then, that the weight of authority is greatly in favour of the proposition that no bill for a discovery could have been maintained in this case before the Common Law Procedure Act, 1854. Consequently, we think that this rule must be discharged, and with costs.

Rule discharged, with costs.

GAUNTLETT *v.* KING AND ANOTHER. June 27th, 1857.

A. authorized B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass.

This was an action of trespass against two persons named King and Elliott for seizing and carrying away the plaintiff's goods under colour of a distress for rent. The goods in question consisted of gas-fittings, keys of certain cupboards, and a number of ledgers, day-books, and papers.

[60] The cause was tried before Williams, J., at the first sitting at Westminster in Easter Term last, when a verdict was taken for the plaintiff, by the direction of the learned judge, for 3*l.* 6*s.*, the value of the goods the taking of which was complained of being separately assessed by the jury as follows, viz. the gas-fittings at 1*l.*, the keys at 6*s.*, and the books at 2*l.*; and leave was reserved to the defendant to move to reduce the verdict by the sum of 40*s.*, if the court should be of opinion that there was no evidence of prior authority by Elliott to King to seize the books, or of subsequent ratification by the former of the seizure.

As to the books and papers, the facts were these:—Rent being in arrear from Gauntlett to Elliott, the latter authorized King, a broker, to distrain. King, finding the books and papers in a sack in a cupboard on the premises, without (as he said) formally distraining them, took them away to his own house, notwithstanding the remonstrances of the tenant's wife, who said they could be of no value to any one but

(*a*) The note is as follows:—"A similar rule was acted on in *Rogers* v. *Seale*, 2 Freem. 84, 2 Eq. Ca. Abr. 70: and see *Medlicott* v. *O'Donel*, 1 Ball & B. 171. But the principle that equity will not interfere against a purchaser for valuable consideration without notice, is commonly laid down in general terms without reference to the nature of the plaintiff's title: And in *Walwyn* v. *Lee* 9 Ves. 24, 33, the Lord Chancellor held a plea of purchase good to a bill for discovery and relief, founded on a legal title. See to the same effect *Jerrard* v. *Saunders*, 2 Ves. jun. 454, *Parker* v. *Blythmore*, Prec. in Ch. 58, 2 Eq. Ca. Abr. 79, *Robinson* v. *Haynes*, Gilb. Eq. Rep 184. And it seems to be clear that a plea of purchase is a good defence to a bill of discovery, though the plaintiff's title be legal: *Burlace* v. *Cooke*, 2 Freem. 24, 2 Eq. Ca. Abr. 681; *Abery* v. *Williams*, 1 Vern. 27; *Bishop of Worcester* v. *Parker*, 2 Vern. 255; *Hoare* v. *Parker*, 1 Cox, 221, 1 Bro. C. C. 578."

See Bright on Husband and Wife, vol. i. pp. 422, 423.

themselves. Three weeks after the distress, the plaintiff's attorney wrote to Elliott demanding the books and papers: and about a week afterwards King called upon him, and offered to give them up, if the plaintiff would give up possession of the premises to the landlord. Ultimately, however, by the direction of the landlord, King, the broker, gave them up. It did not appear that the books and papers were mentioned in the inventory.

Lush, in Easter Term, obtained a rule nisi to reduce the damages, in accordance with the leave reserved. He submitted that Elliott, the landlord, was not liable in trespass for the act of King, whom he had employed to distrain, in seizing the books and papers, unless he authorized it beforehand or subsequently (with knowledge) assented to it; referring to *Freeman* v. *Rosher*, 13 Q. B. 780.

[61] Morgan Lloyd now shewed cause. There clearly was evidence enough to warrant the jury in coming to the conclusion that the landlord, Elliott, ratified the act of the broker in seizing the books and papers. [Williams, J. It was assumed throughout that these things were not distrainable: but I protest I do not understand why not. Lush. There is no doubt everything may be distrained which can be brought back to the premises in the same plight and condition. It may be that these articles were valueless to the distrainor: but the saleable value is not an element in the consideration as to whether they are distrainable. The contention on the part of the defendants at the trial was, that these goods had in truth never been distrained at all.] There can be no doubt that the books and papers were distrained with the other goods: the defendants were not the less guilty of a trespass in taking them away, that they omitted to insert them in the inventory. It is submitted that the landlord was liable for the acts of the broker, under the original authority given to him: but that, at all events, there was ample evidence of ratification to go to the jury.

Lush, Q. C., in support of his rule. The liability of the landlord for the act of the broker is accurately defined in *Freeman* v. *Rosher*, 13 Q. B. 780. There, in trespass against a landlord, it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture, and paid the proceeds to the defendant, who received them without inquiry, but without knowledge that anything irregular had been done: and it was held that no such authority or assent appeared as would sustain the action. In delivering the judgment of the court, Patteson, J., said: "It is clear that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or subse-[62]-quent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a building or removing a fixture. The chief reliance was therefore placed on the receipt of the money as proof of a subsequent assent; but, as the defendant had no knowledge that a trespass had been committed, and received it in the belief that his warrant had been lawfully executed, the receipt under such circumstances is no evidence of assent. Where the principal is responsible for damage arising from the want of skill or mistake of the agent in the course of the performance of his employment, the principal is not responsible in trespass, but in case; and the form of the action involves an interest of some importance, as the measure of damages in an action on the case would be confined to an indemnity." Here, neither did the landlord authorize the trespass, nor did he ratify it. The books and papers were not distrained. It is true the broker removed them off the premises; but they were never treated as part of the distress. [Williams, J. The evidence shewed that the asportation was complete before the landlord ascertained what he had taken: I have no doubt. Cockburn, C. J. Do you contend that a landlord who gives a general authority to a broker to distrain, is not responsible for the act of the broker in exceeding his authority?] There would be little difficulty, it is submitted, in sustaining that proposition, if the rule were so framed as to admit the argument. These articles, however, never were distrained at all.

Cockburn, C. J. It is clear that this rule must be discharged. The books and papers in question were undoubtedly taken by way of distress. The broker whose business it was to make the levy, found the articles, amongst other goods of the tenant, in a cupboard, and he seizes them all. It appears to me that that puts an end to the question.

[63] Williams, J. I am entirely of the same opinion. In either view, the plaintiff must be entitled to succeed. The articles in question were clearly taken as a distress. They were carried away by King's orders, in spite of the remonstrances of Gauntlett's

wife. Whichever account, therefore, was the true one, the books, &c. were taken as a distress for the landlord. Finding afterwards that the broker had made a mistake, he caused them to be returned to the plaintiff. He could not purge the trespass which was already complete, by omitting to insert these things in the inventory. King was clearly acting as the agent of Elliott, and both are liable.

Rule discharged.

[64] TABOR *v.* EDWARDS. June 25th, 1857.

At the post-terminal sittings in banc, no business can be taken except that of which notice has been given.

This case (a demurrer) was called on in its turn on the first day of these sittings, and was struck out.

Archibald, for the plaintiff, now moved that the case might be restored to the paper.

CRESSWELL, J. We are sitting here under the authority of an act of parliament (*a*), for the purpose of disposing of such business as is specified in the notice which has been given (*b*). You are now making an original motion. We have no power to entertain it.

The rest of the court concurring,

Archibald took nothing.

[65] JONES *v.* THE PROVINCIAL INSURANCE COMPANY. July 4th, 1857.

[S. C. 26 L. J. C. P. 272; 3 Jur. N. S. 1004; 5 W. R. 885.]

Upon effecting a policy on his life, in February, 1855, the proposed assured signed a declaration, as the basis of the insurance, stating "that his age did not exceed twenty-nine years; that he had had the small-pox or cow-pox; that he had not had certain specified diseases; that no proposal to insure his life had been declined at any office; that he was then in good health, and did ordinarily enjoy good health; and that he was not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous, unless anything stated in answer to certain questions which preceded the declaration might be so considered."—In an action upon the policy, by the administrator of the assured, it appeared, that, in 1853 and 1854, the deceased had had two severe bilious attacks. A medical man who had attended him on those occasions stated that there was nothing in those illnesses which tended to shorten his life or to render it less insurable, and that his state of health after them was as good as ever. Two other medical men,—one of whom had seen him on the last occasion,—stated, that, in their judgment, those illnesses did tend to shorten his life and to render him ineligible for insurance; but it did not appear that their opinions had ever been communicated to the assured. The judge told the jury, that, "if the assured honestly believed at the time he made the declaration, that the bilious attacks had no effect upon his health, and did not tend to shorten his life or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had

(*a*) These post-terminal sittings in banc were originally held under the authority of the statute 1 & 2 Vict. c. 32, "for the purpose of disposing of business then pending and undecided," s. 1: and the 2nd section enacted that such sittings should be holden by virtue of a rule or order, to be made in or out of term, whereof a week's notice should be published in the *London Gazette*, and affixed on the outside of the court, and in the judges' chambers and masters' offices, specifying the particular business to be taken thereat. Now, by the 95th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, it is provided that "the superior courts may appoint and hold sittings either in banc or for the trial of issues in fact by judge or jury, at any time or times, whether in term or vacation, not being between the 10th of August and the 24th of October." The notice in the *Gazette* is no longer given.

(*b*) The notice intimated that the court would proceed in disposing of the business pending in the "special paper" and in the paper of "new trials."

had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy:"—Held, that this direction was correct.

This was an action brought by the plaintiff as administrator of John Powell Jones, deceased, against the Provincial Insurance Company, upon a policy of insurance for 1000*l.* effected by the intestate upon his own life, in the office of the company, on the 28th of February, 1855.

The declaration stated, that, by a certain policy of insurance made on and bearing date the 28th of February, 1855, signed by three of the directors of the said company, sealed with their common seal,—after reciting that the said John Powell Jones had proposed to effect an assurance with the defendants in the sum of 1000*l.* upon his own life, payable at death, and had delivered into the office of the defendants a declaration in writing, duly signed by the said John Powell Jones, and bearing date the day of the date of the said policy, whereby it was declared (amongst other things set forth) that the age of the said John Powell Jones did not then exceed twenty-nine years, and that he had never been afflicted with rupture, insanity, gout, fits, apoplexy, palsy, dropsy, dysentery, scrofula, any affection of the liver, [66] spitting of blood, consumptive symptoms, asthma, habitual cough, any affections of the lungs, or any other disease, ailment, or infirmity tending to the shortening of life; nor was he addicted to any habit tending to shorten life; that he had had the small pox, scarletina, measles, and whooping cough, and had been vaccinated successfully; that he was then in a good state of bodily health, and did ordinarily enjoy good health: and that the said John Powell Jones was not aware of any circumstance, or that he had had any disorder tending to shorten his life or to render an assurance on his life more than usually hazardous; which said declaration it was agreed should be the basis of the contract between the said John Powell Jones and the said company for the said assurance; and that the said John Powell Jones had paid to the defendants the sum of 20*l.* 15*s.* for the said assurance for the space of twelve calendar months, commencing on the day of the date of the said policy, and terminating on the 27th of February, 1856, the receipt whereof was thereby acknowledged,—it was witnessed that it was thereby declared and agreed by the defendants, that, in case the said John Powell Jones should die before or upon the said 27th of February, 1856, or in case he should survive that day, he or his assignees should on or before the 28th of February, 1856, and on the 28th of February in each and every succeeding year during the continuance of the said assurance, well and truly pay or cause to be paid to the defendants the like premium or sum of 20*l.* 15*s.*, then and in such case the stocks, funds, and property of the defendants should, according to the provisions of the deed of settlement of the said company, and according to the provisions of the statute passed in the eighth year of the reign of Her present Majesty, intituled "An act for the registration, incorporation, and regulation of joint stock companies," and after satisfying [67] all prior claims and demands thereon, be subject or liable to pay, satisfy, and make good to the executors, administrators, or assigns of the said John Powell Jones, within three calendar months next after proof satisfactory to the board of directors of the said company should have been given of the death of the said John Powell Jones, the sum of 1000*l.*: Provided always, and the said policy was upon the express condition, that, if any statement or allegation contained in the declaration thereinbefore referred to should be untrue, or if the assurance thereby effected should have been obtained through any fraud, misrepresentation, concealment, or untrue averment whatsoever, then the said policy should be null and void to all intents and purposes, and all premiums and other moneys paid in respect thereof should be forfeited to the defendants: Provided also, that the stocks, funds, and property of the defendants, or so much thereof as for the time being should remain unapplied and undisposed of and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities contained in the said deed of settlement, should alone be answerable for all claims or demands under or in respect of the said policy, and neither the directors executing the said policy nor any of them, nor any other proprietor or holder of a share or shares in the capital of the said company, should be personally subject or liable to any claim or demand under or in respect of the said policy, beyond the amount of the share or shares then held by him, her, or them in the said capital, and which should not be subject to prior claims and demands, it being one of the original and fundamental principles of the said company that the responsibility of the individual

shareholders should in all cases and under all circumstances be limited to their respective shares in the said capital: Provided also, that the said policy and the said assurance should be [68] subject to the several conditions and regulations printed on the back thereof, so far as the same could be applicable, in the same manner as if the same were respectively repeated and incorporated in the said policy,—which said conditions and regulations so printed on the back of the said policy were and are in the words and figures following, that is to say, "1. This policy will not become void if the premium be paid within thirty days next after the same shall have become payable: but, if the premium shall not be paid before the expiration of thirty days from the day on which the same shall have become payable according to the terms of the policy, or to any subsequent agreement with the company, then the policy shall be void: 2. If the age of any person, or of any one of the persons, on whose life or lives an assurance shall be effected by any policy, shall exceed the age stated in the declaration, it shall be lawful for the board of directors, if they in their discretion shall think fit (but not otherwise), to declare that the policy shall not be void on that account, and to allow such a sum or sums to be paid on such policy, upon the dropping thereof, as would have been assured thereby for the annual or other premium or premiums actually paid in respect thereof, if the age of the person on whose life the assurance shall be effected had been correctly stated in the declaration: 3. Policies will become void, if the parties whose lives have been assured shall go out of Europe (except to Madeira), or shall die on the high seas (except in passing from one part of the united kingdom of Great Britain and Ireland to another, or from or to any part of the united kingdom of Great Britain and Ireland to or from any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from any one of the same islands to any other of them, or from or to Madeira, and also, in time of peace, from any part of England to any other part of Europe); but the fore-[69]-going exception is not to extend to persons who at the time of death on the high seas shall be employed in a sea-faring capacity, or, being or becoming military or naval men, shall be called into actual service, unless in such case previous permission shall have been obtained from the board of directors, and such additional premium paid as the board of directors shall judge adequate to the increase of risk: 4. Assurances made by persons on their own lives, who shall die by duelling, or by their own hands, or by the hands of justice, will become void so far as respects such persons, but shall remain in force so far as any other person or persons shall then have a bonâ fide interest therein, acquired by assignment or by legal or equitable lien, upon due proof of the extent of such interest being made to the directors: 5. If any person who shall have been assured upon his or her own life for at least five years, or shall have paid a sum equivalent to five years annual premium, shall die by duelling, by the hands of justice, or by his or her own hands, and not felo de se, the board of directors shall be at liberty to pay his or her legal representatives the sum that the company would have paid for the purchase of his or her interest in the policy, if it had been surrendered on the day previous to his or her decease, provided the interest in such assurance shall be in the assured or in a trustee or trustees for his, her, or for their children at the time of his or her decease: 6. All claimants, upon the decease of any person whose life shall have been assured by the society, will be required to furnish such proof of the cause and date of death, and to give such further information respecting the same, as the directors shall think reasonable: and proof will be required of the date of birth, unless that fact shall have been established or admitted by the board of directors, and indorsed on the policy." Averment that the said John Powell Jones survived the 27th of Feb-[70]-ruary, 1856, and duly, and within the time limited in that behalf in and by the said policy and the said conditions and regulations, paid to the defendants the said annual premium of 20l. 15s. for keeping the said policy in force from the last-mentioned day for twelve calendar months then next ensuing, and the defendants accepted the last-mentioned premium for the purpose last aforesaid, and the said policy, at the time of the death of the said John Powell Jones hereinafter mentioned, was and continued in full force and effect: and that, whilst the said policy was in such full force and effect, and before this suit, the said John Powell Jones died: That, at the time of the death of the said John Powell Jones, and thenceforth hitherto, the stocks, funds, and property of the said company were and had always been sufficient, according to the provisions of the deed and deeds of settlement of the said company, and according to the provisions of the said statute in the said policy mentioned as aforesaid, and after

satisfying all prior claims and demands thereon, to pay, satisfy, and make good to the plaintiff, as such administrator as aforesaid, the said sum of 1000*l.*, according to the tenor and effect, true intent, and meaning of the said policy and the said conditions and regulations; and that, before this suit, all conditions precedent had been performed and fulfilled, and everything had happened and been done, and all times had elapsed, necessary to entitle the plaintiff, as such administrator as aforesaid, to receive the said sum of 1000*l.*, and to maintain this action for the recovery thereof; yet the said sum of 1000*l.* had not been paid, satisfied, or made good to the plaintiff, as such administrator as aforesaid, and was still wholly due and unpaid, contrary to the form and effect of the said policy: And the plaintiff, as administrator as aforesaid, claimed 1100*l.*

The defendants pleaded,—first, that the declaration [71] in the said policy mentioned, and therein stated to be the basis of the said contract between the said John Powell Jones and the defendants, was untrue in this, that, before and at the time of making the same, the said John Powell Jones was not in a good state of bodily health, and did not ordinarily enjoy good health.

Secondly, that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones had been and was afflicted with a disease, ailment, or infirmity tending to the shortening of life.

Thirdly,—that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones was addicted to a habit, to wit, a habit of intemperance, tending to shorten life.

Fourthly, that the said declaration in the said policy mentioned was untrue in this, that, at the time of making the same, the said John Powell Jones was aware of circumstances which rendered an assurance on his life more than usually hazardous.

Fifthly,—that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones was aware that he had a disorder tending to shorten his life, or to render an assurance on his life more than usually hazardous.

Sixthly,—that the defendants were induced to make and enter into the said policy, and that the said policy was effected with and obtained from them, by and through fraud, misrepresentation, concealment, and untrue averments of material facts by and on behalf of the said John Powell Jones and his agents in that behalf.

Upon each of these pleas the plaintiff took and joined issue.

[72] The cause was tried before Martin, B., at the last Spring Assizes at Liverpool. The facts which appeared in evidence were as follows:—The policy upon which the action was brought was executed on the 28th of February, 1855, and was founded upon a proposal which negatived the existence of any special circumstances affecting the value of the life to be assured,—such as, having had gout, rupture, any severe malady, especially within the last seven years, any wounds, having been intemperate, &c.,—and a declaration as follows: "I, the above-named John Powell Jones, do hereby declare that my age does not exceed twenty nine years; that I have had the small-pox or cow-pox; that my habits are temperate; that I have not had gout, dropsy, asthma, insanity, habitual cough, spitting of blood, nor (since infancy) any rupture, fits, or convulsion; that no proposal to insure my life has been declined at any office; that I am now in good health, and do ordinarily enjoy good health; and that I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous, unless anything stated above may be so considered."

It appeared, that, down to the year 1851, John Powell Jones, the assured, had resided with his father in Liverpool; that he was not a person of robust health, being subject to attacks of dispepsia; that, in 1850, by the advice of a medical man at Liverpool, he went a voyage to the Mediterranean; that, in 1851, his father placed him in a farm near Holywell; that, in November, 1853, he had a rather severe bilious attack, which confined him to his bed for three days, and, in May, 1854, a still more serious attack of the same sort, which confined him to his bed about a week; and that, in August, 1856, he was seized with a severe illness, which ultimately terminated in his death on the 4th of November in that year.

[73] A medical man, named Parry, was called on the part of the plaintiff. He stated, that he attended the assured on the occasion of his illness in 1853, which he

described as an ordinary bilious attack, which yielded to the common remedies, and did not in any degree injure his constitution, or render his life less good; that he also attended him in his illness of 1854, which was an attack of the same sort, but more severe; but that he recovered from it very rapidly, and became in as good health as he had been in before; and that he detected no organic disease at all in him. Upon cross-examination, the witness stated that the deceased laboured under a very irritable condition of stomach, but nothing amounting to organic disease; though he admitted that the life of a man subject to such attacks was less valuable as an insurance.

This gentleman was the person referred to as the medical attendant of the assured at the time the insurance was effected. He stated that he did not allude to the illnesses of 1853 and 1854 in his answers to the questions put to him on that occasion, because he thought neither of them of sufficient consequence to call for mention.

On the part of the defendants, two medical witnesses were called, viz. Mr. Neild and Mr. Gee,—the former of whom had been taken from Liverpool to see the assured during his illness in May, 1854, and the latter of whom, as the company's medical referee, had examined the assured prior to the making of the policy.

Mr. Neild described the illness of May, 1854, as being so severe as to induce him to tell the father of the assured that his case was hopeless; that, though he could not say that there was organic disease, he thought the patient could not recover, and that, if he did, great care as to diet would be essential to prolong his life; that, after that illness, the life was not eligible, and, **[74]** should not have been recommended by any medical man who was aware of the circumstances; that it rendered an assurance on his life more than usually hazardous; and that there were symptoms of chronic inflammation of the stomach, and a highly sensitive condition of the nervous system.

Mr. Gee stated, that, when he examined the deceased with a view to the insurance of his life, he made no mention of the illnesses of 1853 and 1854, nor did he state that he had been attended on those occasions by Mr. Neild and Mr. Parry; that, in his (the witness's) judgment, those illnesses had a tendency to make an insurance upon his life more than usually hazardous, and were an important element to be mentioned in any statement of his case; but he admitted, that, at the time he examined him, the deceased appeared to be in perfect health.

It did not appear that either of the medical men who had attended the assured in 1853 and 1854 had ever intimated to him the serious character of those attacks, or that his life was thereby rendered more precarious. No evidence was offered in support of the third and sixth pleas.

On the part of the defendants it was insisted that the policy was avoided by the falsity of the declaration signed by the assured as the basis of the insurance; and that it was enough for them to shew that the illnesses of 1853 and 1854 did in fact tend to shorten the life of the assured, or to render an insurance upon it more than usually hazardous, without shewing that the assured was aware that they were of that character.

For the plaintiff it was submitted, that, whatever the tendency of those illnesses, if the assured at the time he made the declaration was unaware of their having a tendency to shorten his life or to render an insurance thereon more than usually hazardous, he was guilty of no fraud in abstaining from mentioning them.

[75] The learned judge told the jury, that, if the assured honestly believed, at the time he made the declaration, that the bilious attacks in 1853 and 1854 had no (permanent) effect upon his health, and did not tend to shorten his life, or to render an insurance upon his life more than usually hazardous, the fact that he was aware that he had had those attacks (even though, without his knowledge, they had such a tendency) would not defeat the policy.

The jury returned a verdict for the plaintiff for the amount mentioned in the policy.

Atherton, Q. C., in Easter Term last, obtained a rule nisi for a new trial on the ground of misdirection "with reference to the issues raised on the first, second, fourth, and fifth pleas, in this, that it was immaterial as regards the issues on the first and second pleas whether John Powell Jones was aware of the untruth of the declaration, provided it was untrue in fact; and in this, that, as regards the issues on the fourth and fifth pleas, it was immaterial whether John Powell Jones knew of the consequences or effect of the attacks of 1853 and 1854, if he knew of such attacks in point of fact." He referred to the case of *Anderson* v. *Fitzgerald*, 4 House of Lords Cases, 484. There,

one F. applied to an insurance office to effect a policy on his life. He received a form of "proposal" containing questions requiring to be answered. Among these were the following,—"Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" to each of these questions F. answered "No." The answers were false. F. signed the proposal, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy [76] mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that, "if anything so warranted should not be true, or if any circumstances material to that insurance should not have been truly stated, or should have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the moneys paid should be forfeited. In an action on the policy, it was held by the House of Lords,—reversing the judgments of the courts of Exchequer and Exchequer Chamber in Ireland,—that it was a misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and, if not material, that the plaintiff was entitled to the verdict: for, that, the representation being part of the contract, its truth, not its materiality, was in question. In delivering his opinion in that case, Lord St. Leonards says,—p. 509: "The word 'true' there is used, of course, in a general sense; and, whether the man knew it to be true or false, is utterly immaterial. Whether the circumstances warranted were material or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true; and therefore the word 'untrue' there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue; it signifies not whether the circumstances were material or immaterial, the contract is to be avoided."

Knowles, Q. C., Edward James, Q. C., and Blackburn, in Trinity Term, shewed cause. The declaration of the assured upon which the pleas are framed, contains certain matters the assertion or negation of which amounts [77] to a warranty; for instance, that the party whose life is proposed to be insured has had the small-pox, is of temperate habits, has not had gout, dropsy, &c., is in good health, and ordinarily enjoys good health. In the part which follows, "I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous," the party is speaking only as to his own knowledge and belief. [Cresswell, J. The question is, who is to be the judge as to whether or not a particular disorder has a tendency to shorten life, or to render an assurance thereon more than usually hazardous? Is the party's own opinion and judgment to be the guide, or is it to depend upon the opinion and judgment of somebody else? Knowing all the circumstances attending the illness, the assured may honestly think it unimportant. Must he take the risk of other people thinking that it has a tendency to shorten life?] If the contract is to receive the construction contended for on the part of the defendants, it follows, that, if the assured had a fever twenty years before the date of his proposal, he would be bound to mention it. [Cresswell, J. No. But it may be that he is bound to disclose all circumstances which in the opinion of a jury, guided by the evidence of medical men, are material.] It appears, that, in the year 1853, the assured had an attack of illness which in a few days yielded to the ordinary remedies, and that, in 1854, he had a somewhat more serious attack of the same sort. But Mr. Parry, who attended him on both those occasions, and Dr. Neild, who saw him on the last occasion, both proved that he had no organic disease, and that there was nothing in those illnesses which had a tendency to shorten his life. And it was clearly shewn, that, at the time of the insurance, in February, 1855, he was in perfect health. [Cresswell, J. The argument on the other side will be, that [78] any concealment by the assured of facts within his knowledge which it was material to the insurers to be made acquainted with in order to guide their judgment, avoids the policy.] That necessarily must have reference to the party's own belief. *Anderson* v. *Fitzgerald*, 4 House of Lords Cases, 484, merely decides, that, whether material or not, the questions being part of the contract upon which the insurance was founded, the party was bound to answer them truly. That is very different from the matter now before the court. [Cresswell, J. *Lindenau* v. *Desborough*, 8 B. & C. 586, 3 M. & R. 45, is more like this case.] In that case it was held that it is the duty of a party effecting

an insurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance; and that it is a question for the jury whether any particular fact was or was not material. That, however, was a case of fraudulent concealment: and Lord Tenterden said that "the general question (*a*) put by the office requires information of every fact which any reasonable man would think material." The fact undisclosed there was clearly material, and was known to the person effecting the insurance. [Cresswell, J. The whole court lay it down that the materiality was a question for the jury; and that it was not enough to excuse the concealment, that the party did not know it to be material.] No doubt. But what is meant by a material circumstance within the party's knowledge? Clearly something which in his judgment is material. "It must be a fraudulent concealment of circumstances that will vitiate a policy:" per Lord Mansfield, in *Meyne* v. *Walter*, 1 Park, Ins. 304 (ed. 1817), 8th edit. 431: *Carter* v. *Boehm*, 1 W. Bla. 593, 3 Burr. [79] 1918. [Cresswell, J. *Bufe* v. *Turner*, 6 Taunt. 338, 2 Marsh. 46, has some bearing upon the present case. There, the plaintiff, having one of several warehouses next but one to a boat-builder's shop which took fire, on the same evening, after that fire was apparently extinguished, gave directions, by an extraordinary conveyance, for insuring that warehouse, then having others uninsured, but without apprising the insurers of the neighbouring fire. Though the terms of the insurance did not expressly require the communication, and the jury acquitted the plaintiff of any fraud or dishonest design, the court held that the concealment of this fact avoided the policy.] *Duckett* v. *Williams*, 2 C. & M. 348, will doubtless be relied on for the defendants: but the language of the policy and declaration there were very different from those now under consideration: and nearly all the cases are explainable upon the same principle.

Hugh Hill, Q. C., and Manisty, Q. C., in support of the rule. The provision upon which this question turns was introduced for the protection of the insurers,—a circumstance which is not to be lost sight of in putting a construction upon it. It clearly was not necessary, to avoid this policy, that there should have been a fraudulent concealment: it was enough if there was an omission on the part of the assured to disclose any circumstance which had a tendency to the shortening of his life, or to render an insurance upon it more than ordinarily hazardous. The proper question was not whether any circumstance existed which in his belief had such a tendency, but whether any existed which in point of fact had such a tendency. In *Lindenau* v. *Desborough* there was no fraud. Bayley, J., there said: "I think, that, in all cases of insurance, whether on ships, houses, or lives, the underwriters should be in-[80]-formed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But, if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach." And Littledale, J., said: "I think the question, on such a policy, is not whether a certain individual thought a particular fact material, but whether it was in truth material; and of that the jury are by law constituted the judges." *Bufe* v. *Turner*, 6 Taunt. 338, 2 Marsh. 46, is a distinct authority to the same effect. The note of *Meyne* v. *Walter*, cited from Park on Insurance, can hardly be correct: and it certainly is inconsistent with the judgment of the same learned judge in *Carter* v. *Boehm*, 1 W. Bla. 593, 3 Burr. 1918. In *Duckett* v. *Williams*, 2 C. & M. 348, by a declaration and statement as to health, &c., signed by the assured previously to effecting a policy on a life, it was agreed, that, if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and the insurance be absolutely null and void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it: nevertheless, it was held that the premiums were forfeited, and could not be recovered back. "A statement," says Lord Lyndhurst, C. B., "is not the less untrue because the party making it is not

(*a*) "Whether the party knew any other circumstances that ought to be communicated to the directors."

apprised of its untruth: and, looking at the context, we think it clear that the parties did not mean to restrict the words in the manner con-[81]-tended for. Two consequences are to follow if the statement be untrue,—one, that the premiums are to be forfeited,—the other, that the assurance is to be void. Now, if the statement were untrue within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and therefore must be so as to the first; for it would be contrary to all the rules of construction to hold that it was material as to one consequence, and not as to the other." [Cockburn, C. J. If it amounts to a warranty, the knowledge of the party would be immaterial. But, where the party says,—"I am not aware of any circumstance having such and such a tendency,"—does he do more than pledge his own opinion and belief?] It is submitted that the words must be taken to amount to a warranty that the assured was not aware of any circumstance or disorder which in point of fact tended to shorten his life or to render an assurance on his life more than ordinarily hazardous,—not, as is suggested on the other side, that he was not aware that the circumstances of which he was aware had the tendency stated. According to the doctrine of the case of *Anderson* v. *Fitzgerald*, 4 House of Lords Cases, 485, "untrue" means untrue in fact: the assured takes upon himself the risk of that which he avers to be true turning out to be untrue. [Cockburn, C. J. It would have been easy to require the party expressly to negative his having had any disease or ailment tending to shorten his life or to render an assurance thereon more than ordinarily hazardous.] The evidence shewed that the life was not an insurable one. The two serious attacks in 1853 and 1854 ought to have been communicated to the insurers. The manner in which the case was presented to the jury clearly was not in accordance with the authorities.

[82] COCKBURN, C. J. I think we are hardly in a position to deal with this case, without first ascertaining from my Brother Martin how he presented the question to the jury.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—

This was an action brought by the plaintiff as administrator of John Powell Jones, deceased, against the Provincial Insurance Company, upon a policy of insurance for 1000*l.* effected by the intestate upon his own life, in the office of the defendants, upon the 28th of February, 1855.

The policy stated that the intestate had delivered into the office of the defendants a declaration in writing signed by him, and being of the same date as the policy, which it was agreed should be the basis of the contract of assurance.

By the declaration actually signed, it was declared that the age of the assured did not exceed twenty-nine years, that he had had the small-pox or cow-pox, that he had not had certain specified diseases, that no proposal to insure his life had been declined at any office, that he was then in good health and did ordinarily enjoy good health, and that "he was not aware of any circumstance or disorder tending to shorten his life or to render an assurance on his life more than ordinarily hazardous," unless anything stated in answer to certain questions which preceded the declaration might be so considered. The assured also thereby declared that the medical and private referees named by him in answer to two of those questions were competent to give information as to his past and present state of health and habits of life. The declaration so made was in some respects erroneously recited in the policy, particularly [83] in adding to the statement that the assured had never been afflicted with the specified diseases, the words "or any other disease, ailment, or infirmity tending to the shortening of life." It, however, also contained the statement that the intestate "was not aware of any circumstance, or that he had had any disorder, tending to shorten his life, or to make an insurance on his life more than usually hazardous."

The declaration in the cause is in the usual form, stating the policy, the payment of premiums, the death of the assured, and the performance of conditions precedent.

The important pleas were the second, fourth, and fifth.

The second plea stated that the declaration in the policy mentioned was untrue, in this, that, at the time of making it, the assured had been and was afflicted with a disease, ailment, or infirmity tending to the shortening of life.

The fourth plea was, that the declaration was untrue in this, that, at the time of

making it, the assured was aware of circumstances which rendered an assurance on his life more than usually hazardous.

The fifth plea was, that the declaration was untrue in this, that, at the time of making it, the assured was aware that he had had a disorder tending to shorten his life, or to render an assurance upon it more than commonly hazardous.

Issues in fact were joined upon these pleas.

At the trial, before Martin, B., it appeared that the assured had had a bilious attack,—not being one of the specified illnesses,—in November, 1853, and another in May and June, 1854. The evidence as to the character of these attacks was contradictory: according to the evidence of Mr. Parry, a medical man who attended **[84]** the assured in both those illnesses, and also in that which caused his death in 1856, there was nothing in the illnesses of 1853 and 1854 to shorten or affect the life of the assured or make it less good. He stated that the assured recovered rapidly from them, and that his state of health afterwards was as good as ever.

The evidence of other medical men conflicted with that of Mr. Parry; but it did not appear that their opinion had ever been communicated to the assured.

We are informed by the learned judge that the defendants at the trial relied altogether upon the statement at the foot of the proposal and declaration actually signed by the assured, commencing, "I, the above-mentioned John Powell Jones," and insisted, that, under the words "I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous," it was enough for them to shew that the illnesses of 1853 and 1854 did in fact tend to shorten the life of the assured, or to render an assurance upon it more than usually hazardous, without shewing that the assured was aware that they were of that character.

The defendants did not at the trial rely upon the declaration recited in the policy as being more stringent than that actually signed, nor did they refer to or rely upon the answers to the questions preceding the declaration, commencing "I, the above-named, &c."

The learned judge ruled and directed the jury, that, if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render an assurance upon his life more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) **[85]** they had such a tendency, would not defeat the policy. The jury found for the plaintiff, for the amount of the policy.

In Easter Term last, a rule was obtained for a new trial, upon the ground of misdirection with reference to the issues raised with reference to the first, second, fourth, and fifth pleas, in this, that it was immaterial as regards the issues on the first and second pleas whether John Powell Jones was aware of the untruth of his declaration, provided it was untrue in fact; and in this, that, as regards the issues on the fourth and fifth pleas, it was immaterial whether John Powell Jones knew of the consequences or effect of the attacks of 1853 and 1854, if he knew of such attacks in point of fact.

The rule was fully argued before the Lord Chief Justice, my Brother Willes, and myself; and we took time to consider.

In our opinion, the course taken at the trial renders it unnecessary to pronounce any judgment upon any of the points argued, except the construction of the declaration actually signed. No point was made at the trial as to the effect of the answers to the questions preceding the declaration signed, or as to the plaintiff being bound by the recital in the policy, though untrue. And there was an obviously good reason for abstaining from insisting upon those matters, inasmuch as they would unquestionably have been distasteful to the jury, who would, after all, assuming the defendants to be right upon those points, have had to pronounce upon the question of materiality. The defendants, therefore, cannot now be heard to argue any such point not raised at the trial; and the only one there raised and decided, was,—first, that the declaration "I am not aware of any disorder or circumstance tending to shorten my **[86]** life," &c., referred not merely to the knowledge of the assured of the disorder or circumstance, but also to his knowledge that it tended to shorten life, &c.

In the argument, we were referred by the defendants' counsel to several authorities, —amongst others, *Lindenau* v. *Desborough*, 8 B. & C. 586, 3 M. & R. 45,—as establishing the proposition which, as a general rule, is indisputable, that it is the duty of a party effecting an insurance on life or property to communicate to the underwriter or other

insurer all material facts within his knowledge touching the subject-matter of the insurance, and that it is a question for the jury whether any particular fact was or was not material to be communicated. It is, however, equally clear that the underwriters may in any particular case limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact, but also as to its materiality: and in our opinion that is the effect of the limited declaration required in the present case as to disorders or circumstances tending to shorten life or to render an insurance upon the life insured more than ordinarily hazardous. Therefore, upon the construction of that clause which alone was relied on at the trial, we are of opinion that the direction of the learned judge was right, and that the rule for a new trial ought to be discharged.

Rule discharged.

[87] THOMAS ASHLEY SUTTON, BY ROBERT M'CLIVE, his Next Friend, *v.* WILLIAM SADLER AND EDWARD DAVENPORT. July 4th, 1857.

[S. C. 26 L. J. C. P. 284; 3 Jur. N. S. 1150; 5 W. R. 880. Adopted, *Smith* v. *Tebbitt*, 1867, L. R. 1 P. & D. 436; *Cleare* v. *Cleare*, 1869, L. R. 1 P. & D. 657.]

The presumption that every man is sane, until the contrary is proved, is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of law and fact.—The competency of a testator is to be assumed until it is impeached by evidence: but it is not to be assumed, as a matter of law, that a will is valid, as made by a competent testator, unless the court or jury who have to decide upon it are convinced that he was competent.—Therefore, he who relies upon a will, in opposition to the title of the heir-at-law, must prove that it is the will of a person of sound and disposing mind. Such proof having been given, if incompetency of the testator to make a will be alleged, it is incompetent on the party alleging it to prove it.—In an action by heir-at-law against devisee,—the question in issue being as to the capacity of the testator to make a will,—the judge in his summing-up told the jury "that the heir-at law was entitled to recover unless a will was proved: but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant:"—Held, a misdirection.—In ejectment by heir against devisee, the heirship being admitted, the defendant is entitled to begin.

Upon a question between heir and devisee as to the competency of the testator at the time of making the will, a witness having been called on the part of the defendant to prove certain statements made by him relative to the property he took under the will of his father,—the last-mentioned will was offered, as well to shew the opinion entertained of him by his father as to competency to manage property, as to shew that the statements so proved to have been made by him were consistent and true. Upon an objection taken by the plaintiff's counsel to its admissibility, and a doubt being expressed by the learned judge, the defendant's counsel withdrew the document:—Held, that the circumstance of the judge, in his summing up, observing upon the objection and the nonproduction of that will as affording a fair inference that the will if produced would shew that the testator (whose will was in question) well knew what he was saying when he made the declarations respecting it, was no misdirection, although apparently giving effect to evidence which had been ruled to be inadmissible. Held also, that it was no misdirection in point of law to tell the jury that they might take into their consideration statements made by the testator as to the dispositions contained in his will, and which in fact corresponded therewith, as throwing back light on the period at which the will was executed (a year before), and as affording means of inferring what was the state of his competency at that period.

This was an action of ejectment for the recovery of lands in Cheshire. The cause came on for trial before Bramwell, B., at the last assizes at Chester, and occupied four

days. The question turned upon the competency of one William Walter Sutton, who died in the year 1849, to make a will.

The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted that he was entitled to begin, which was conceded (*a*). A will was then produced; and after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, the defendant's counsel called witnesses to prove the testator's competency.

Evidence was then given on the part of the plaintiff, to impeach the competency of the testator; and it was sought to be shewn that he had been incompetent à nativitate, and also that, if ever capable of making a will, he had from habitual and incessant drunkenness rendered himself incapable.

The learned Baron, in leaving the case to the jury, told them that the heir-at-law was entitled to recover unless a will was proved: but that, when a will was **[88]** produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant.

The jury returned a verdict for the defendant.

Grove, Q. C., in Easter Term last, obtained a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence, and also upon affidavits imputing partiality and misconduct to the jury. He submitted, upon the authority of *Harwood* v. *Baker*, 3 Moore's P. C. 282, that the learned Baron was wrong in laying it down that the burthen of proof of incompetency lay on the plaintiff. As to the alleged misconduct of the jury, he referred to *Metcalf* v. *Green*, Cro. Eliz. 189; Co. Litt. 227 b.; *Hughes* v. *Budd*, 8 Dowl. P. C. 315; *Morris* v. *Vivian*, 10 M. & W. 137.

John Evans, Q. C., Welsby, and Coxon, on a former day, shewed cause. The summing-up of the learned Baron was perfectly correct; for, all the authorities lay it down that the burthen of proving the incompetency of the testator lay on the party impeaching the will. In 1 Williams on Executors, 5th edit. 18, it is said: "If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs. The burthen of proof rests upon the person attempting to invalidate what on its face purports to be a legal act: 2 Phill. Evid. 7th edit. 293. Sanity must be presumed till the contrary is shewn: *Groom* v. *Thomas*, 2 Hagg. 434. Hence, if there is no evidence **[89]** of insanity at the time of giving the instructions for a will, the commission of suicide three days after will not invalidate the instrument, by raising an inference of previous derangement:" *Burrowes* v. *Burrowes*, 1 Hagg. 109: see also *Hoby* v. *Hoby*, 1 Hagg. 146. The learned Baron, in substance, told the jury that the heir-at-law was entitled to recover, unless a will was proved: but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted, and that the devisee must prevail unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. [Cresswell, J. The latter part amounts to this,—if you cannot tell on which side the evidence preponderates, find for the defendant.] It was for the plaintiff to establish his case: if he failed to satisfy the jury of the insanity of the testator, the defendant was entitled to succeed. In *The Attorney-General* v. *Parnther*, 3 Bro. C. C. 441, Lord Thurlow, C., thus lays down the rule:—"If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case, applying

(*a*) See *Doe d. Bather* v. *Brayne*, 5 C. B. 655.

to stated intervals, ought to go [90] to the state and habits of the person, and not to the accidental interview of any individual, or to the degree of self possession in any particular act; for, from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind which is deemed necessary, in general, to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general as that the party who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others." So, in *Groom* v. *Thomas*, 2 Hagg. Ec. 433, Sir John Nicholl says: "The point in this case is, the sanity or insanity of the testatrix,—a sort of case which always depends on its own particular circumstances. The principle of law applicable to such a question admits of no controversy. Every person is presumed to be sane until it is shewn that he has become insane: the presumption then changes: it is presumed that he continues of unsound mind, and the party setting up any instrument executed after insanity has manifested itself, has the burthen of proof cast upon him: he must shew recovery, and he must shew not merely that the party whose act is the subject of inquiry was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off all disease, was again become perfect, was sound upon all subjects, and that no delusion remained." The same doctrine is laid down in Professor Greenleaf's treatise on the law of evidence, 7th edit. §§ 42, 689. In *Cartwright* v. *Cartwright*, 1 Phillim. 100, Sir W. Wynne says,—"I take it the rule of law of England is the rule of the civil law, as laid down in the second book of the Institutes (lib. 2, tit. 12, § 2), 'Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur." There is no kind of doubt [91] of it; and it has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it: but the effect of it is this,—it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational: but, where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason, must prove it; so that, in all these cases, the question is, whether, admitting habitual insanity, there was a lucid interval or not to do that act." The rule is the same in the American courts. In *Brooks* v. *Barrett*, 7 Pickering, 94, it was held, that, a will being proved primâ facie by the statute of evidence, the burthen of proof is on the party objecting to its allowance on the ground of insanity, to shew that the testator was not of sound mind: and, if the evidence is doubtful, the presumption of law in favour of sanity is to have its effect. [Cresswell, J. The onus lay on the defendants, who set up the devise, to prove that the will was made by a person of sound disposing mind. You say that was satisfied by the presumption that every man is sane until the contrary is proved?] Exactly so. [Crowder, J. Could it be correct to tell the jury, that, if they have a doubt about it, after taking into consideration the presumption of sanity, they must still find in favour of the will?] The competency of the party is a presumption of law. [Crowder, J. What have the jury to do with presumptions of law? Williams, J. Is it a presumption of law or a presumption of fact?] It is submitted that it is a presumption of law. All the authorities shew that in [92]-competency must be proved. [Cresswell, J. You contend that it lies on the party who seeks to defeat the will, by evidence to rebut the presumption of competency. Willes, J. The question is, whether the jury must not be satisfied that the testator is competent.] The case of *Bremer* v. *Freeman*, 1 Deane's Eccl. R. 192, which was a question as to the capacity of an English subject domiciled in France to make a will according to the law of this country,—has some bearing upon this case.

As to the alleged misconduct of the jury, affidavits were produced which fully answered those upon which the rule was founded.

Grove, Q. C., Beavan, and M'Intyre, in support of the rule, insisted that the learned Baron misdirected the jury, in telling them that the onus lay on the plaintiff to establish the incompetency of the testator: relying mainly upon the cases of *Barry* v. *Butlin*, 2 Moore's P. C. 481, and *Harwood* v. *Baker*, 3 Moore's P. C. 282. In the former of these cases, it is stated by Parke, B., that the onus probandi lies in every case on the party propounding a will, and that he must satisfy the conscience of the

court that the instrument so propounded is the last will of a free and capable testator. And in *Harwood* v. *Baker*, Erskine, J., delivering the judgment of the court, says: "Their lordships are of opinion, that, in order to constitute a sound disposing mind, the testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others whom by his will he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than in those where the mind has been too much **[93]** enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and therefore the question which their lordships propose to decide in this case is, not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share in his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court (*a*):—

This was an ejectment tried before Bramwell, B., at the last Chester Assizes.

The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted upon the right to begin, which was granted. His counsel then produced a will, and, after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, called witnesses to prove the competency of the testator. The plaintiff then gave evidence to impeach his competency, and endeavoured to shew that **[94]** he had been incompetent à nativitate. The learned judge, in summing up, told the jury that the heir-at-law was entitled to recover unless a will was proved; but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. A verdict having been found for the defendant, a rule nisi for a new trial was granted in Easter Term, it being alleged that the learned judge misdirected the jury.

The question was argued before us after last term; and some cases were cited in which it has been said that sanity is presumed, and that the onus of proof is on him who disputes it. The cases principally relied on, were, *The Attorney-General* v. *Parnther*, 3 Bro. Ch. Ca 441, *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 434, and *Brooks* v. *Barrett*, 7 Pickering's U. S. Rep. 94; and a passage in Professor Greenleaf's treatise on Evidence was also relied on.

The case of *The Attorney-General* v. *Parnther* was cited for the following passage in the judgment of the Lord Chancellor: "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must shew competence at the period when the act was done, and to which the lucid interval refers." If that is correct,—and we see no reason to dispute it,—the converse also is true, that he who alleges competency must prove it. Now, he who relies on a will in oppo-**[95]**-sition to the title of the heir-at-law, must allege that it is the will of a person of sound and disposing mind: he must therefore prove it. The case of *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 434, was in circumstances very similar. The testator was admitted to have been sane, and afterwards insane; and there the court held, that the party propounding a will executed after the period when the testator was admitted to have become insane, was bound to prove sanity. The decision, therefore, was no authority for the

(*a*) The case was argued before Cresswell, J., Williams, J., Crowder, J., and Willes, J.

defendant in this case. It was cited for the principle laid down by Sir John Nicholl,—"Every person is presumed to be sane, until it is shewn that he has become insane: the presumption then changes; it is presumed that he continues of unsound mind; and the party setting up any instrument [executed] after insanity has manifested itself, has the burthen of proof cast upon him; he must shew recovery." That is perfectly correct: but the learned judge of the Ecclesiastical court was evidently dealing with a case of admitted original sanity, then of proved insanity; and it has no application to a case where capacity was never admitted: nor was he affecting to state the precise nature and extent of the presumption to be made in favour of sanity. Reliance was also placed on two passages in the very learned work of the late Professor Greenleaf upon the Law of Evidence. In § 42 of the first volume (7th edit.), he says: "Every man is presumed to be of sane mind until the contrary is shewn:" and for this he refers to *The Attorney-General* v. *Parnther*, and Hale's Pleas of the Crown, 30. It therefore carries the case no further. The rule in criminal cases depends upon different considerations. Again, under the title "Wills," in § 689, the learned professor writes, —"In regard to insanity, or want of sufficient soundness of mind, we have heretofore seen, that, though in the probate of a will, as the real issue [96] is, whether there is a valid will or not, the executor is considered as holding the affirmative, and therefore may seem bound affirmatively to prove the sanity of the testator, yet we have also seen that the law itself presumes every man to be of sane mind until the contrary is shewn:" and he refers to the passage before mentioned, to a passage under title "Insanity," § 373 (which relates to the responsibility of a party for his actions), and to *Brooks* v. *Barrett*, 7 Pickering's Rep. 94. He adds,—"The burthen of proving unsoundness or imbecility of mind in the testator is therefore on the party impeaching the validity of the will for this cause." If the learned professor by this passage means that the competency of a testator is to be assumed until it is impeached by evidence, we agree with him: but, if he means that a will must be assumed to be valid, as made by a competent testator, unless the court or jury who have to decide upon it are convinced that he was incompetent, we think it is not in accordance with the English authorities on the subject. The professor says that the competency of a testator is a presumption of law, not of fact.

On this doctrine of presumptions there is a very learned chapter in Starkie on Evidence. He divides presumptions into presumptions of law, which are altogether artificial; presumptions of law and fact, which are of a mixed character (being also artificial presumptions, but to be found by juries, being recognised and warranted by the law as the proper inferences to be made by juries under particular circumstances); and natural presumptions, or presumptions of mere fact. The presumption of sanity cannot, we think, be treated as a merely artificial or legal presumption, but, at the utmost, as a presumption of law and fact, that is, an inference to be made by a jury from the absence of evidence to shew that a party does not enjoy that sound-[97]-ness which experience proves to be the general condition of the human mind. But, in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth: and, where a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative. In another passage, Mr. Starkie speaks of the presumption of sanity in a testator as a presumption of fact.

On the other hand, the counsel in support of the rule called our attention to *Barry* v. *Butlin*, 2 Moore's P. C. 481, where Parke, B. stated as the indisputable rule of law that the onus probandi lies in every case on the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator; and to *Harwood* v. *Baker*, 3 Moore's P. C. 282. In this latter case, a will had been propounded in the Prerogative court of Canterbury. The attesting witnesses were examined, and several others on either side. The judge of that court by his decree pronounced against the force and validity of the pretended will, upon the ground that the evidence adduced was not sufficient to prove that the deceased was a capable testator. Against this decree the party propounding the will appealed. The Judicial Committee dismissed the appeal, "because the party propounding the will had not satisfactorily proved, as he was bound to do, that the paper in question did contain the last will and testament of the deceased." In neither of these cases was any weight given to the presumption of sanity unconnected with the evidence.

Some very valuable observations on this subject are to be found in the judgment of Lord Brougham in *Waring* v. *Waring*, 6 Moore's P. C. 355: "The burthen of proof," says his Lordship, "often shifts about in the progress of the cause, accordingly as the successive steps of the inquiry, by leading to inferences decisive until [98] rebutted, cast on the one or the other party the necessity of protecting himself from the consequences of such inferences. Nor can anything be less profitable as a guide to our ultimate judgment, than the assertion, which all parties are so ready to put forward severally, that, in the question under consideration, the proof is on the other side. Thus, no doubt, he who propounds a latter will, undertakes to satisfy the court of probate that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor (the party propounding) choose to rest satisfied with his primâ facie case after an issue tendered against him. In this case, the proof has shifted to the impugner; but his case may easily shift it back again." The result must be the same where the party propounding does not rely on a primâ facie case, but gives the whole of his proofs in the first instance. The onus remains on him throughout; and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given: and, if it does not satisfy them that the will is valid, they ought to pronounce against it.

If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will: and, if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will: and in each case the presumption in favour of competency would prevail. But that is not a mere presumption of law: and, when the whole matter is before the jury on evidence given on both sides, they ought not to affirm that a document is [99] the will of a competent testator, unless they believe that it really is so.

The result is, that the rule for a new trial must be made absolute.

Rule absolute.

Nov. 5th.—The cause was tried again at the Summer Assizes at Chester in 1857, before Cockburn, C. J., and occupied six days.

The defendant's counsel, as before, began by proving the execution of the will under which he claimed, and by calling a great number of witnesses for the purpose of shewing, that, although the testator had been a person of intemperate habits, he had latterly much reformed, and was at the date of the will perfectly competent.

Amongst others, a witness was called who spoke to declarations made by the testator as to the nature and amount of the property which he took under his father's will.

The will of the testator's father was then tendered in evidence, as well for the purpose of shewing the father's opinion as to his son's capacity to manage property, as for the purpose of corroborating the statements of the son as to what he took under that will.

This evidence was objected to as inadmissible; and, the Lord Chief Justice intimating some doubt about it, the defendant's counsel withdrew it.

[100] A large body of evidence was then given on the part of the plaintiff, as to the conduct and habits of the testator from his boyhood down to the time of his death, shewing that for many years he had been addicted to habits of intemperance and debauchery to such an extent as wholly to enervate and destroy the small amount of mind he had once possessed.

The Lord Chief Justice, in his summing up, which occupied seven hours, went carefully through the evidence,—observing, in passing, upon the circumstance of the plaintiff's counsel having objected to the admissibility of the will of the testator's father, and to the fact of its being in court and not called on for the part of the plaintiff, which it probably would have been if the representation proved to have been made as to its contents by the testator (the son) had not been correct,—and, adverting to the rule of law laid down in the judgment of this court upon the former occasion, he left the case to the jury to determine upon the balance of testimony on the one side and on the other.

The jury again returned a verdict for the defendant.

Grove, Q. C. (with whom was Beavan), in the following Michaelmas Term, moved for a new trial, on the ground of misdirection. The first ground of objection to the summing-up is, that the jury were invited to draw an inference unfavorable to the plaintiff, from the fact of his counsel having objected to the reception of a piece of evidence which the learned judge had ruled to be inadmissible. [Cockburn, C. J. The will of the testator's father was offered by Mr. Evans for the purpose of shewing that the father, by leaving his property to his son, intimated his opinion as to his capacity to manage his affairs. I thought it inadmissible.] It was also tendered for the purpose of shewing that the testator well knew the nature and extent of the property **[101]** which he took under it. [Crowder, J. I must confess I do not see why is was not admissible. Cockburn, C. J. I told the jury that they might fairly infer, as a matter of fact, from the plaintiff's objection to its reception, and also from the circumstance of the plaintiff's counsel abstaining from producing it, though in court, that the will, if produced, would shew that the testator correctly apprehended the nature of the dispositions contained in it: and that the fact of his giving a correct account of what he took under that will was cogent evidence to rebut the presumption of insanity. I did not put it to them as a matter of law.] The will having been tendered, objected to, and withdrawn, it should have been considered as wholly out of the question. It was inviting the jury to draw an inference of fact from the circumstance of counsel having successfully resisted the introduction of a piece of evidence which was inadmissible, in short, it was giving effect to that which was not legal evidence. [Willes, J. It seems to me that my Lord would hardly have done justice to the defendant if he had abstained from making the remarks he did upon that part of the case. Crowder, J. It is every day's practice, where a person is present in court who could speak to a matter in controversy, and who is not called, to tell the jury that they may infer that his evidence, if he were called, would probably be unfavorable to the party who ought to have called him.] That, it is submitted, is not quite this case. If the will of the testator's father was inadmissible,—which it must now be assumed to have been, it could not properly form part of the instruction to the jury. The closing remarks, too, of his Lordship's summing up were eminently calculated to distract the attention of the jury, and to withdraw their minds from the real point of time to which their consideration should be addressed. [Cockburn, C. J. The way in which I **[102]** left the case to the jury was substantially as follows:—I told them that the plaintiff would be entitled to their verdict, unless either of the wills executed by the testator should stand good; which latter question entirely depended on the capacity of the testator to make a will at the time of executing both or either of these wills. I explained to them, that, as the case stood before them, the burden of proof was on the defendant, the devisee; and that, to entitle himself to the verdict, it was for him to satisfy the jury of the competency of the testator. I read to the jury on this point the language of this court in its recent judgment in this case. But I told them, that, as the two wills (of 1843 and 1845) were in substance the same, if they, the jury, were satisfied, that, at the time of executing either of them, the testator was competent, the defendant would be entitled to their verdict. I said this, because strong observations had been made to the jury by the plaintiff's counsel as to the presence of the defendant, and its probable effect and influence, at the making of the will of 1845; whereas, at the making of the will of 1843, the testator had gone to the attorney's office without the defendant, attended only by a servant. In observing on what constituted capacity to make a will, I adopted the doctrine contended for by the plaintiff's counsel on the authority of the case of *Harwood* v. *Baker*, 3 Moore's P. C. 282, viz. that a testator must not only know that he is disposing of his property by a testamentary instrument, but must be capable of understanding the nature and extent of the property of which he is disposing, the manner in which he is disposing of it, and the claims of those who have legitimate claims upon him in the final disposition of his property. I desired the jury to apply this principle to the case before them. In commenting upon the evidence, I divided the history of the testator into three periods, **[103]** the first, from his boyhood to the time he left his father's house in 1835, and went to live with his aunt Cope, the second, that during which he lived away from home, till, after the death of his father in 1842, he went to live with the defendant at Speerston Hall, the third, from his so going to live with the defendant, till his death, in 1849. I pointed out to the jury the conflict of evidence as to the mental

powers and condition of the testator during the first of these periods. I pointed out to them, that, as to the second, the evidence seemed to be all one way, and that there could be no doubt that during that period the testator was utterly lost, both in mind and body, from habitual and incessant drunkenness, and, if ever capable, was then reduced to a state of utter incapacity; and I advised them, unless they believed that in the third period the testator had (as was contended for by the defendant, and endeavoured to be established by his evidence,) renounced in a great degree his habits of debauchery, and thereby recovered his mental powers in a sufficient degree to be capable of making a will when these wills were executed, they should find against the defendant. I called the attention of the jury in detail to the evidence on both sides as to this latter period, comparing it as I went along. I observed on the evidence as to the statements made by the testator at various times, and particularly on his death-bed, as to the manner in which he had disposed of his property; observing, that, if the jury believed this evidence, as the statements so made by the testator corresponded with the disposition in fact made by the will, they were calculated to throw back light on the period at which the wills were executed, and to afford means of inferring what was the state of his competency at that period.] That was calculated to divert the minds of the jury from the important period, viz. the time of making the will. [Cockburn, C. J. The **[104]** jury were perfectly alive to the fact that the date of the will was the important period for their consideration.

Williams, J. I am of opinion that there was no misdirection in this case, in the proper sense of the word. The Lord Chief Justice appears, in going through the evidence, to have very properly reminded the jury of the circumstances under which it was given, making remarks thereon that would naturally emanate from any mind of ordinary shrewdness.

Crowder, J. I also think there was no misdirection in the way in which the case was presented to the jury. As to the first point, I do not find that any law was laid down by my Lord. It is said that the jury were improperly told that they might draw an inference from evidence which was ruled to be inadmissible. It appears to me that the observations of the Lord Chief Justice were very fair and proper observations upon the fact of a piece of evidence having been offered on the part of the defendant, and withdrawn upon an objection taken to its admissibility by the other side. The will of the testator's father was in court; it was not put forward for the purpose of contradicting anything proved on the part of the plaintiff, but merely for the purpose of corroborating the declarations which the testator had made as to the interest which he took under it. It was a thing from which the jury might fairly draw an inference in the defendant's favour. I see nothing like a misdirection in point of law. And as to the latter part of the summing-up which is objected to, my Lord has explained the way in which he left the case, referring to the several periods of the life of the testator. I see nothing in the observations he made upon the evidence that was at all calculated to mislead the jury, or to induce them, as is now suggested, to think that the ques-**[105]**-tion they had to determine was, the state and condition of the testator's mind at the time of his death. Upon the whole I agree that there ought to be no rule.

Willes, J. I am entirely of the same opinion. Mr. Grove complains that he has sustained prejudice from an objection successfully taken by him at the trial. I certainly should be very sorry that a party should sustain prejudice or inconvenience from taking a proper objection, and one upon which he was entitled to succeed. But, though it has been very ingeniously put by Mr. Grove, it seems to me that what he now complains of has nothing to do with the objection. The question which the jury had to determine was, whether the testator was competent to make a will. Now, it appears that he had given a substantially correct and connected account of the disposition of his father's property. That clearly was very good evidence to shew the state of his mind. The will of his father was in court, and might have been inspected and put in by the plaintiff to shew that that statement was untrue. The plaintiff did not put it in: and, when it was offered as evidence on the part of the defendant, it was objected to, and withdrawn. What was the fair and natural inference to be drawn from that? Why clearly that the plaintiff did not think it worth while to put it in, because it would not contradict the evidence which the defendant had given. The point, therefore, stands quite apart from the objection to the admissibility of the evidence. I own my opinion is that the objection ought not

to have prevailed. I think it was perfectly competent to the defendant to put in the will, for the purpose of shewing that the account which the testator had given of its contents was correct. And there can be little doubt, that, if there had been any substantial variance between that document and the account which the testator gave [106] of it, the plaintiff's counsel would have put it in. As to the other point, the part of the summing-up to which that objection applies seems to me to be nothing more than a mode of inviting the attention of the jury to the question whether in what is called the third period of the testator's life he was aware of the manner in which his will had been framed at an earlier period The fact of his being sane and collected at that time was certainly more consistent with sanity at the period alluded to, than with the theory attempted to be set up on the part of the plaintiff. I cannot see any impropriety in the observations of the Lord Chief Justice in this respect. Upon neither ground, therefore, do I think there ought to be a rule.

Rule refused.

TOMAS BECK Y CAHILL AND BERNARDO VELASCO FERNANDEZ, Executors of Lucas Beck, Deceased, *v.* DAWSON. July 4th, 1857.

[S. C. 26 L. J. C. P. 253; 3 Jur. N. S. 1128.]

A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed one C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed one D., an insurance-broker, who effected the insurance in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C. in respect of premiums and commission on former transactions.—In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, and for money had and received, the judge, treating it as immaterial whether the letter of instructions from B. to C. had been shewn to D. or not,—ruled that B. had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for, that, if B.'s letter of instructions had been shewn to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent; and therefore that fact ought to have been ascertained.—But, quære whether the conduct of B. did amount to a breach of duty?

This was an action against an agent for negligence in effecting a policy of insurance. [107] The declaration stated, that, in the life-time of Lucas Beck, deceased, the said Lucas Beck retained the defendant as his agent for hire and reward in that behalf to effect a good and available insurance against certain perils on a certain cargo, that is to say, a cargo of oranges and figs, shipped by the said testator, to wit, from Seville to Liverpool, and consigned by the said testator to the defendant for sale or return, upon the terms that the defendant should use due and reasonable care and diligence in and about effecting the said insurance, and in taking all necessary steps to enable the said testator to obtain payment of the moneys which might become due in the event of the loss of the said cargo by any of the perils insured against, and should in the event of the inability of the defendant to effect the said insurance give notice thereof to the testator within a reasonable time in that behalf; and the defendant then accepted the said retainer, and then, in consideration of the premises, promised the said testator duly and faithfully to discharge his duty as such agent in the premises: And the plaintiffs, as such executors as aforesaid, said, that, although the said testator, and the plaintiffs as such executors as aforesaid, had respectively done all things, and though all things had happened, and all times had elapsed, necessary to entitle the said testator in his life time, and the plaintiffs as such

executors as aforesaid, to a performance by the defendant of his said promise, and to sue the defendant for the breaches thereof thereinafter mentioned; and although the defendant might and could and ought to have effected such an insurance in the life-time of the said Lucas Beck: yet the defendant broke his said promise in this, to wit, that he did not nor would use due and reasonable care and diligence in and about effecting the said insurance, but carelessly and negligently omitted to effect any good or available insurance upon **[108]** the said cargo agreeably to his said promise, nor did the defendant give any notice to the said testator in his life-time, or to the plaintiffs as such executors as aforesaid, of his inability to effect the same: And the defendant further disregarded his promise in this, that, although he might and could and ought to have taken steps, the same being necessary steps, to enable the said testator, and the plaintiffs as such executors as aforesaid, to obtain payment of the moneys due and payable in respect of the loss of the said cargo by certain of the perils insured against; yet the defendant did not nor would use all due and reasonable care and diligence in and about taking such steps, but wholly neglected so to do: Averment, that the said cargo so consigned to the defendant as aforesaid was in the life-time of the said testator wholly lost on the said voyage by divers of the perils against which the defendant was retained to effect an insurance as aforesaid; whereby the testator was deprived of the moneys which he ought to have received by reason of such insurance, and his personal estate was thereby damnified and lessened, and the plaintiffs as such executors as aforesaid had been thereby wholly deprived of the amount which ought to have been received by reason of such insurance, to wit, 300*l*.

There was also a count in trover for the policy, and a count for money received by the defendant for the use of the plaintiffs as executors.

The defendant pleaded,—first, that the plaintiffs were not executors of the last will and testament of Lucas Beck, deceased, as alleged,—secondly, to the first count, that the defendant did not promise as alleged,—thirdly, to the first count, that the said Lucas Beck did not retain the defendant as alleged, upon such terms as alleged, nor did the defendant accept such retainer, as alleged,—fourthly, to the first count, a denial of the alleged breaches of promise and each of them,—fifthly, to **[109]** the first breach in the first count, that the defendant could not have effected such insurance in the life-time of the said Lucas Beck, as alleged,—sixthly, to the second breach, that the defendant could not have taken such steps to enable the testator, or the plaintiffs as such executors, to obtain payment of the moneys due or payable in respect of the loss of the cargo, as alleged,—seventhly, to the first count, that, after the making of the said promise, and before any breach thereof by the defendant, the said Lucas Beck in his life-time discharged the defendant from his promise and from the performance of the same,—eighthly, to the second count, not guilty,—ninthly, to the second count, that the said goods were not the goods of the plaintiffs as such executors, as alleged,—tenthly, to the first and second counts, that the defendant did what was complained of by the leave of the said Lucas Beck in his life-time, and of the plaintiffs as such executors as aforesaid since the death of the said Lucas Beck, respectively,—eleventhly, as to the residue of the declaration, never indebted,—twelfthly, to the residue of the declaration, payment before action. Issue thereon.

The cause was tried before Willes, J., at the sittings in London after Trinity Term, 1856. The facts which appeared in evidence were as follows:—The plaintiffs' testator, who was a merchant carrying on business at Seville, under the firm of Cahill, White, & Beck, having in November, 1854, consigned a cargo of fruit to Liverpool, by the ship "Walburton," by letters of the 3rd and 7th of that month instructed the defendant, his agent there, to effect an insurance thereon for 300*l*. Finding that he could not effect a policy at Liverpool upon such good terms as in London, the defendant sent directions to one Lewis, a commission agent, to get the policy effected there. Lewis employed for that purpose one Naile, an insurance broker. Naile effected the in-**[110]**-surance in his own name; and, an average loss having been incurred, the underwriters, after considerable delay in adjusting the amount, paid the loss to Naile, who claimed to be entitled to set off the sum so received by him against premiums and commission due to him from Lewis upon other transactions.

There was a conflict of evidence as to whether Lewis, at the time he instructed Naile to get the policy effected, shewed him the letter of instructions he had received from the defendant, or informed him that he was acting as agent in the transaction. Lewis swore that he did: Naile denied it: but, at all events, it was pretty clear that

Naile became acquainted with the fact before he received the money from the underwriters.

It appeared that Lewis had on former occasions been employed by Cahill & Co. as their agent in London in the charter of ships and effecting insurances and sales, and that the "Walburton" had been chartered by him, but that they had not recently employed him in any business of importance.

On the part of the defendant it was insisted that the defendant had been guilty of no breach of duty in employing Lewis to carry out the instructions of his principal, and that Lewis had only adopted the usual course of business in employing an insurance-broker, and that the fact of Naile, the insurance-broker, having caused the policy to be effected in his own name did not make the instrument less good and available, or in any way affect the right of the principals to recover against the underwriters for a loss, nor could the principals be prejudiced by Naile's improper claim of lien. It was further insisted, that, assuming that the course pursued by the defendant was at first unauthorized by the instructions he received from his principals, the latter had subsequently ratified it; and in support of this the following correspondence was put in:—

[111] A letter of the 7th of May, 1855, from Cahill & Co. to the defendant,—

"We are duly favoured with your's 25th ult., in answer to three letters of ours on the subject of the account of insurance on the 'Walburton's' cargo. We are sorry to see nothing had been done since your last advices; and, as to Mr. Lewis, he had not written us a single word on the subject, nor is it likely he should, as it was an affair entirely committed by us to your care, and not to his. We beg, therefore, once more earnestly to request of you to consider that it is you, not Mr. Lewis, whom we intrusted with the insurance of the 'Walburton's' cargo, and that consequently it is from you alone, and not from him, that we hope and expect shortly to receive the termination and account of this so long unsettled affair."

A further letter of the 29th of May, from Cahill & Co. to the defendant,—

"We are anxious to get this matter settled, and, not having a single word from Mr. Lewis on the subject, did not know what to attribute so long a delay to, unless it was to be attributed to dilatoriness on his part; and therefore it was that we expressed a wish to have this affair wound up; and our wish to have it settled through your mediation was, to avoid complication, which would undoubtedly arise should the result of the insurance come through a different person from that to whom the cargo was consigned per 'Walburton.' We hope you will soon obtain the final winding up of this affair from Mr. Lewis."

A further letter of the 24th of July, from Cahill & Co. to the defendant,—

"Referring you to our annexed circular, and deprived of your esteemed favours since our last (29th May), we beg now to say that we were shortly afterwards addressed by Mr. Lewis on the subject of the insurance **[112]** on the 'Walburton's' cargo, which he said had not been arranged, owing to some difficulties which had occurred; but he expected shortly to wind it up. He has since, it appears, been ill, but is well again, and attending to business. We pray, therefore, you will once more urge him to finish this tiresome business as soon as possible, as we are now fast approaching to another season, without having seen an end of the first cargo of fruit shipped last season at our port."

A further letter of the 1st of September, from Cahill & Co. to the defendant,—

"We were in receipt of your esteemed favour 25th July, having had the pleasure of addressing you on 24th same, to which, and to our former letters of the 7th and 29th May, we beg to refer you on the subject of 'Walburton's' cargo. We must really say that it is a very unusual occurrence that has taken place in this business. We intrusted you with the insurance on this cargo, and a year almost has elapsed without its winding up, merely because the person you employed as your agent in London for the purpose does not choose to give any account of it. There certainly is some means of forcing him to do so, if letters are not sufficient. If so, pray employ it, and see if this tiresome business can be concluded."

A further letter of the 10th of November, from Cahill & Co. to the defendant,—

"We confess our inability to read some parts of your esteemed favour, 15th ult., now before us; but will explain our opinion of the case of the 'Walburton's' insurance. We gave you orders for effecting insurance thereon, and for the purpose you thought proper to avail yourself of some person or persons in London, and now this person or

persons refuse to account to you for such insurance. Now, this is the state of the case; and we may be allowed to ask, what matters it to us whether **[113]** you employ legal or illegal means to force him to come to his senses? We have nothing to do with him: it was you employed him, not we: and we trust through you to obtain the full amount insured.'

A further letter of the 20th of February, 1856, from Cahill & Co. to the defendants,—

"Your esteemed favour, 13th inst., is before us. In the first place, we will observe, &c., &c. As to the chief object of your letter,—that of your responsibility for the insurance of the 'Walburton,' -not being of same opinion with you, as our previous letters have shewn you, we have referred the matter to our friends and agents in London, Messrs. W. M'Andrew & Sons, to arrange with you. In our opinion, your interest would not be prejudiced by paying us the insurance, as in such case you would be substituted in our place to claim it from the broker, who would undoubtedly have to pay all for his unjust detention of funds which he well knew did not belong to his debtor. By so doing, you would do but justice to us, as we have had nothing to do with either the broker or Mr. Lewis, but with you; and we have your acknowledgment of the cargo having been insured. Besides, Mr. Lewis has not been our agent for the last eight years, nor had the management of any business of ours; so that we cannot be responsible for his acts."

Other letters were put in, bearing date in 1848, 1849, and 1850, addressed by Cahill & Co. to the defendant, instructing him to employ Lewis to effect certain insurances for them on cargos of fruit. One of these letters, dated the 8th of November, 1849, contained the following passage: -"Our mutual friend Thomas R. Lewis, of London, having opened a general policy for one or more cargos of fruit shipped by us, we this mail order his including therein the amount of this shipment."

[114] The learned judge was of opinion that the defendant had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible to his principals for the amount received by Naile. He treated it as immaterial whether Lewis had shewn his letter of instructions to Naile, or not.

A verdict was taken for the plaintiffs, damages 326l., with leave to the defendant to move to enter the verdict for him, if the court should be of opinion that the learned judge had ruled erroneously.

James Wilde, Q. C., in Michaelmas Term, 1856, accordingly obtained a rule nisi to enter a verdict for the defendant, or for a new trial, "on the ground that the defendant properly executed the orders he received, or that the course taken by him was ratified by the plaintiffs." He submitted that the charge in the declaration was not made out; for, that the defendant had caused a good and available policy to be effected, and that the fact of its having been effected in the name of Naile did not in any degree affect the plaintiffs' right to recover for a loss, the receipt of the money by Naile being a receipt to the use of the persons interested; and that Naile's improper claim of lien could not affect the defendant. He referred to *Snook* v. *Davidson*, 2 Campb. 217, *Westwood* v. *Bell*, 4 Campb. 349, and *Maanss* v. *Henderson*, 1 East, 335.

Honyman (with whom was Byles, Serjt.), in Trinity Term, shewed cause. The insurance was effected by Naile for Lewis. [Cresswell, J. If Lewis, at the time he employed Naile to get the policy underwritten, disclosed to him that he was acting as agent of another, Naile could acquire no lien upon the proceeds of that policy for premiums and commission due to him from **[115]** Lewis upon other transactions: and, if so, how can it be said that there was not a valid insurance upon the Walburton's cargo?] If it was a material question whether or not Lewis communicated to Naile the letter of instructions he received from Dawson, the defendant's counsel should have asked the learned judge to leave that matter to the jury. The plaintiffs could not have sued either Lewis or Naile; there being no privity between them. The case somewhat resembles *Ireland* v. *Thompson*, 4 C. B. 149, where it was held, that, where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested; and that a person employed by him to superintend the sale, might lawfully pay over the proceeds to him or to his order. Maule, J., in delivering the judgment of the court, there says: "Whether the action could have been maintained, if the plaintiff, or all those interested in the ship and cargo, had intervened before

the money had been paid by the orders of Frazer (the master), it is not necessary to determine. But there are strong reasons for considering the defendant and his partner as the agents of Frazer only, and not accountable to those interested in the ship and cargo, even if they had intervened before payment. In a learned work cited on the argument,—Story on Agency,—the author states the rule thus (—203, n.): 'A sub-agent employed by an agent is in general accountable to the agent only, and not to the principal: for, there is no reciprocity of contract between them:' and this doctrine is supported by several cases which he refers to, amongst which are *Stephens* v. *Badcock*, 3 B. & Ad. 354, where the court held that a clerk who had received money for his master on account of the plaintiff, was not answerable to the plaintiff, whose remedy was against the master, though the clerk **[116]** had not paid the money to him,—*Cartwright* v. *Hateley*, 1 Ves. jun. 292, where a son, employed under and accountable to his father, was held not to be accountable to his father's principal, and *Pinto* v. *Santos*, 5 Taunt. 447, 1 Marsh. 332 (which in its circumstances bears some resemblance to the present case), where it was held that bankers, who had received from an agent the proceeds of a ship which belonged to different persons in different shares, with notice of the party from whom the money was received, and of the rights of those who were entitled to it, were liable to account to the agent only from whom they received the money, notwithstanding the intervention of the plaintiff, who was entitled to the largest share. See also the case of *Sims* v. *Brittain*, 4 B. & Ad. 375, 1 N. & M. 594, in which the surviving part-owners of a ship were considered not entitled to maintain an action for money had and received against persons whom a deceased part owner (who was the ship's husband) had employed to receive and pay money on account of the ship,—on the ground of want of privity between the plaintiffs and the defendants. The principle on which these cases were determined would probably govern the present case, if the circumstances required its application." [Cockburn, C. J. Suppose Dawson had employed Naile, how would the matter have stood then?] Possibly in that case the plaintiffs might have had a right of action against Naile: but even then their remedy against Dawson would remain. Under the count for money had and received, inasmuch as the money was received by Naile for Lewis, and the latter is identified with Dawson, the plaintiffs are entitled to insist that Dawson has received the money by or through his agent. The plaintiffs are therefore entitled to retain the verdict on that count.

James Wilde, Q. C., and Tomlinson, in support of the **[117]** rule. The special count charges the defendant with having negligently omitted to effect a good and available insurance upon the cargo in question, and also with having neglected to take proper steps to obtain payment of the loss from the underwriters. Now, as to the first, it is clear that there has been no default; a good and available policy was effected, for the money was paid in respect of the loss. Then, as to the other part of the charge, if Naile set up an illegal claim of lien upon the money, that is not the defendant's fault. That it is the recognized course of dealing to employ an insurance or policy broker, as he is sometimes called, to effect an insurance, is clear: see Arnould on Insurance, 2nd edit., vol. i., p. 117. And the authorities are equally clear, that, although the broker has a lien for his general balance against the person who employs him to effect the policy, where he acts in ignorance that the person so employing him is merely an agent in the transaction, yet, where he knows, or has reason to believe, that he is dealing with one who is only an agent, his lien extends no further than the premiums and commission due in respect of the particular policy: see *Snook* v. *Davidson*, 2 Camph. 217; *Westwood* v. *Bell*, 4 Camph. 349; *Mannes* v. *Henderson*, 1 East, 335; Marsh. Ins. 3rd edit. 308. If Dawson's letter of instructions to Lewis, therefore, was communicated to Naile, he clearly could have no right to retain the money. [Cresswell, J. The onus probandi lay on you. I apprehend, that, unless it was found that Lewis did communicate to Naile the fact of his being only an agent, there is no defence to the action. You should have required that to be left to the jury.] The whole matter was reserved for the court. [Cockburn, C. J. The authority given by the plaintiffs' testator to Dawson primâ facie was, to cause a policy to be effected either in his own (the principal's) name or in that of Dawson. He has done **[118]** neither. On the contrary, he employs a third person, who causes the insurance to be effected in such a way as to confer upon the broker a right to receive, and, for aught that appears, to retain, the money.] It is submitted that Lewis did not enable Naile to receive the money otherwise than to the use of the persons legally entitled to it

viz. the plaintiffs. The fact of Naile, who is bound to pay over the money to the plaintiffs, having omitted to do so, cannot give the latter a cause of action against Dawson. It may be conceded, that, if Dawson had acted upon the instructions of his principals in such a way as to give a third person a legal right to intercept the money, he might be open to the charge of having negligently effected the insurance. [Cockburn, C. J. Does not the defendant, by putting it into the power of Lewis to cause the policy to be effected in the way he did, contravene his duty to the plaintiffs, and so render himself liable at all events for nominal damages?] Clearly not, unless he gives some person a legal right adverse to the interest of his principals. Assuming, however, that Dawson's employment of Lewis was not originally authorized by the testator, the correspondence clearly shews that the act was subsequently ratified by him. The plaintiffs, therefore, cannot now complain that Lewis was improperly put in motion.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:

This was an action brought by the executors of a merchant who resided at Seville, in Spain, against his agent, who resided at Liverpool, charging him with negligence in effecting a policy of insurance. It appears that one Beck, a merchant at Seville, had written to the defendant, requesting him to effect an insu-**[119]**-rance upon a cargo of fruit, and that the defendant, thinking it might be effected on more advantageous terms in London than in Liverpool, wrote to one Lewis in London, explaining to him the nature of the order which he had received, and instructing him to effect the policy. Lewis thereupon employed one Naile, an insurance-broker; and there was some controversy at the trial as to whether or not Lewis had shewn Naile his letter of instructions. Naile effected the policy, and, a loss having occurred, received the money from the underwriters, but refused to hand it over to the defendant, insisting on a lien as against Lewis in respect of premiums due to him upon other policies. The learned judge who tried the cause treated it as immaterial whether the letter of instructions had been shewn to Naile or not; thinking that the defendant had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received by Naile from the underwriters.

The case was argued before us in Trinity Term last upon both points. The question as to how far it was material to shew that the letter was communicated, certainly was not determined at the trial. There is some difference of opinion in the court as to whether or not the defendant did in any way violate his duty, by transferring to Lewis the order to effect the policy: but, at all events, we are all of opinion that the true measure of damages was not that which the learned judge stated. This being an action upon the case for negligence, if that letter had been exhibited to Naile, he could have acquired no right to retain the proceeds of the policy for a claim against Lewis, because he would have known that Lewis was acting merely as agent for Dawson; and the unlawful detention of the money by Naile could not give the plaintiffs a right of **[120]** action against the defendant for the whole amount so received by Naile, though the defendant might be liable for some nominal damages in respect of the breach of his duty as agent. That question, however, cannot be decided until it is first ascertained whether the letter of instructions sent to Lewis was or was not shewn to Naile at the time the order for the insurance was given to him; consequently, there must be a new trial.

This being a point of some considerable importance in the law of principal and agent, the parties may put it in any course of investigation they may consider to be expedient.

Rule absolute accordingly (*a*).

(*a*) The cause went down again, but has not yet (E. T. 1858) been tried.

LOVELL *v.* SMITH. June 25th, 1857.

A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an abandonment thereof.

This was an action brought by the plaintiff to try the right to a foot way claimed by him over the defendant's land, in the parish of West Hadden, in the county of Northampton.

The cause was tried before Wightman, J., at the last Assizes at Northampton. The facts were as follows:—In the year 1803, the plaintiff became the occupier of a cottage called West Hadden Cottage, and had occupied it ever since. The defendant's farm,—over part of which the way was claimed,—was between the plaintiff's cottage and the village, and was at that time occupied by one Thomas Whitwell, who continued in **[121]** occupation until Lady-Day, 1824. In 1820, Whitwell became owner of the fee: and, from Lady-Day, 1824, the farm was occupied by one Isaac Lovell (a cousin of the plaintiff). Whitwell, however, continued to reside in the house until October, 1824, when he died, having by his will devised the house and farm to his daughter Mary, then a minor, in fee. She, in July, 1824, being still a minor, married. In 1834, the estate became the property of one William Dunkley, who died some time before February, 1838, having by his will devised the estate to his wife for life, who is still living.

There was abundant evidence of an uninterrupted user of a way over the land in question from the plaintiff's cottage to the village, prior to the year 1812. In 1824, the farm being then in the occupation of Isaac Lovell, by agreement between him and the plaintiff, and with the assent of Whitwell, the then owner of the fee, the direction of the footpath was altered, and a new way made over a portion of the defendant's land, and the old one ceased to be used. The obstruction complained of was in a part of the old line between the plaintiff's land and the point of deviation on the defendant's land.

The plaintiff's case being closed, the defendant's counsel submitted, that, inasmuch as the declaration claimed a way generally, and the particulars pointed at two ways, viz. the original way, and the substituted one, he was entitled to call upon the plaintiff to state which of the two he relied on. To this the learned judge assented

The plaintiff's counsel thereupon said that he claimed to be entitled to the new or substituted way, by virtue of twenty years' user under the 2 & 3 W. 4, c. 71, s. 2: but, that failing, by reason of the disability arising from the infancy and coverture of Mary Whitwell, he submitted that he was entitled to fall back upon his **[122]** original prescriptive right to the old way. He referred to *Payne* v. *Shedden*, 1 M. & Rob. 382.

For the defendant, it was insisted that there was no evidence to support the claim to the old way by prescription, because the user of it had become impossible by acts of the owner of the soil, acquiesced in by the plaintiff who claimed the right.

The learned judge was of opinion that the disability negatived the plaintiff's claim under the statute in respect of a twenty years' user: and he proposed to put it to the jury whether the prescriptive way had not been abandoned.

The plaintiff's counsel having summed up his evidence, and the defendant's counsel having addressed the jury, the learned judge left it to them to say whether the plaintiff had a way by prescription; and, if he had, whether, by agreement between the owner and occupier of the land over which the way claimed ran, and the plaintiff, the person claiming the way, another way was substituted for the old way, and the old one abandoned and extinguished.

The jury having returned a verdict for the defendant,

Field, in Easter Term last, moved for a rule nisi for a new trial on the ground of misdirection,—"first, that there was no evidence to be left to the jury of an abandonment of the right of way claimed,—secondly, in the judge not telling the jury, that, under the circumstances proved in evidence, the non user of the way was not sufficient to justify them in presuming an abandonment,—thirdly, that the obstruction was on part of the way which had been immemorially used, and as to which there was no evidence of abandonment:" and also on the ground that the verdict was against evidence. The non-user of the old way under the cir **[123]** cumstances proved,

clearly was no evidence of abandonment. In *Payne* v. *Sheddon*, 1 M. & Rob. 382, a plea of twenty years' user of a right of way, under the 2 & 3 W. 4, c. 71, was held not to be defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. Patteson, J., there says: "If there be ten years enjoyment of a right of way, and then a cessation, under a temporary agreement, for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years, to make it indefeasible under the statute; for, the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with, the right. So, if, instead of the direct path from A. to B., another track over the plaintiff's land, from A. to C. and thence to B., had been substituted by a parol agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it." The case thus put is precisely this case. Again, in *Hale* v. *Oldroyd*, 14 M. & W. 789, in case for the diversion of water, the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, three ponds filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. At the trial, it appeared in evidence that the plaintiff had enjoyed an immemorial right to the flow of this water into an antient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish, and overgrown with grass. The plaintiff's right in **[124]** respect of the three ponds having been defeated by proof of an outstanding life estate, under the 2 & 3 W. 4, c. 71, s. 7, —it was held that he was entitled, under this declaration, to recover in respect of his right to the flow of water to the old pond. Parke, B., there says: "The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones. He did not thereby abandon his right; he only exercised it in a different spot; and a substitution of that nature is not an abandonment. He has a right, therefore, under this declaration, to recover in respect of the old pond." And in *Ward* v. *Ward*, 7 Exch. 838, it was held that an immemorial right of way is not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party's having had a more convenient way. Alderson, B., in the course of the argument in that case, observes,—"The presumption of abandonment cannot be made from the mere fact of non user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user. Here, the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property." In Gale on Easements, 380, 381 —after referring to *Payne* v. *Sheddon*, 1 M. & Rob. 382, and *Hall* v. *Swift*, 6 Scott, 167, 4 N. C. 381, *Hale* v. *Oldroyd*, 14 M. & W. 789, and *Carr* v. *Foster*, 3 Q. B. 581, 2 Gale & D. 753, as elucidating the doctrine that "a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment,"—the learned author says: "Where, however, there has not **[125]** been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, or, by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right, would at all events be strong evidence, and in effect almost conclusive, that he never had any such right:" and he refers to *Norbury* v. *Meade*, 3 Bligh, 211, 241. [Cresswell, J. Here, the plaintiff used the new way set out by Isaac Lovell in 1824, not as a way of right, but under a licence. The question is, whether there was any evidence of an abandonment of the old way, except so long as he might be permitted to use the new one.] Precisely so. [Crowder, J. Was not abandonment a question for the jury?] No doubt: but here there was no evidence of abandonment.

A rule nisi having been granted,

Hayes, Serjt., now shewed cause. He submitted that there was ample evidence

to justify the conclusion to which the jury came, that the old way had been abandoned when the new one was set out, that it was purely a question of fact for them, and that the learned judge had properly left it to them; and that, the claim arising out of the twenty years' user of the new or substituted way, under the statute 2 & 3 W. 4, c. 71, s. 2, being by reason of the disability of the owner of the fee out of the question, the cases cited upon the motion were altogether inapplicable.

Field, in support of his rule, was stopped by the court.

[126] CRESSWELL, J. I am of opinion that this rule should be made absolute. The learned judge evidently had his mind diverted from the true question by the contest between the counsel at the trial. The plaintiff at first claimed to be entitled to the new way, by reason of an uninterrupted enjoyment for twenty years, under the 2 & 3 W. 4, c. 71, s. 2. The defendant's counsel having succeeded in inducing the judge to lay that out of the question, the plaintiff's counsel fell back upon his original prescriptive right. Now, there was nothing from which an abandonment of that right could be inferred, except the exercise of the right over the new way; and that clearly was not sufficient.

WILLIAMS, J. I am of the same opinion. As it now turns out, the case very much resembles that of *Roe d. the Earl of Berkeley* v. *The Archbishop of York*, 6 East, 86, where the acceptance of a new lease granted under a special power, and an occupation under it for several years, was held not to operate as a surrender of a former lease, which had in fact been cancelled and given up, so as to prevent the lessee from setting it up again, upon its turning out that the new lease was void by reason of its not having been made in strict accordance with the terms of the power.

WILLES, J. I am entirely of the same opinion. The facts seem to have been these,—The plaintiff, having a right of way by prescription, more than thirty years ago agreed with the owner and occupier of the servient tenement that the use of a portion of that way should be discontinued, and a new one, equally convenient to him, should be substituted for it. It is quite obvious that that was done without any intention on the part of the plaintiff to abandon his original right: and the jury were not at liberty to infer an abandonment or ex-**[127]**-tinguishment, without some evidence of intention. I do not think that this court means to lay it down that there can be an abandonment of a prescriptive easement like this without a deed, or evidence from which the jury can presume a release of it. It is unnecessary, however, to discuss that on the present occasion, because I agree with the rest of the court in thinking that the facts of this case shew clearly that there was no intention on the part of the plaintiff to abandon the way, either legally or popularly. There was no evidence to go to the jury of the old right of way having ever been given up or destroyed.

CRESSWELL, J. After this intimation of opinion on the part of the court, probably the defendant will hardly think it worth his while to go down again (*a*).

Rule absolute.

[128] LODER *v.* KEKULE. July 4th, 1857.

[S. C. 27 L. J. C. P. 27; 4 Jur. N. S. 93; 5 W. R. 881.]

In an action for the breach of a contract by delivering goods of a quality inferior to that contracted for, the proper measure of damages is, the difference between the value of goods of the quality contracted for, at the time of the delivery, and the value of the goods then actually delivered, —or their value as ascertained by a re-sale within a reasonable time: and the fact of the goods having been previously paid for cannot be taken into consideration in estimating the damages.

The plaintiff in this action sought to recover damages against the defendant for an alleged breach of two contracts each for the sale of one hundred casks of Russian tallow; the complaint being, the delivery of tallow of a quality inferior to that contracted for.

(*a*) The cause came on to be tried before Erle, J., at the following Spring Assizes, when a compromise was come to, —a juror being withdrawn, and the question as to the costs of the second trial being left to the learned judge, who directed that the plaintiff's costs out of pocket should be paid by the defendant.

The first count of the declaration stated, that, in October, 1855, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, one hundred casks of Russian prime Ukraine Y. C. tallow, at 58s. per cwt. free on board at Dantzic, to be ready for shipment at Dantzic during the month of November, 1855; the defendant to provide ship room on best terms for London; tare to be at the rate and payment to be made in the manner then agreed upon; and the defendant then, in consideration of the premises, promised the plaintiff to perform the said agreement on the defendant's part: Averment, that the said month of November elapsed, and ship room was procurable for London according to the said contract, and a sufficient and proper time for the defendant to have performed the said contract on his part expired, and the plaintiff paid for the said tallow according to the said contract,—all which happened before this suit; and that the plaintiff was at all times ready and willing to accept a shipment of and to receive the tallow according to the said contract, and before this suit performed all conditions and matters precedent or otherwise on his part: Breach, that the defendant did not perform the said contract on his part, and supplied and shipped as and for the said tallow one hundred casks of tallow of which a great part was not Russian prime **[129]** Ukraine Y. C. tallow, but was different therefrom, and of much less value, and did not at any time supply or ship, or have ready for shipment, one hundred casks of Russian prime Ukraine Y. C. tallow; and thereby the plaintiff before this suit sustained great damage by reason of the inferior quality and value of the tallow actually supplied, and by reason of certain freight, insurance, landing, selling, and other charges, duties, and dues incurred and paid by the plaintiff in respect of the same, and by reason of the loss of profit which would have arisen from the supply of tallow according to the contract, and thereby also lost interest upon, and the use of, large sums which he would have obtained from the sale of the tallow, if it had been supplied to him according to the contract.

There was a second count upon a similar contract for one hundred casks of first sort Russian Ukraine Y. C. tallow, at 59s. per cwt., and a similar breach.

The defendant pleaded payment into court of 23*l.*; to which the plaintiff replied damages ultra, whereupon issue was joined.

The cause was tried before Willes, J., at the sittings in London after Trinity Term, 1856. The facts which appeared in evidence were as follows:—In October, 1855, the plaintiff contracted with the defendant to buy of him two parcels of 100 casks each of "Russian prime Ukraine Y. C. tallow," at 58s. and 59s. per cwt. respectively,—the price being paid in advance,—and on the terms stated in the first and second counts of the declaration respectively. The tallow was accordingly shipped on board the "Emilie," and arrived in London on the 12th of January, 1856. The unloading of the cargo commenced on the 16th of January, and was finished on the 25th. Upon inspecting the tallow, the plaintiff found that it was very inferior in quality to that which he had contracted for; and in the result it turned out **[130]** that, of the two hundred casks, sixteen only were according to contract (*a*). These the plaintiff accepted at the contract price; but, as to the remaining 184 casks, a correspondence ensued between the plaintiff and the defendant, the former offering to return the tallow, and demanding back his money, or to accept the tallow with an allowance of 7s. per cwt.; the defendant declining to take back the tallow or to make the required allowance. And on the 12th of March the plaintiff sold the 184 casks, in his own name, on account of the defendant.

It appeared that the price of tallow declined considerably in London on the 17th of January, and that it continued to decline until the time of the sale. The value of tallow according to the contract on the 25th of January, when the landing and delivery took place, was 58s. per cwt.: the 184 casks, when sold on the 5th of April, fetched 51s. 6d. per cwt. only.

On the part of the defendant, it was insisted that enough had been paid into court to satisfy the plaintiff's claim in respect of the breach of contract; and that the true measure of damages was, the difference between the value of so many casks of tallow of the quality contracted to be sold, and the value of the article actually delivered: and, further, that the plaintiff's conduct amounted to an acceptance of the tallow in satisfaction of the contract; and that the sale was unauthorised, and unreasonably delayed.

On the part of the plaintiff, it was submitted that he was entitled to recover, as

(*a*) Fourteen of the one parcel, and two of the other.

damages for the breach of contract, the difference between the contract price, and the sum produced by the tallows on the re-sale.

The learned judge left it to the jury to say, whether the plaintiff accepted the tallow delivered as a fulfil-[131]-ment of the contract, and whether it had been re-sold within a reasonable time. The jury answered the first question in the negative and the second in the affirmative; and they assessed the damages at 516*l.*, which was less by 361*l.* 13*s.* than the sum which the plaintiff would be entitled to upon the principle of assessment insisted upon by him, viz. the difference between the contract price prepaid by him and the price for which the tallows were re-sold.

Byles, Serjt., in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, pursuant to leave reserved, "on the ground, that, according to the true mode of computing the damages, the money paid into court was sufficient." He submitted that the plaintiff had adopted the contract by accepting part of the tallows, and selling the rest in his own name, and without authority from the defendant; and that the true measure of damages, assuming the plaintiff to be entitled to recover, was, the difference between the value of tallow such as that contracted for, and of that which was actually delivered. He referred to *Chapman* v. *Morton*, 11 M. & W. 534.

Hugh Hill, Q. C., and Aspland, shewed cause. The sole question upon this rule is, whether the learned judge was bound to tell the jury to find for the defendant, and that the sum paid into court was sufficient to cover any damages the plaintiff was entitled to for the breach of the contract. Whether or not the plaintiff accepted the tallow as a fulfilment of the contract, was clearly a question for the jury, —see per Parke, B., in *Chapman* v. *Morton*, 11 M. & W. 540, and it is submitted that the sum the plaintiff was entitled to recover was, the difference between the contract price which he had paid and the sum which the inferior tallows realized [132] on the re-sale; and that, it being admitted on the record that the tallows delivered were not the tallows contracted for, it was a question of fact for the jury whether the plaintiff had taken to them under the contract, or repudiated the contract, and re-sold under justifiable circumstances and within a reasonable time: and there was no evidence to warrant them in concluding that the plaintiff ever meant to take to the shipment as a performance of the contract, or that the sale was unreasonably delayed. The plaintiff had parted with his money; and, the defendant failing to return it, he was justified in selling the goods to reimburse himself. The sale was a mere mode of ascertaining the amount of damages. As to the measure of damages, *Powell* v. *Horton*, 2 N. C. 668, 3 Scott, 110, is directly in point. There, the defendant contracted to sell to the plaintiff "Scott & Co., 75 barrels mess pork, at 53*s.* per barrel:" at the trial it was proved that mess pork cured by Scott & Co. obtained in the market a higher price by 2*s.* 6*d.* per barrel than pork cured by any other house; and witnesses (connected with the trade) were allowed to state their construction of the contract: it was held, that, by the terms of the contract, the pork was expressly warranted to be pork cured by Scott & Co., and not merely consigned by that firm, and that the witnesses were properly admitted to explain the contract. Upon the question of damages, Bosanquet, J., said: "The article having been sold as pork of a particular description, and not answering that description, the proper measure of damages was that which the jury have given, viz. the difference between the invoice price and the sum produced on the re sale; and, under the circumstances, I think the sale was not delayed for an unjustifiably long period." The distinction between the case of money paid in advance and other cases, is pointedly referred to in *Gainsford* v. *Carroll*, 2 B. & C. [133] 624, 4 D. & R. 161, where it was held, that, in assumpsit for not delivering goods upon a given day, the true measure of damages is, the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered. On the cases of *Shepherd* v. *Johnson*, 2 East, 211, and *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257, being cited, the court said,—"These cases do not apply to the present. In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here, the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken; and, if he has sustained any loss by neglecting to do so, it is his own fault." Upon the whole, it is submitted that the question was properly for the jury, and that their mode of estimating the damages was the correct one, or, at all events, not open to objection on the part of the defendant.

Byles, Serjt., and T. Jones, in support of the rule. The true measure of damages can have nothing to do with the market price, but is, the difference between the value of the tallows which the plaintiff contracted to buy, and that of those which he did receive. In the first place, the plaintiff had no authority from the defendant to sell the tallows at all; and if he had, he should have sold the whole of them, and not in his own name. His dealing with them as he did was the same as if he had taken to the goods in the first instance. He might have rescinded the contract, and brought his action to recover back the money which he had paid. He has not done so here: and, if he had, he could not have recovered; for, he cannot affirm the contract as to part and reject it as to the other part. In *Harnor* v. *Groves*, 15 C. B. 667, it was held that the vendor of **[134]** goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract, and recover back the price. So, in *Blackburn* v. *Smith*, 2 Exch. 783, it was held that a purchaser of an estate could not repudiate the contract for a defect of title, after he had dealt with the property as his own. *Chapman* v. *Morton*, 11 M. & W. 534, in its circumstances very closely resembles this case. There, the plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbech, a quantity of oil-cake, which was delivered to the defendant there in December, 1841. The defendant conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs, and requiring them to take it back, which the plaintiffs refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal, and that, if no directions were given by them, it would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name, and in July sold it in his own name to a third party. In an action to recover the price of the oil-cake, the Lord Chief Baron ruled that these facts amounted to an acceptance, and directed the jury to find for the plaintiff. So, here, the learned judge should have directed the jury to find that the plaintiff accepted the tallow as a fulfilment of the contract. Assuming this to be an action for not delivering tallow according to contract, the true measure of damages is that above suggested, and in that case the sum paid into court is sufficient to cover the plaintiff's **[135]** claim. [Williams, J. This is not the case of a sale of a specific chattel.] Still the measure of damages would be the same: the only difference being, that, in the case of the sale of a specific chattel, the buyer must take it, even though it should not answer the purpose for which it is bought; whereas, in the case of an ordinary sale, the buyer may reject the article if it does not answer the contract. The correct rule, as the result of all the cases, is thus stated in Sedgwick on Damages, 2nd edit. p. 218: "It seems originally to have been held that the measure of damages in these cases was, the difference between the price paid and actual value; but it is now well settled that the rule is, the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty, the price paid being mere evidence of that value." From the note at p. 274 of that work, it seems that Chancellor Kent had in a former edition of his Commentaries used the word "price," instead of "value"; but that he has corrected it in a recent edition (*a*). In **[136]**

(*a*) The note is as follows:—The opinion expressed by Mr. Chancellor Kent is also well worthy of notice. The text of the original edition of this work contained the following passage,—"Chancellor Kent, in his Commentaries, vol. ii., 480, § xxxix., says, 'The general rule is well settled, that, in a suit by vendee, for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is, the price of the article at the time of the breach.' The learned Chancellor appears here to overlook the distinction resulting, as we have seen, from the payment of the price before-hand, which runs through these cases, and which is entirely analogous to the rule in trover, that the value of the chattel, not at the moment of conversion, but its highest value up to the time of trial, is the rule of damages." To which the Chancellor, in his 6th edition, replied as follows,—"The learned author is mistaken in supposing I had overlooked that distinction. These Commentaries are not calculated to embody all the nice or arbitrary or fanciful distinctions that are to be met with in

Maine on Damages, 88, the rule is stated as follows:—"Where the article has not been returned, the measure of damages will be, the difference between its value, with the defect warranted against, and the value which it would have borne without that defect. It was formerly laid down that the measure would be, the difference between the contract price, and that for which it would sell with its defect: *Caswell* v. *Coare*, 1 Taunt. 566. But the weight of authority in England is strongly in favour of the rule as stated above: see, per Buller, J., *Towers* v. *Barrett*, 1 T. R. 136; per Lord Eldon, C. J., *Curtis* v. *Hannay*, 3 Esp. N. P. C. 82; *Clare* v. *Maynard*, 6 Ad. & E. 519, 1 N. & P. 701, 7 Car. & P. 741; *Cox* v. *Walker*, 6 Ad. & E. 523, n. And the doctrine in America is the same: see Sedgwick on Damages, 293." The market price cannot be looked at. The buyer is entitled to receive that which the seller contracted to sell; if an article of less value be delivered, he is entitled to the difference: and the rule is the same whether the contract be for the sale of a specific chattel, or a general contract, except that, in the former case the buyer must take the thing delivered, and in the latter he need not. All the cases both here and in America result in what is stated as the rule in Sedgwick, in Kent, and in Maine: the true measure, is the amount of the inferiority in value. The fact of the agreed price of the article having been paid beforehand **[137]** in no degree varies the case: in none of the authorities has it ever been so laid down; and here it clearly could not, the sale having taken place without the defendant's authority or consent. With respect to *Powell* v. *Horton*, 2 N. C. 668, 3 Scott, 110, it may be observed, that it is Bosanquet, J., alone who speaks of the price having been paid; and that that case was decided long before the rule as to the measure of damages in cases of this sort was as it is now laid down. [Willes, J. It is at least as old as *Leigh* v. *Paterson*, 8 Taunt. 540. I thought that case had settled the rule as to damages.] Suppose this had been a question upon the statute of frauds, would not the facts here have been evidence of an acceptance under s. 17? [Cresswell, J. I apprehend not.] That is contrary to *Morton* v. *Tibbett*, 15 Q. B., 428.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court:

This was an action brought to recover damages for the breach of two contracts for the sale of one hundred casks of tallow each, by the delivery of an article inferior in quality to that which was sold.

The tallow arrived by the ship "Emilie" in London, where the plaintiff and defendant resided, on the 12th of January, 1856. The unloading of the cargo commenced on the 16th, and was finished on the 25th of January. As soon as the plaintiff had inspected the tallow offered for delivery, he objected to the quality, as not fulfilling the terms of the contract, in a letter dated the 28th of January; and thereupon a correspondence began between him and the defendant, which continued until the 12th of March, when a re-sale took place by order of the plaintiff.

The price of the tallow had been paid in advance; **[138]** and this action was brought to recover the difference between the contract price so paid and the amount realised by the re-sale.

The defendant had paid a sum of 234l. into court.

The market-price of tallow had fallen considerably on the 17th of January, and continued to decline until the re-sale on the 12th of March.

At the trial, before my Brother Willes, there was no dispute as to the breach of the contract, by delivering tallow of an inferior quality; but it was contended by the defendant, without taking any objection to the form of the declaration, that the sum paid into court was sufficient to cover the damages sustained: and this depended on the principle on which the damages ought to be estimated.

The learned judge left it to the jury to say whether the plaintiff had accepted the tallow as a delivery under the contract: and, the jury having found in the negative, the damages were assessed at a sum far exceeding that which had been paid into court, but far less than the difference between the contract price prepaid by the

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the reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damage is, the value of the article at the time of the breach, or when it should have been delivered. Mr. Sedgwick seems himself to come to that conclusion amid the contrariety of opinion and cases which he cites."

plaintiff, and the sum for which the tallows were re-sold. The jury further found that the plaintiff re-sold the tallow as soon as he reasonably could, and that it was properly sold.

The learned judge reserved leave to the defendant to move to enter a verdict for him, if, upon the facts proved at the trial, it should appear to the court that the defendant had paid in a sum sufficient to cover the damages legally sustained by the plaintiff.

On the argument in this court, it was contended that the judge, under the circumstances, ought not to have left such a question to the jury, but should have directed them to find an acceptance,—as Lord Abinger did in *Chapman* v. *Morton*, 11 M. & W. 534, upon evidence very similar. On the other hand, it was argued **[139]** that, in that case, Parke, B., expressed his opinion that it was a question of fact for the jury; and that his opinion was the better one, and had been properly acted on by my Brother Willes.

But, on further consideration, we have come to the conclusion that this point does not properly arise in the present case; for, that we ought, at all events, to disregard the finding of the jury on this matter. If we were to act on it, the consequence would be that we must treat the action as brought for money had and received, and the plaintiff would be entitled to recover a greater amount of damages than the verdict has given him, and even more than he asked for at the trial: for, he would be entitled to recover back the whole money prepaid, deducting only the amount paid into court: and the defendant would be put to bring a cross action against the plaintiff in respect of his unauthorized sale of the tallows. But it is plain, both from the conduct of the cause and the form of the declaration, that this action was brought to recover damages for the delivery of the inferior tallow, and not to recover back the money paid in advance; and that the plaintiff, in effect, elected to sue for such damages, instead of bringing an action for money had and received: and the concession of the defendant's counsel as to the form of the pleadings was not intended substantially to affect the position of the parties in this respect; but his objection in effect was, that, upon the facts of the case, and these pleadings, in any form into which they might be properly put by amendment, no claim could be sustained for damages beyond the amount paid into court.

Looking at the case in this aspect, we think that the pre-payment cannot be taken into consideration in apportioning the damages; and that the true measure of damages would have been, if there had been nothing else in the case, the difference between the value of **[140]** tallow of the quality contracted for, at the time of the delivery, and the value of the tallow actually delivered. This, however, is on the assumption that the tallow delivered could be immediately re sold in the market. But, as in the present case it appears clearly from the correspondence that the defendant by his conduct delayed the re-sale: and, as the jury have found, we think, correctly, that the re-sale on the 12th of March was in a reasonable time, we are of opinion that the proper measure of damages is, the difference between the value in the market of tallow of the quality contracted for on the 25th of January, and the amount made by the re-sale of the tallow actually delivered.

Applying this principle, the case, as to amount, stands thus:—No damage is claimed in respect of sixteen of the casks, which answered the description in the contract. The remaining 184 casks, containing 1549 cwt. net, were sold at about 51s. 6d. per cwt., and fetched in all 3896l. 9s. The price of tallow, according to the contract, upon the 25th of January, when the landing and delivery took place, was 58s. per cwt The correct amount of damages will, therefore, be, the difference between 1549 cwt. at 58s. per cwt., making 4492l. 2s, and the above sum of 3896l. 9s. (the actual proceeds of the inferior tallow), or 595l. 13s. Deducting from this the sum paid into court, 234l., there will be left 361l. 13s.

The damages must, therefore, be reduced from 516l. to 361l. 13s.

Rule absolute accordingly.

End of Trinity Vacation.

[141] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banco in this term, were,—Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

[142] HIGHMORE, Clerk, *v.* THE EARL AND COUNTESS OF HARRINGTON.
Nov. 3rd, 1857.

The court refused to grant a new trial on the ground that the damages were excessive, where the jury had given 750l. in an action for defamatory words spoken of a beneficed clergyman to his curate.

This was an action of slander. The plaintiff was the Vicar of Elverston, in the county of Derby. The slander complained of was uttered by Lady Harrington in a conversation with one Jones, the plaintiff's curate, upon his calling one day to lunch at Elverston Hall. It appeared that the plaintiff and a large section of his parishioners were at variance; and that many idle and unfounded stories were told in the village as to his undue familiarity with a female servant, and his misappropriation of the sacrament-money, &c. These were repeated by Lady Harrington to Mr. Jones, on the occasion alluded to, and the immoral character of the plaintiff assigned by her as her reason for declining to take the sacrament at his hands. This conversation **[143]** was conveyed, and (as was alleged by Lady Harrington, when called to contradict Jones at the trial,) with considerable exaggeration, by Jones to the plaintiff, who thereupon brought this action.

The cause was tried before Cresswell, J., at the last Assizes at Derby. The only witnesses of any importance were Mr. Jones on the one side and Lady Harrington on the other, in direct opposition. The jury returned a verdict for the plaintiff, damages 750l.

Edwin James, Q. C., now moved for a new trial, on the ground that the verdict was not warranted by the evidence, and that the damages were excessive. He submitted that the character in which Mr. Jones came to Elverston Hall, and the circumstances under which the alleged slander was uttered, might almost be said to make it a privileged communication: and that, at all events, the plaintiff could have sustained no real damage. [Cockburn, C. J. If the jury believed that Mr. Jones's evidence was true, I think it impossible that we can say the damages are excessive. My own impression is, that juries are hardly liberal enough in these cases.] Lady Harrington was merely telling Jones her reasons for abstaining from assisting at a solemn rite of the church; and it was not creditable in Jones to make so ill a return for the hospitality he was receiving at the hands of her ladyship. [Cockburn, C. J. Was it not the curate's duty to communicate to his vicar the charges which he had heard made against him? What need was there for Lady Harrington to tell Mr. Jones her reasons for declining to take the sacrament from the vicar?] If Jones had wished to do his duty as a gentleman and a christian minister, he would have put the lady on her guard at the outset.

COCKBURN, C. J. I am of opinion that there ought to **[144]** be no rule in this case. There was a direct conflict at the trial between the evidence of Jones and that of Lady Harrington: and the jury thought proper to come to the conclusion that the former was worthy of belief. That being so, I have no hesitation in saying, that, looking at the destructive and fatal tendency of the imputations cast upon the plaintiff as a clergyman and a gentleman, the damages which the jury have awarded him are anything but excessive.

CROWDER, J. The charges being so serious, I entirely agree with my Lord in thinking that the damages are far from being excessive.

The rest of the court concurring.

Rule refused.

DANIEL KEENE *v.* JAMES KEENE. Nov. 5th, 1857.

[S. C. 27 L. J. C. P. 88.]

Where a bill is drawn for a given sum, "with interest at 10 per cent. per annum," the drawee, on the default of the acceptor, is liable for interest at 10 per cent. after the maturity of the bill and notice of the dishonour.

This was an action for the balance of an account. One of the items of the plaintiff's claim consisted of a bill of exchange for 200*l.* drawn by the defendant upon one Edward Keene on the 21st of February, 1853, payable twelve months after date, with interest at the rate of 10*l.* per cent. per annum, and indorsed by Edward Keene to the plaintiff, and which bill had been dishonoured.

The cause was referred to one of the masters, under the compulsory clauses of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 3 et seq.). The plaintiff, having proved the presentment and dishonour of **[145]** the bill, and that due notice thereof had been given to the defendant, claimed interest at the rate of 10*l.* per cent. per annum. For the defendant it was insisted that the indorsee was only entitled to recover from the drawer interest at 5 per cent. from the maturity of the bill. The master having allowed 10 per cent.

Tompson Chitty now moved, on the part of the defendant, to refer the matter back to the master for re-consideration. The drawer of a bill which is dishonoured by the acceptor is only liable for interest from the time at which he receives notice of the dishonour.—*Walker* v. *Barnes*, 5 Taunt. 240: and there is no implied contract on the part of the drawer, on the acceptor's default, to pay more than the ordinary interest of 5 per cent. [Crowder, J. Does not the drawer undertake to pay, upon the acceptor's default, what the acceptor was bound for?] The acceptor would only be liable to interest at 5 per cent. after the Maturity of the bill. The bill is in effect a bill for 220*l.* [Willes, J. That clearly is not so. Until the maturity of the bill, the interest is a debt: after its maturity, the interest is given as damages, at the discretion of the jury. Colonel Fremont had to pay 25 per cent. (the Californian rate of interest) upon the bills which he drew there on Mr. Buchanan, the secretary of state of the United States, at Washington, and which bills had been protested for non-acceptance: see *Gibbs* v. *Fremont*, 9 Exch. 25 Here, a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed: and the master is substituted for a jury.]

COCKBURN, C. J. I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of damages the rate of in-**[146]**-terest the parties themselves had contracted for. I think he has done quite right.

CROWDER, J., I am of the same opinion. The master would I think have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money.

The rest of the court concurring,

Rule refused.

TOOMEY *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. Nov. 17th, 1857.

[S. C. 27 L. J. C. P. 39; 6 W. R. 44. Adopted, *Cotton* v. *Wood*, 1860, 8 C. B. N. S. 572; *Smith* v. *Great Eastern Railway*, 1866, L. R. 2 C. P. 10; *Ryder* v. *Wombwell*, 1868, L. R. 4 Ex. 39; *Blackman* v. *London, Brighton, and South Coast Railway*, 1869, 17 W. R. 770. *Gee* v. *Metropolitan Railway*, 1873, L. R. 8 Q. B. 177; *Dublin, Wicklow, and Wexford Railway* v. *Slattery*, 1878, 3 App. Cas. 1171; *Hall* v. *Jupe*, 1880, 49 L. J. C. P. 729.]

On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room" and fell down some steps and was injured. In an action against the railway company:—Held, that, in

the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company.

This was an action in which the plaintiff sought to recover damages against the London, Brighton, and South Coast Railway Company for an injury sustained by the plaintiff from alleged negligence on the part of their servants.

The declaration stated, that, before and at the time of committing of the grievances thereinafter mentioned, the defendants were possessed of a public railway station, to wit, at Forest Hill, for the reception of passengers in and by the defendants' railway, for the profit and advantage of the defendant's and by reason of the possession and use of the said railway station by the defendants for the purpose aforesaid, they ought to have kept the same in a reasonably safe and secure condition, and [147] so as not to be dangerous to persons lawfully and properly using the same: nevertheless, the defendants failed in such duty, and by means of the mere neglect and default of the defendants in that behalf, the plaintiff, who was lawfully in and using the said station as a passenger of the defendants, and with their permission, and for their profit and advantage, fell through a door, which the defendants then carelessly, negligently, and improperly left open and unguarded, in the said station, and which was by the neglect and default of the defendants in that behalf dangerous to persons lawfully and properly using the same, into a deep cellar or hole, and thereby sustained divers bodily injuries, and became permanently wounded in health and disabled from following his trade of hawker, or otherwise earning his living, and was put to expense, and spoiled his clothes which he had on, and lost divers of his goods and money, which he had with him when he fell, and was and is otherwise injured: And the plaintiff claimed 500l.

The defendants pleaded not guilty.

The cause was tried before Cresswell, J., at the first sitting at Westminster in this term. The facts were as follows: The plaintiff, a poor and illiterate person who carried on the employment of a hawker, went to the Forest Hill station of the London, Brighton, and South Coast railway, for the purpose of proceeding to London by the 10.30 p.m. train. Whilst waiting there, he inquired of a person on the platform, unconnected with the railway, where he should find a urinary: this person told him to go to the right: he did so, and found two doors, upon one of which was painted the words "For gentlemen," and upon the other the words "Lamp-room;" there being a light over the former, but none over the latter. The plaintiff, being in a hurry, and unable to read, opened the wrong door, stepped forward, and fell down some steps, breaking two of his ribs, and [148] otherwise seriously hurting himself. There was no evidence as to the description of the steps down which the plaintiff fell, nor as to the state in which the door of the lamp room was ordinarily kept: but the plaintiff's son stated, that, when he went some time after the accident to look at the place, he found the door locked.

On the part of the defendants, it was submitted that there was no evidence to go to the jury of negligence, and that the accident was attributable entirely to the plaintiff's own want of caution in going hastily and in the dark through a strange door.

The learned judge was of this opinion, and the plaintiff was nonsuited, with leave to move to enter a verdict for 35l. (agreed damages), if the court should be of opinion that there was evidence which ought to have been submitted to the jury.

Pigott, Serjt., now moved accordingly. The question is, whether there was any evidence of negligence on the part of the company or their servants: if there was, it should have been left to the jury. Railways are constructed for the use of all classes of persons whether literate or otherwise. Travellers of all sorts use them at all times; and the rapidity with which things are conducted at the stations, leaves so little time for reflection, that it is incumbent on the companies so to order them as to prevent the possibility of an accident like this occuring. This is not an action for the breach of a common-law duty, but an action of tort founded on contract, as was said by Maule, J., in *Martin* v. *The Great Northern Railway Company*, 16 C. B. 179, where an action was held to lie against the defendants for insufficiently lighting a station, whereby the plaintiff, in running across the railway to get to a train, fell over a switch handle, and was injured. [Williams, J. If the plaintiff had taken ordinary care, the accident would [149] not have happened. He should not have gone so hastily through a strange door.] He could not expect a door in such a situation to lead him to any danger.

The door should have been kept locked. Suppose it had been made to open inwards, and a person leaning against it fell through, would it be any answer on the part of the company to say that the door was not intended for people to lean against! In Taylor on Evidence, 2nd edit. vol. i., p. 44, § 31, it is said: "Questions of reasonable skill or care, due diligence, and gross negligence, must, in the great majority of instances, be determined by the jury, since the judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient,—per Taunton, J., in *Doorman* v. *Jenkins*, 2 Ad. & E. 261, 4 N. & M. 174,—or against a gratuitous bailee for gross carelessness in losing the property intrusted to his care, *Doorman* v. *Jenkins*, 2 Ad. & E. 256, 4 N. & M. 170,—what law can possibly define whether such and such conduct amounts to sufficient negligence on the part of the defendant to entitle the plaintiff to a verdict! In these and the like cases, therefore, the question has usually been left entirely to the jury, and, even when they have found a verdict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial." This is not like the case of negligence on the part of an attorney, which is a mixed question of law and fact.

WILLIAMS, J.(*a*). I am of opinion that there should be no rule in this case. I think there was no evidence of negligence on the part of the company or their servants **[150]** which ought to have been submitted to the jury. It is not enough to say that there was some evidence: for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence. All that appeared, was, that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to shew that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is, that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury.

WILLES, J. I am entirely of the same opinion. In order to establish a case of negligence against the defendants, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it. There was nothing of the sort proved here. There was nothing to shew that the door and steps beyond were more than ordinarily dangerous; and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impos-**[151]**sible for careless persons to meet with injury. I think the plaintiff failed to make out that he sustained the injury complained of through any negligence of the company or their servants.

Rule refused.

KING *v.* THE ACCUMULATIVE LIFE FUND AND GENERAL ASSURANCE COMPANY. Nov. 4th, 1857.

[S. C. 27 L. J. C. P. 57; 3 Jur. N. S. 1264. Adopted, *In re Sovereign Life Assurance Company*, [1892] 3 Ch. 287.]

A. effected a policy "upon and for twenty years' continuance of the life of himself," with the Accumulative Life Fund and General Assurance Company. By the terms of the policy it was provided that "the capital stock and other securities, funds, and property of the company remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of

(*a*) Cockburn, C. J., and Crowder, J., being shareholders in the company, declined to take part in the discussion.

the provisions of the deed of settlement, should alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of that policy;" and that no director, officer, or shareholder should be individually or personally liable, &c.—The deed of settlement entitled policy holders to participate in profits; and also contained provisions enabling the directors in certain events to dissolve the company.—The directors having, not in strict accordance with their powers to dissolve the company,—transferred its funds and property to another company, who were to take their liabilities, A. brought an action against the company (his assurers), charging them with having wrongfully aliened and transferred their property, and ceased to carry on business, whereby he lost the moneys and profits he would otherwise have made from the continuance of the contract:—Held,—first, that there was no implied contract on the part of the company to continue to carry on the business,—secondly, that, if there were, there was no evidence of any breach of it, inasmuch as if the transfer was properly made, there was no cause of action, and, if not warranted by the deed of settlement, it was ultrà vires, and void,—thirdly, that the plaintiff had commenced his action before he had sustained any injury.

This was an action on a policy of assurance on the life of the plaintiff.

The declaration stated, that, on the 29th of June, 1854, the plaintiff caused to be effected with the defendants a policy of assurance in the words and figures following, that is to say,—"Accumulative Life Fund and General Assurance Company. Chief Offices, No. 14 Manchester Square. No. 50. Sum assured, 100*l*. Premiums, 1*l*. 4*s*., payable quarterly. Age admitted. Whereas, Mathias Butcher King, of, &c., hereinafter called 'the assured' has proposed to effect an assurance with the Accumulative Life Fund and General Assu-**[152]**-rance Company, in the sum of 100*l*. upon and for twenty years' continuance of the life of himself: And whereas the said assured has paid to the said company the sum of 1*l*. 4*s*. as a premium or consideration for this assurance for three months, until the 1st of July, 1854: Now, this policy witnesseth, that, if the said M. B. King shall die before or upon the 1st of July, 1854, or shall live beyond that day, and the said assured or his assigns, or the holder of this policy who shall be registered as such in the book hereinafter mentioned of the said company, shall on or before that day, and on or before the 1st of October, 1st of January, 1st of April, and 1st of July in this and in each and every succeeding year during the continuance of this assurance, pay to the said company the premiums of 1*l*. 4*s*., then the funds and other property of the said company shall, according to the provisions of the deed of settlement of the said company, be subject and liable to pay to the executors, administrators, or assigns of the said assured, or to the holder of this policy, who shall be registered as aforesaid, after satisfactory proof of the death of the said M. B. King shall have been received at the office of the company, the sum of 100*l*. of lawful money of Great Britain: Provided always that the secretary of the said company shall, upon the request of the holder of this policy, and with the consent in writing of the said assured, register such holder in a book, to be called 'The register of holders of policies:' Provided also that the payment as above mentioned of the said sum of 100*l*. to the holder of this policy who shall be registered as aforesaid, shall be a good and sufficient discharge to the said company from and against any claims and demands upon or in respect of this policy: Provided also, and these presents are, upon the condition, that, in case the person upon whose life this assurance is effected (or if all, any, or, either of such **[153]** persons, if there be more than one) shall go beyond the limits of Europe, or, being or becoming a military or naval man, shall enter into actual service, a written notice of every such event shall be forthwith given to the board of directors of the said company, and such additional premium or premiums shall be payable and from time to time be paid to the said company in respect thereof as the board of directors shall deem reasonable, and shall award and direct to be paid: Provided also, and these presents are upon this express condition, that this policy shall be indisputable, except in cases of fraud: Provided also, that the capital stock and other the securities, funds, and property of the said company remaining at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of this policy; and

that no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall by reason of this policy be in any wise individually or personally liable or subject to any such claims or demands, or be in any wise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares. Given under the hands of three of the directors, and sealed with the common seal of the said company, this 29th of June, 1854. Payable at the age of 50, in 1874. Examined, &c. R. J. H., P. E. B., and R. W., directors. Robert Jones, secretary:" That the defendants by the said policy covenanted and agreed with the plaintiff as therein mentioned: That, from the time of making the said policy until the breach thereinafter mentioned, the plaintiff did all things necessary on his part, and was ready and **[154]** willing to do all things which it was necessary that he should be ready and willing to do to entitle him to sue for the breach and matter thereinafter mentioned: Yet that the defendants, after making the said policy, and whilst the same was in force, wrongfully aliened, transferred, and disposed of all their funds and other property to another company called "The Anglo-Australian and Universal Family Life-Assurance Company," contrary to the provisions of their deed of settlement, and then and from thence hitherto wholly and absolutely ceased to carry on business according to their said deed of settlement or otherwise, or to accumulate or acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing the said contract with the plaintiff, and then wholly and absolutely discharged the plaintiff from paying any more of the said premiums; whereby the plaintiff lost the moneys and profits which he might and otherwise would have made from the continuance of the said contract.

The defendants pleaded,—first, that, after the making of the said policy in the declaration mentioned, and whilst the same was in force, they, the defendants, did not wrongfully alien, transfer, and dispose of all their funds and other property to the said Anglo-Australian and Universal Family Life-Assurance Company, contrary to the provisions of their deed of settlement, and did not then and from thence hitherto wholly cease to carry on business according to their said deed of settlement or otherwise, or to accumulate or acquire, or to endeavour to accumulate or acquire any funds or property, and that they did not thereby disable themselves from performing their said contract with the plaintiff, and then wholly and absolutely discharge the plaintiff from paying any more of the said premiums,—secondly, never indebted. Issue thereon.

[155] The cause was tried before Williams, J., at the first sitting at Westminster in last Easter Term. The deed of settlement of the company, bearing date the 10th of February, 1854, was put in. The material provisions thereof were as follows:

Clause 82. "That the directors shall apportion the amount of clear profits set apart as aforesaid in such manner as they shall think fit, and one part thereof shall be appropriated as a bonus to the shareholders, and divided among them in proportion to their respective shares in the capital of the company, and the other part shall be appropriated for the payment of bonuses to the holders of such policies as shall be entitled to profits at the period up to which the periodical calculations on which the appropriation is founded shall have been made; and the directors shall cause such last part of the said profits to be apportioned among the persons for the time being recognized by the company as entitled to such assurances, according to a fair calculation to be made by the actuary of the company, subject to the approval of the directors."

Clause 100. "That an absolute dissolution of the company shall be made only under the following circumstances, that is to say, if a resolution for that purpose shall be reduced into writing, and shall be twice read and put to the vote, and shall be carried by a majority of at least three fourths in number of the shareholders present, holding among them at least three fourths of the shares of the company, at an extraordinary general meeting, and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting, to be held after the expiration of fourteen days, but before the expiration of two calendar months, next after the general meeting at which such first resolution shall have been passed,—then the company shall be dissolved; and it is thereby de **[156]**-clared to be dissolved accordingly, except for the purpose mentioned in the next following clause (and without prejudice thereto), from the date of such second general meeting."

Clause 101. "That, immediately upon the dissolution of the company, the board

of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall, if practicable, obtain from the directors or managers of some other assurance company an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities, endowments, on other contracts and engagements, when and as the time for the payment and satisfaction of the same shall successively arise, and shall cause to be transferred to some of the trustees of such other assurance company, or as the directors thereof shall direct, so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all existing policies, to enable the company from whose directors or managers the undertaking shall have been obtained, to comply therewith; and shall make such arrangements with the said directors or managers in regard to the said undertakings, as the said board of directors shall in their discretion think fit; and shall cause to be done and executed all such acts, deeds, and things as in the opinion of the said board of directors shall be necessary or advisable for carrying the said arrangements into effect: and, if any funds or property of the company shall remain after answering the purpose, and all other claims against the company, the directors shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted **[157]** into money, and shall cause the money arising from the said remaining funds or property to be paid and distributed, at such time or times as they shall think fit, to and amongst the shareholders and other holders of shares in the capital of the company, according to their respective rights and interests therein: Provided always, that no shareholder who shall not put in his claim, and, if required, establish his title to the share in such surplus falling due to him within two years after the second or final extraordinary general meeting held for dissolving the company, shall be entitled to any share or interest therein, but the same shall be applied and divided, as part of the surplus capital of the company, for the benefit of and among the then ascertained parties among whom the rest of the capital shall be distributed."

Clause 102. "That, notwithstanding any such dissolution of the company as hereinbefore provided for, all the powers, privileges, rights, and duties of the share holders of the company, and of the officers thereof (including the power to call and hold meetings of the company and of the board of directors), and the control thereby given over the officers of the company and through the medium of such meetings, and including the power to call for and enforce the payment of further instalments, shall, until all claims and demands shall have respectively been satisfied or provided for as aforesaid, and until the final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue in full power so far as the same may be necessary for the winding up the concerns of the company, and for enabling the directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payment and distribution as aforesaid."

A deed of dissolution of the Accumulative Life Fund **[158]** and General Assurance Company was also put in. This deed bore date the 20th of December, 1855, and was made between the company of the first part, certain shareholders of the second part, and one Hawkins of the third part: and it provided, amongst other things, that the parties of the second part should take shares in the Anglo-Australian and Universal Family Life-Assurance Company; that a proper deed of assignment should be executed, by which the Accumulative Life Fund and General Assurance Company should assign and make over all their business, goodwill, contracts, moneys, and securities, and all other property to and for the Anglo Australian and Universal Family Life-Assurance Company, and that the former company should be amalgamated or united with the latter, and should cease to exist as an independent company from the 3rd of June, 1856.

The deed of assignment, executed in pursuance of the last-mentioned deed, contained a covenant by the Anglo Australian and Universal Family Life Assurance Company to allot to the shareholders of the Accumulative Life Fund and General Assurance Company shares in the Anglo-Australian and Universal Family Life-Assurance Company, paid up, in full, or in part, as the case might be: and it was declared to be the intention of all parties to the deed, that the sums paid by the

shareholders of the Accumulative Life Fund and General Assurance Company shares should be represented by a like amount in principal of allotted shares; and also an agreement by the Anglo-Australian and Universal Family Life-Assurance Company to take upon themselves the liabilities of the Accumulative Life Fund and General Assurance Company as set forth in the schedule thereto, and all contingent liabilities upon policies of insurance granted by the last-mentioned company, and existing on the 3rd of December, 1855.

[159] On the part of the defendants, it was insisted that the declaration disclosed no cause of action, and that they were justified by the terms of the deed of settlement in entering into the arrangement they had done.

The learned judge, without expressing any opinion, directed a verdict to be entered for the plaintiff for the amount of the claim, reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable."

Petersdorff, in due course, obtained a rule nisi accordingly, "on the ground that the defendants were not liable and had not in law or in point of fact committed any breach of the contract as alleged, or otherwise done any act which could confer a right of action upon the plaintiff.

Atherton, Q. C., and David Keane, now shewed cause. By the terms of the policy, the plaintiff is entitled to receive the sum insured out of the funds of the company, and therefore the company are bound to maintain those funds in all their integrity so as to meet the plaintiff's claim when it shall arise: and, having by their own wrongful act put it out of their power to perform their contract in this respect, they are clearly liable to an action. The language of the policy does not so qualify the terms of the insurance as to make the assured depend even upon a regular dissolution of the company. The words "according to the provisions of the deed of settlement" have reference merely to the regulating the mode of payment. But here it does not appear that the requisite steps for that purpose were taken pursuant to the 100th section of the deed of settlement. [Williams, J. Does not the question resolve itself into this, —whether the policy **[160]** amounts to an implied covenant on the part of the company to carry on the business?] Unless, at all events, it is dissolved in conformity with the provisions contained in the deed of settlement. By the deed of assignment, of the 4th of June, 1856, the defendants have parted with all they possessed, and conveyed it to the Anglo-Australian company. Besides, the plaintiff has a further interest in the company being kept alive; for, by the 82nd clause of the deed of settlement, it is expressly provided that the shareholders shall participate in the profits. [Cockburn, C. J. What damages do you say you are entitled to?] The value of the policy, upon the supposition that everything will go on right, and that the funds of the company will be sufficient in 1874 to meet the claim,—which would readily be ascertained by an actuary.

Byles, Serjt., and Petersdorff, in support of the rule. There is no precedent for an action of this kind: it is completely a case of the first impression; an action quia timet. It is not an action against the directors, but against a quasi corporation created under the 7 & 8 Vict. c. 110. This is substantially a case of mutual assurance: it is like the case of a member of a firm suing his co-partners in a court of law for malversation in the partnership affairs. That which has been done,—the dissolution of the company,—has been rightly done, or it has been done wrongfully: if the former, it is not what the plaintiff complains of: if the latter, the corporate body, the shareholders, are not liable; the action should have been brought against the directors. If the seal of the corporation has been wrongfully put to the deed of dissolution, it is altogether ultrà vires, and cannot have the effect of dispossessing the company of its funds. [Cockburn, C. J. The policy contains no reference to any power of amalga-**[161]**-mation or dissolution.] It refers to the deed of settlement, and therefore the holder is bound to take notice of the provisions of that deed: *The Royal British Bank* v. *Turquand*, 5 Ellis & B. 248: and the deed, in the 101st clause, contains as ample powers as it is possible to conceive, to enable the directors to transfer all the property, rights, and liabilities of the company to another company. The plaintiff enters into the contract with full knowledge of that provision. There is no such implied covenant on the part of the company, as is suggested, to keep the funds intact. [Cockburn, C. J. The argument on the other side is, that, inasmuch as by the terms of the policy the holder is to look only to the fund, that raises an implied covenant on the part of the company not to do anything during the subsistence of the policy

which shall have the effect of detracting from that fund. The questions seem to me to be these, first, is there such an implied covenant? secondly, if there be, have the company broken it?—thirdly, has the time arrived at which the plaintiff has a right to complain of the breach?] To what extent is the implied covenant to go? How is it to be defined? What are the obligations of the company with reference to the fund, beyond and different from the terms of the policy? [Williams, J. Suppose a judgment obtained against the company, could it be enforced under the provisions of the 7 & 8 Vict. c. 110? Willes, J. There is an express decision upon that point in the negative: *Hallet* v. *The Merchant Traders' Ship, Loan, and Insurance Association*, 13 Q. B. 960.] The allegation in the declaration, that the defendants "wrongfully aliened, transferred, and disposed of all their funds and other property to another company, called the Anglo-Australian and Universal Family Life Assurance Company, contrary to the provisions of their deed of settlement," is disproved upon the evi-[162]-dence; for, the schedule shews that part only of the shareholders assented to the transfer: the others would still remain liable to pay up their calls.

Cockburn, C. J. I am of opinion that the rule must be made absolute to enter a nonsuit in this case. Three questions seem to present themselves for our consideration, —first, whether there is any implied covenant on the part of the company to keep the funds so as to be available to answer the plaintiff's claim when it shall arise,— secondly, whether the company have done anything whereby that fund has become alienated so as not to be forthcoming to meet the plaintiff's claim, —thirdly, whether, assuming these two propositions to be decided in favour of the plaintiff, the time has arrived at which he is in a situation to maintain an action against the company.

Now, in the first place, it seems to me that no implied covenant does arise here. It has been contended that an implied covenant on the part of the defendants to continue the business of an insurance company, and to keep its funds available to answer claims upon policies, arises on that part of the policy which provides that "the capital stock and other the securities, funds, and property of the said company remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of this policy: and that no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall, by reason of this policy, be in any wise individually or personally liable or subject to any such claims or demands, or be in any wise charged by reason thereof, beyond the [163] amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares." It does not appear to me that any implied covenant such as is contended for arises from that proviso: it seems to me that all that was intended by it was, to protect the shareholders from individual and personal liability to the holders of policies. But for that proviso, the shareholders would have been liable personally in the event of the funds of the company proving insufficient to meet the claims on policies. It was evidently introduced, not for the purpose of enlarging the security and extending the remedy of the policy holder, but precisely the reverse, for the purpose of depriving him of the right which the law would otherwise have given him of resorting to the individual shareholders, and of protecting the latter from personal responsibility.

Independently of that, it seems to me that the second proposition also fails: the company have not done anything to divest themselves of the fund; for, on looking at the deed of settlement, I do not find that it contains any provision for the amalgamation of the Accumulative Life Fund and General Assurance Company with any other company: the only provision I find is for the dissolution of the company in a given state of circumstances; and then follow certain directions as to what shall be done with the funds of the company after such a dissolution has been resolved on or effected, for the purpose of satisfying or securing the claims and demands on the company arising from assurances or other engagements. These provisions, which are contained in the 100th and 101st clauses, are here sought to be applied to the case of an amalgamation with another company. It seems to me, therefore, that the proceeding has been altogether ultra vires, and that the plaintiff is not in a condition to contend that the funds of the company have been so aliened or transferred as to [164] prevent him from obtaining satisfaction of his demand thereout.

Further, supposing that both the above propositions could be decided in favour of

the plaintiff, this further objection remains, that the time has not arrived at which he is entitled to enforce his claim against the company. If profits were made, he might, under the 81st clause of the deed of settlement, have been entitled to a share. But, independently of profits, the plaintiff or his representative could have no claim upon the company until his policy becomes payable, viz. at his death, or in the year 1874. Until that event happens, or that period arrives, the action is, as it has been very properly designated, an action quia timet. Non constat, that, when the money becomes due, the amount will not be paid by the company. For these reasons I am of opinion that there ought to be a nonsuit.

WILLIAMS, J. I am of the same opinion. At first sight I thought there might be some difficulty in disposing of this rule by entering a nonsuit, and that the proper course would be to arrest the judgment. But, upon further consideration, I am disposed to think that a nonsuit is the proper consequence of the failure of the plaintiff to sustain the allegation in the declaration, of the alienation of the funds of the company. The declaration, after setting out the policy, and averring that all things necessary were done to entitle him to sue, alleges for breach that the defendants, after the making of the policy, and whilst the same was in force, wrongfully alienated, transferred, and disposed of all their funds and other property to another company called the Anglo-Australian and Universal Family Life-Assurance Company, contrary to the provisions of their deed of settlement, and then and from thence hitherto wholly and absolutely ceased to carry on busi-[165]-ness according to their said deed of settlement or otherwise, or to accumulate or acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing their said contract with the plaintiff, &c. That is directly traversed by the plea. In order to sustain the declaration, I think it is necessary to interpret the word "wrongfully" as meaning that the alienation of the funds of the company took place under such circumstances as to make it wrongful and to give the plaintiff a cause of action. I am of opinion that there is nothing in the evidence to shew that there was a wrongful alienation in that sense. Certainly the alienation would be wrongful, if there were implied in the policy a covenant on the part of the company that they would continue to carry on the business as it was carried on at the time the policy was effected. I assume that there was evidence of such an amalgamation or dissolution of the company as would prevent them from continuing to carry on their business under the terms of the deed of settlement. The question then is, whether there is any implied covenant, -there being none expressed,—that they will continue so to carry on their business. I am of opinion that there is not. Even if the deed of settlement were out of the question, it seems to me to be impossible to say that the policy amounts to anything more than a contract that the plaintiff or his executors shall receive the sum assured when the time for payment shall have arrived. It is difficult to imply from the circumstance of the policy holder being entitled to a share of profits, a contract on the part of the company that they will, in order to give him a better chance of profits, continue to carry on the business, supposing it should turn out to be disadvantageous to them to do so. The difficulty is still further increased by the consideration, that, if such a covenant [166] is to be implied, it might equally be implied that the company bound themselves to carry on the business with diligence. I see many cogent reasons why we should not infer a covenant such as is suggested. But, when we look at the deed of settlement, we find it evidently contemplates the possibility of a dissolution of the company. I therefore think it is impossible that a covenant can be implied on the part of the company to continue to carry on the business, whether it be prosperous or not, in order that the plaintiff may not be excluded from the chance of receiving a share of profits, if profits should be made. The next question is, whether, supposing there is no such implied covenant, this declaration can be sustained on the view which has been presented, viz. that the conduct of the defendants amounts to a voluntary disabling of themselves from the performance of their contract. There is no doubt, that, if a party contracts to do a thing at a future period, and before the time arrives voluntarily does some act which renders it impossible for him to perform what he has contracted to do, the party contracted with is not bound to wait for the intervening period to elapse, but may at once bring his action. Do the circumstances of this case support that view? It seems to me that they clearly do not. The fallacy lies in supposing that the terms of the policy are such that the contract cannot possibly be performed unless the business of the

company continues to be carried on. That clearly is not so. All that the company contract to do is this, that they will, in a given event, pay the amount of the policy out of the capital stock and funds of the company, if sufficient: and it would be a good answer to a claim upon the policy, that the directors have no funds. It is manifest, that, if, when the policy became payable, the executors of the assured were to sue upon it, and the directors could shew that **[167]** they had no funds wherewith to pay, the executors would have no ground of complaint. It may be that the step which the plaintiff complains of, viz. the amalgamation with the other company, may be most beneficial to him. How, then, can we say that the plaintiff is entitled to maintain an action, when, for aught that appears, the contract may be performed when the time for its performance arrives? How can we say that the company have disabled themselves from performing their contract, when for anything that appears the money will be forthcoming at the proper time? This clearly is not like the case which was manifestly in the mind of the pleader when he drew this declaration, where the party who has contracted to do something at a future day, has by his own act precluded the possibility of its performance when the proper time arrives, —as, for instance, where a woman contracts to do an act which she can only do as a single woman, and by afterwards marrying renders it utterly impossible that she can perform her contract: in that case, of course, an action would lie at once for the breach. But that is a totally different case from this. For these reasons, I concur with the Lord Chief Justice in thinking that this rule should be made absolute to enter a nonsuit.

CROWDER, J. I also am of opinion that there is no implied covenant on the part of the company to continue to carry on their business during the currency of the policy. I am likewise of opinion that the allegation that they wrongfully aliened, transferred, and disposed of all their funds, &c. to another company, has not been established; and that this action is premature. I rather incline to think that the proper course would be to arrest the judgment: but, as the rule is not so drawn, and the rest of the court seem to think **[168]** that there should be a nonsuit, I do not feel disposed to differ from them. The declaration, as it seems to me, discloses no cause of action at all. It proceeds upon the notion that an implied covenant on the part of the defendants to continue to carry on the business of the company, arises out of the contract on the face of the policy: and this implication is said to arise on two grounds,—first, because by the terms of the policy the funds of the company only are liable to make good the sum assured, and no personal responsibility attaches to the shareholders,—secondly, that, by the terms of the contract with the plaintiff, he is entitled to a participation in the profits of the concern, if profits are made. Upon neither of these grounds does it appear to me that any such covenant can be implied. As to the first, the proviso that the funds of the company only shall be liable to answer the claims on the policy, was evidently introduced for the purpose of limiting the right of the policy holder to a recourse to the general fund. In *Hallett* v. *Dowdall*, 18 Q. B. 2, this was held, upon a bill of exceptions tendered by me as counsel for one of the defendants, to be a good limitation as against the policy holder, and to preclude him from proceeding against the shareholders. The same point had been previously decided in *Hallet* v. *The Merchant Traders' Ship, Loan, and Insurance Association*, 13 Q. B. 960, and in other cases. I agree with the Lord Chief Justice in thinking that this limitation does not alter the case, or create by implication a contract which but for such limitation would not exist. This is perfectly an action primæ impressionis. It is the first time it has ever been contended that a policy holder has a right to come and say that something has been done by the assurers in breach of some implied contract in the policy. Then it is said that the holder of this policy is entitled to a share of **[169]** profits. But that is only in an event which may or may not occur: and the fact of his being entitled to participate in profits does not necessarily give rise to a covenant on the part of the company that they will continue to be in a position to make profits. There is no pretence for saying that any such contract as is contended for arises upon the terms of the policy. Reference is made to the deed of settlement: and, when that is looked at, it will be found that there is a provision for the dissolution of the company, and for the transfer of its funds to another company. Upon the whole, therefore, it seems to me that there is no ground for contending that there is any implied contract on the part of the company to continue to carry on the business in the way suggested. Then, as to the allegation in the declaration that the defendants, whilst the policy was in force, wrongfully aliened, transferred, and

disposed of all their funds and other property to another company, contrary to the provisions of their deed of settlement, and ceased to carry on business, and thereby disabled themselves from performing their contract with the plaintiff,—it seems to me that there is nothing in the evidence before us to shew that this allegation was proved. It is urged that the defendants have in fact transferred their funds. I am disposed to think that the alternative put by my Brother Byles, is correct. Have the directors properly used the seal of the company so as to make a valid transfer? If they have, that is not an act done in contravention of the rights of the company: on the contrary, it is in accordance with the provisions of the deed of settlement. Take the other view: suppose the seal has been wrongfully affixed to the transfer deed, and not in accordance with the 101st clause of the deed of settlement, which assumes that there has been a valid dissolution of the company, that which has been done is altogether ultrà **[170]** vires, and the deed cannot operate a transfer of the funds. Then it may be asked what injury has the plaintiff sustained? I do not see that it has been shewn he has sustained any. It may very well be that the company were in a bad way, and that the new company are much more likely to meet the claims of the policy holders when the proper time arrives And as to the alleged right to share in profits, that is a very remote contingency. It seems to me that this has been very properly characterized as an action quia timet. When the event has happened upon which the money becomes payable under the policy, and not till then, the plaintiff or his representatives will be entitled to enforce it.

WILLES, J. I also am of opinion that the rule must be made absolute for entering a nonsuit. It seems to me that there has been neither a breach of contract committed nor an actionable wrong done by the defendants to the plaintiff. The complaint is, that the defendants have aliened and transferred their funds, and that they have ceased to carry on their business. The former affords no ground of action, unless it is a breach of some contract with the plaintiff. Then, is there any contract by the defendants with the plaintiff that they will not alien or transfer their funds? It appears to me that there is not. That which has been relied upon as creating an implied contract, superadded to the express contract which may or may not at a future time create a debt, is the proviso that the capital stock, and other the securities, funds, and property of the company, unappropriated to any prior demand, shall alone be liable to make good the claim upon this policy. But, when that is looked at, with reference to the statute which regulates joint-stock companies, the 7 & 8 Vict. c. 110, it will appear to be a proviso in **[171]** limitation of the right of the policy holder, and not as giving him any additional security. The 66th and 68th sections of that statute give a person who has a claim against the company a mode of enforcing it against individual shareholders, where satisfaction cannot be obtained by having recourse to the property of the company. *Hallet* v. *The Merchant Traders' Ship, Loan, and Insurance Association*, 13 Q. B. 960, and other cases in the Exchequer (*a*), have put a construction upon this proviso by which we are bound, viz. that it limits the right of the policy holder to have recourse to the funds of the company, and precludes him from proceeding by execution or otherwise against the individual shareholders. The other complaint is, that the company have ceased to carry on business, or to accumulate or acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing their contract with the plaintiff. The former ground of complaint affected both the amount secured by the policy and the bonus; but this affects the bonus only. By the terms of the deed, the directors are from time to time to ascertain whether any profits have been made, and out of those profits when ascertained they are to set aside a reserve fund, and to say whether any and what bonuses shall be added to the several policies. That leaves the amount and the time of payment of the bonus entirely in the discretion of the directors. If profits are made, and bonuses declared, the policy holder is to have the benefit of them. That is the whole contract that is expressed on the face of the policy; and I see none that is to be implied, to conflict with that. Coupling that with the provision enabling the com-**[172]**-pany to effect a dissolution, how is it possible to imply a contract that they will continue to carry on business for the benefit of the policy holders? Then, there being no such contract, have the directors been guilty of any tort? Have they in the course they have pursued committed any wrong against the plaintiff? I am of opinion that

(*a*) See *Dawson* v. *Wrench*, 3 Exch. 359, and *Reid* v. *Allan*, 4 Exch. 326.

they have not. I think there is no ground for this action, and consequently that there must be a nonsuit.

Rule absolute accordingly.

HORLOR *v.* CARPENTER. Nov. 4th, 1857.

[S. C. 27 L. J. C. P. 1.]

The defendant addressed the following letters to the plaintiff:—"Feb. 13, 1851. I am Mrs. J.'s executor, and will pay you anything you may be pleased to advance Mr. T. A., from the first money I receive on his account."—"Feb. 14, 1851. If you advance 100*l.* to Mr. T. A., or any other sum, I will undertake to pay you from the first money I have on his account, upon having his authority so to do." The plaintiff having advanced T. A. 20*l.*, he addressed to the defendant an authority, as follows:—"Jan. 29, 1852. Please pay Mrs. H. the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852: until September, 1853: and, should any money be owing by me to her after that time, please to pay same as above:" —Held,—dubitante Williams, J.,—that this was a sufficient authority to the defendant to pay the plaintiff further advances beyond the 20*l.*—After verdict, the defendant's counsel insisted that the guarantee was not a continuing guarantee:—Held, that he was precluded from urging that point, on a motion for a new trial.

The plaintiff in this action sued for 38*l.* 8*s.* upon a guarantee given by the defendant for advances made by the plaintiff for one Adams (*a*).

The first count of the declaration stated, that the defendant, before and at the time of making the promises thereinafter mentioned, was the executor of the last will and testament of one Mrs. Jenkins, deceased, and, as such executor, under and by virtue of the provisions of the said will, had been and was accustomed and liable to pay over to one Thomas Adams certain rents **[173]** and moneys received and to be received by the defendant under the said will, for the use and behoof of the said Thomas Adams; and thereupon, and in consideration that the plaintiff would lend and advance to the said Thomas Adams moneys of her, the plaintiff, he, the defendant, promised the plaintiff, upon the said Thomas Adams giving the plaintiff authority to receive the amount from the defendant, to repay to the plaintiff any such sums as the plaintiff might so lend and advance from and out of the first money which he, the defendant, should receive on account of the said Thomas Adams, to wit, from and out of the first moneys to be by him thereafter received on account of the aforesaid rents and moneys, as and when he should receive the same, and to hold himself responsible to the plaintiff for the same: Averment, that the plaintiff, confiding in the said promise and undertaking of the defendant, did afterwards lend and advance to the said Thomas Adams divers large sums of moneys, in the whole amounting, to wit, to 58*l.* 8*s.*, and the said Thomas Adams did thereupon give to the plaintiff an authority to receive the said amount from the defendant, who then had due notice of the premises; and that the defendant afterwards received on account of the said rents and moneys 20*l.*, and paid the same to the plaintiff, but afterwards and before he received any further portion of the said rents and moneys, the defendant purchased of the said Thomas Adams all his interest of and in the said rents and moneys, and took an assignment of the same from the said Thomas Adams, and thereby disabled himself from performing his said contract with the plaintiff, according to the said terms thereof, and had ever since received, as they became due, the said rents and moneys in his own right, and the plaintiff had never yet been paid the residue of the said sum of 58*l.* 8*s.*, or any part thereof, out of the said rents and moneys, or otherwise.

[174] Sixth plea, to the first count, that, after the making of the said alleged promise in that count mentioned, and before the loan or advance to the said Thomas Adams of the said several sums of money, or any part thereof, and before the said alleged purchase by the defendant, or any breach of his said promise, it was mutually agreed between the plaintiff and the defendant, that the defendant should be released and discharged from his said promise, and that the defendant, in consideration of the

(*a*) See *Horlor* v. *Carpenter*, ante, vol. ii., p. 56.

plaintiff advancing to the said Thomas Adams 100l., or any other sum, should undertake to pay the same to her out of the first moneys he had on account of the said Thomas Adams, upon having his authority so to do; that the defendant did accordingly undertake and promise the plaintiff, that, if the plaintiff would advance 100l. to the said Thomas Adams, or any other sum, he would pay the same from the first money he had on account of the said Thomas Adams, upon having his authority so to do; and that the plaintiff did afterwards advance to the said Thomas Adams a sum of money, to wit, 20l., and that the defendant did pay the same (being the said sum of 20l. in the declaration alleged to have been paid) to the plaintiff out of the first money he had on account of the said Thomas Adams, upon having his authority so to do, according to the true intent and meaning of his said last-mentioned promise. Issue thereon.

At the trial before Williams, J., at the second sitting at Westminster in Easter Term last, the following facts appeared in evidence:—In February, 1851, Thomas Adams, who was indebted to the plaintiff in the sum of 5l., wishing to borrow further sums of her, told her that the defendant received certain rents for him, and that he would be responsible for the payment. The plaintiff accordingly applied to the defendant, who, in answer to her application, inclosed her a cheque **[175]** for 5l. in a letter dated the 11th of February, as follows:—

"Madam,—Upon the payment of the inclosed, please return the bill as above, to yours respectfully, "R. CARPENTER.

"P.S.—If you wish to oblige Mr. Adams, by his giving an authority to receive the amount from me from his rents, I will pay it you, and hold myself responsible to you for the same."

Upon receiving this letter, the plaintiff, accompanied by Adams, called upon the defendant, who then wrote upon the back of it the following:—

"February 13th, 1851.

"Dear Madam,—I am Mrs. Jenkins's executor, and will pay you anything you may be pleased to advance Mr. Thomas Adams, from the first money I receive on his account.—Yours, &c., "R. CARPENTER."

The plaintiff again called on the defendant on the following day, when he gave her another letter as follows:—

"February 14th, 1851.

"Dear Madam,—If you advance 100l. to Mr. Thomas Adams, or any other sum, I will undertake to pay you from the first money I have on his account, upon having his authority so to do.—Yours, &c., "R. CARPENTER."

Upon receiving this undertaking, the plaintiff from time to time advanced money to Adams, in the whole amounting to 20l.; and on the 15th of August, Adams addressed a letter to the defendant as follows:—

"Dear Sir,—Please to pay to Mrs. Sarah Horlor the sum of 20l. namely, 5l. each quarter, commencing the 29th of September, 1851, until the 29th of September, 1852, ending. "THOMAS ADAMS."

[176] On the following day the defendant wrote to the plaintiff as follows:—

"August 16th, 1851.

"Dear Madam,—I have received an authority from Mr. Adams to pay you 20l., namely, 5l. per quarter, commencing at the Christmas quarter next; so that about a fortnight after each quarter you will be entitled to its receipt.—Yours respectfully, "R. CARPENTER."

Three of the instalments mentioned in that letter having been duly paid by the defendant, and the plaintiff having made further advances to Adams, the latter, on the 29th of January, 1852, sent him a letter as follows:—

"Sir,—Please to pay Mrs. Horlor the sum of 20l., by four instalments, namely,

5l. each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853, ending: and, should any money be owing by me to her after that time, please to pay same way as above.—Yours, &c., "THOMAS ADAMS."

On sending the plaintiff the last instalment of the first 20l., the defendant wrote to the plaintiff, acknowledging the receipt of the last-mentioned authority, in these terms:—

"January 30th, 1852.

"Dear Madam,—I inclose half 5l. note on account of Thomas Adams, which please acknowledge, and the other half shall follow. I have received an order from Mr. Adams to hand over 20l. after this shall have been paid; but, of course I cannot hold myself responsible only so far as he is empowered to receive same under the will.—Yours truly, "R. CARPENTER."

The plaintiff made further advances to Adams to the extent of 18l. 8s. beyond the second 20l.; but, the de-[177]-fendant, having in the meantime purchased Adams's interest under Mrs. Jenkins's will, he refused to pay either the second 20l. or the subsequent advances.

Parol evidence was offered, and, not being objected to, received, for the purpose of shewing, that, at the time of giving the letters which constituted the guarantee, it was the understanding of all the parties that advances were to be made from time to time by the plaintiff to Adams.

The only point urged on behalf of the defendant was, that the document dated the 14th of February, 1851, was given in substitution of the letter of the 13th, and that, an authority once given, the guarantee was exhausted; and that, at all events, it could not apply to the 18l. 8s. last advanced.

The learned judge left it to the jury to say whether the letter of the 14th of February, 1851, was intended to be a substitution for that of the 13th, or whether the two were to be concurrent: and he told them, that, in estimating the damages, they might take into their consideration the possibility of Adams dying or parting with his interest under the will to a stranger before the whole of the payments should have become due.

The jury returned a verdict for the plaintiff, damages 30l. The learned judge thereupon gave the defendant leave to move to reduce the verdict by the 18l. 8s., if the court should be of opinion that the guarantee did not extend to that.

It was then submitted on the part of the defendant that the learned judge ought to have directed the jury to find for him, on the ground that the letter of the 13th of February, 1851, was not a continuing guarantee. But, as this point had not been taken at the proper time, his Lordship refused to reserve it.

Prideaux, in Easter Term last, obtained a rule nisi [178] for a new trial, on the ground of misdirection, amongst other things, in telling the jury to find for the plaintiff if they were of opinion that the second undertaking was not intended to be substituted for the first; or to reduce the damages by the sum of 18l. 8s., or such other sum as the court should direct, on the ground that the jury ought to have withdrawn the last amount advanced, to wit, 18l. 8s., from the consideration of the jury.

Holl now shewed cause. The letter of the 13th of February, 1851, and the letter indorsed on it, manifestly contemplated several transactions, and were not intended to be limited to a single advance. If the words are susceptible of that construction, the maxim "verba fortius accipiuntur contrà proferentem" must apply. In *Mason* v. *Pritchard*, 12 East, 227, an engagement to be answerable to the plaintiff "for any goods he hath or may supply W. P. with, to the amount of 100l.," was held to be a continuing guarantee to that extent for goods which might at any time be supplied by the plaintiff to W. P. until the credit was recalled,—the court saying that the words "were to be taken as strongly against the party giving the guarantee as the sense of them would admit of." That principle of construction is approved of in *Mayer* v. *Isaac*, 6 M. & W. 605, where the contrary doctrine laid down by Bayley, B. in *Nicholson* v. *Paget*, 7 C. & M. 68, 3 Tyrwh. 164, is distinctly repudiated, Alderson, B., saying,—"Undoubtedly, the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a [179] construction put upon it

in his favour, because the words of the instrument are not his, but those of the other party." So, in *Merle* v. *Wells*, 2 Campb. 413, Lord Ellenborough says,—"If a party means to be surety only for a single dealing, he should take care to say so." And in *Bastow* v. *Bennett*, 3 Campb. 220, the same learned judge ruled that an undertaking to be answerable to a given amount for any goods supplied by A to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. It is impossible to say that the document in the present case is not fairly susceptible of a construction which would exclude its being limited to a single loan and a single authority. [Cockburn, C. J. The words are in the singular number,—"an authority to receive the amount:" it is at least ambiguous.] "Amount" means "The sum total of two or more particular sums or quantities," Webster; "The sum total; the result of several sums or quantities accumulated," Johnson; "The total of several articles in an account," Bailey. The surrounding circumstances and the subsequent conduct of the parties may be taken into account to explain any latent ambiguity in the instrument itself. The words "from the first money I receive on his account" mean nothing more than that the contemplated advances shall form the first charge upon the money which the defendant may from time to time receive on Adams's account. If the language of the guarantee is so ambiguous that the court cannot see upon the face of it whether it applies to one loan or to several, then parol evidence was admissible to explain it: *Haigh* v. *Brooks*, 10 Ad. & E. 309, 323, 2 P. & D. 477, 4 P. & D. 288; *Butcher* v. *Stewart*, 11 M. & W. 857; *Goldshede* v. *Swan*, 1 Exch. 154. [Willes, J. In those cases, the parol evidence was received, not for **[180]** the purpose of shewing the extent of the guarantee, but merely to explain what the consideration was.] If parol evidence be admissible to explain the one, on the same principle it must be admissible to explain the other. The rule is laid down generally. [Williams, J. You may always look at the surrounding circumstances, to ascertain what the parties mean. The case of equivocation depends upon a different principle: for instance, where a man gives a legacy to "his cousin John," and it appears that he has two cousins bearing that Christian name, parol evidence may be given to shew which of the two was the object of his bounty. Crowder, J. Here, the evidence was not objected to. Parties cannot be allowed to impeach verdicts upon grounds not urged at the time of the trial.] That principle was acted upon in a recent case in this court, of *Martin* v. *The Great Northern Railway Company*, 16 C. B. 179. [Willes, J. And still more recently in *Jones* v. *The Provincial Insurance Company*, ante, p. 65. Williams, J. If the point as to whether the guarantee was continuing or not had been taken at the trial, I certainly should have reserved it. I could not have put it to the jury. Cockburn, C. J. It is essential to the administration of justice that certain rules should be adhered to. At the trial, the defendant's counsel relied only upon the point raised by the sixth plea, viz. that the letter of the 14th of February, 1851, was given in substitution for that of the 13th; and the direction to the jury proceeded upon the assumption that that was the only issue relied upon. It was never suggested until after that had been disposed of by the finding of the jury, that there was a further point, viz. that the letter of the 13th did not support the declaration. The defendant is clearly precluded by every principle of justice and convenience from relying upon that point now.] As to the second point, the defendant must, to **[181]** succeed here, make out that the letter of the 14th of February, 1851, was necessarily a substitution in point of law for that of the 13th, and that the two could not co-exist. [Kinglake, Serjt. If the court is of opinion that the first question is not open to the defendant now, it will be useless to discuss the second: we went to the jury upon it.] Then, as to the damages,—that question depends upon the construction of the second authority, of the 29th of January, 1852, which was in these terms:—"Please to pay to Mrs. Horlor the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853, ending. And, should any money be owing by me to her after that time, please to pay same way as above." That was a distinct authority from Adams to the defendant, not merely to pay the second 20*l.* advanced, but any further sums which might thereafter be advanced. This authority was assented to and acknowledged by the defendant; and it was proved that the plaintiff upon the faith of it advanced Adams 20*l.* and further sums amounting to 18*l.* 8*s.* beyond. The whole of these advances she clearly had a right to look to the defendant for.

Kinglake, Serjt., and Prideaux, in support of the rule as to the reduction of damages. The authority the parties contemplated manifestly was, an authority to be given after the money was advanced; it could not have been intended that the defendant's undertaking should operate as a floating guarantee for future advances to an indefinite extent. In *Nicholson* v. *Paget*, 1 C. & M. 68, 3 Tyrwh. 161, the correct rule is laid down, notwithstanding the observations which have been made upon it. Bayley, B., in delivering the judgment of the court says: "This is a contract of guarantee, which is a contract of a peculiar description; **[182]** for, it is not a contract which a party is entering into for his own debt, or on his own behalf; but it is a contract which he is entering into for a third person: and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." And, again, at the conclusion of his judgment, he says: "It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried." [Willes, J. That is not the law of England (though it is the law of France) since the case of *Mayer* v. *Isaac*, 6 M. & W. 605, where this point was well considered, and where Alderson, B., expressly repudiates Mr. Baron Bayley's doctrine, saying,— 'If I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason* v. *Pritchard*, 12 East, 227, than with the opinion of Bayley, B., in *Nicholson* v. *Paget*."] The obvious construction of the authority of the 29th of January, 1852, is, that the defendant was to pay the 20*l.* already advanced, and no more,—the latter words of that document, "and, should any money be owing by me to her after that time, please to pay," &c., evidently had reference to the contingency of the rents not realizing the 5*l.* a quarter, so as to cancel the debt within the period mentioned. The authority to pay must be precise, and must specify the sum to be paid. [Williams, J. In short, you say the defendant is entitled to have an authority such as is beyond all doubt or dispute.] Precisely so. The damages ought therefore to be reduced by the sum of 18*l.* 8*s.*, or in the same propor-**[183]**-tion as that sum bears to the amount assessed by the jury.

Cockburn, C. J. I am of opinion that this rule must be discharged. It appears that the defendant undertook, in consideration of the plaintiff's making advances to one Adams, to repay the same out of certain trust-moneys coming to his hands for Adams, upon Adams giving him an authority so to do; that the plaintiff accordingly advances 20*l.* to Adams, who thereupon gives the defendant an authority in these terms:—"Please to pay Mrs. Horlor the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th September, 1852, until September, 1853, ending. And, should any money be owing by me to her after that time, please to pay same way as above." It is suggested, on the part of the defendant, that the latter words of the authority mean, that, if the rents should prove insufficient to pay the 5*l.* a quarter during the period mentioned, the defendant is to make good the deficiency out of the rents subsequently accruing. That is certainly a very ingenious construction: but I do not think it is what the parties meant. There is nothing to shew that the parties ever contemplated it as at all doubtful that the rents received by the defendant on account of Adams within the stipulated time would be sufficient to cover the sum already advanced: and it is much more likely that they contemplated that further sums would be advanced. If, after the defendant had made payments on Adams's account upon the faith of that authority, Adams had sought to recover the money from the defendant, I think that letter would be a sufficient answer to his claim. I therefore think the authority was sufficient to cover subsequent advances as well as the 20*l.*, and consequently that there is no ground for reducing the damages.

[184] Williams, J. I must confess I should, but for the strong opinions entertained by my Lord and the rest of the court, have entertained some doubt as to the sufficiency of the authority beyond the 20*l.* I should have thought the authority ought to have specified the amount, and not have thrown upon the defendant the duty of ascertaining whether or not the amount claimed was correct. As, however, the rest of the court are unanimous, I will not stand out.

Crowder, J. I concur with the Lord Chief Justice in thinking that this rule

should be discharged, and for the reason he has assigned. The defendant engages to repay to the plaintiff, out of the moneys to be received on Adams's account, any money she may advance to Adams, upon Adams giving him authority so to do,—that is, such an authority as will hold him harmless. I see no reason why the authority should specify the amount: it seems to me to be sufficient if he gave an authority that would be binding as between him and the defendant. There is nothing on the face of the letter of the 29th of January, 1852, at all indicative of any doubt that enough would accrue from the rents to pay the 5l. quarterly: nor do I see any reason why the words which follow should not extend to future advances beyond the 20l.

WILLES, J. I am of the same opinion. The defendant undertakes to re-pay the plaintiff any advances she may make to Adams out of the money he is to receive on Adams's account, on receiving from Adams an authority so to do. It seems to me that such authority would be sufficient if it were in these words merely,—"I authorize you to pay to Mrs. Horlor the amount due to her." It certainly would be more convenient that the authority should specify the sum to be paid: **[185]** but, if the defendant required that, he should have expressly stipulated for it. It appears to me that Adams's letter of the 29th of January, gives the defendant all the authority he required; and I cannot adopt the construction which has been suggested. I may add, that I do not think my Brother Kinglake sustained any prejudice by the concession he is supposed to have made at the trial.

Rule discharged.

FLOWER *v.* GARDNER. Nov. 17th, 1857.

[S. C. 27 L. J. C. P. 56.]

In an action for goods sold, the delivery having been proved by the plaintiff's carman, the defendant's wife and servants were called to prove that the goods had been paid for on delivery,—the latter swearing that they had on each occasion paid the carman, having received the money for that purpose, sometimes from the defendant's wife, and sometimes from the defendant himself,—and the former, that, as to part, she had given the money to the servants for the purpose of making the payments. On the trial, the defendant was in court, but was not called as a witness until observations had been made by the plaintiff's attorney on account of his not being put into the box. A verdict having been found for the defendant, and the master having on taxation declined to allow him the costs of his attendance,—the court directed a review; holding that the defendant's attendance as a witness was under the circumstances advisable and proper, and that it did not lie in the plaintiff's mouth to say that it was not necessary.

This was an action brought by the plaintiff, a brewer, to recover from the defendant the sum of 3l. for beer supplied by the former to the latter in London; the defence being, payment before action brought.

The cause was tried before the Secondary of London. The plaintiff's carman having proved the delivery of the beer, the defendant's wife and servants were called,—the former for the purpose of proving that she had from time to time as the beer was delivered given her servants money to pay for it,—and the latter to prove that the beer had always been paid for on delivery, for which purpose they had received the money, sometimes **[186]** from the defendant himself, and sometimes from his wife.

The defendant was in court, and his attorney having closed his case without calling him, the plaintiff's attorney asked him if he did not mean to put his client into the witness-box: the defendant's attorney thereupon requested the defendant to step into the box, but declined to examine him, and intimated to the plaintiff's attorney that he might do so if he pleased: this the plaintiff's attorney declined to do, and the jury returned a verdict for the defendant.

Upon the taxation of costs, there was an item in the bill of 15l. 10s. for the travelling expenses and attendance of the defendant, who, it appeared, came from a distance of two hundred miles, and who was sworn by his attorney to be a material and necessary witness. The master having disallowed this,

Manisty, on a former day in this term, obtained a rule nisi for a review of the taxation.

Prentice now shewed cause. The costs of the defendant's attendance were properly disallowed. The mere fact of his attorney choosing to swear that he believed him to be a material and necessary witness will not deprive the master of the right to exercise his discretion as to the number of witnesses he ought to allow. The fact of his omitting to call him in the first instance, and afterwards declining to put any questions to him, clearly shewed that his attendance was altogether uncalled for and unnecessary. [Cockburn, C. J. The course taken by the plaintiff's attorney rendered it highly proper and necessary that the defendant should be tendered as a witness. Having challenged his attorney to call him, with a view to prejudice the minds of the jury, does it lie in the plaintiff's mouth **[187]** to say that he was not a necessary witness?] That might be a fair topic to urge before the master; but, having taken all the circumstances into consideration, including the smallness of the demand, and having exercised his discretion upon them, the court will not interfere with his decision.

Manisty, in support of his rule. The principle of taxation is not to be influenced by the smallness of the amount of the demand. It is enough to say that the plaintiff's own attorney by his conduct shewed that he considered the defendant's presence necessary.

Cockburn, C. J. I am of opinion that this rule should be made absolute. I think it would have been most unsafe to have presented the defendant's case to the jury without his evidence. The defence was, that the beer had all been paid for by the defendant's servants to the carman of the plaintiff at the time of delivery. If the defendant's servants only had been called, there would have been merely their oaths against the oath of the carman: and we all know the inclination of juries to find for the plaintiff where it is a mere balance of evidence. For the purpose, therefore, of corroborating the testimony of the servants, it was material to shew that they were furnished with the money, as is was natural that they should be, either by the master or the mistress. It appeared that some had been supplied by each. Suppose the wife only had been called, and had proved that she gave her servants part of the money, would not the plaintiff's attorney have claimed, and probably succeeded in obtaining, a verdict for the rest? It clearly, therefore, would not have been safe to omit to have the defendant in court. Besides, it is impossible to shut one's eyes to the fact, that, the defendant's case having been closed **[188]** without his being called, the plaintiff's advocate took advantage of that circumstance, and observed upon his being present in court and not being called; and so he made him a witness. Under all the circumstances, I think it but reasonable and right that the defendant should have been present, and that he should be allowed his expenses.

Williams, J. I am of the same opinion. The fair test is, what would counsel have recommended if advising on the evidence? I cannot help thinking that he would under the circumstances have considered the defendant's presence necessary: and I think the defendant's attorney would have failed in his duty to his client if he had not had him in court. If so, it follows that the item in question does not fall within the class of extra costs, but was an expense created by the attendance of a witness the defendant was bound to have present.

Crowder, J. The question is, whether it was prudent and proper for the defendant to be in attendance at the trial. I think it was. The very fact of the claim being a small one must have satisfied the defendant that the plaintiff would have supported his case by the perjury of his carman. It is not for the plaintiff to complain of the expense incurred in the defence against a demand which had already been paid. Besides, the plaintiff's attorney challenged the defendant's being put in the witness-box. After that, I think it hardly lay in his mouth to say that he was not a necessary and proper witness.

Willes, J., concurred.

Rule absolute.

[189] HODGKINSON *v.* FERNIE AND ANOTHER. Nov. 25th, 1857.

[S. C. 27 L. J. C. P. 66; 6 W. R. 181. Adopted, *Dinn* v. *Blake*, 1875, L. R. 10 C. P. 389; *Landauer* v. *Asser*, [1905] 2 K. B. 187. Approved, *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London*, [1912] 3 K. B. 139; [1912] A. C. 686.]

The decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award.—Thus, where a verdict was taken for the plaintiff, subject to the award of an arbitrator, as to the amount of damages, and his award included an amount of damages which (it was assumed) the plaintiff was not legally entitled to in the action,—the court refused to interfere.—And, held, that it was not a case for remitting the matter back to the arbitrator for re-consideration, by virtue of the 8th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),—that clause being intended only to apply to cases where before the act such a course might have been adopted under the provision in the submission or order of reference usually known as "Mr. Richards's clause."

This was an action to recover damages by reason of the plaintiff's ship "Sultana" having been run down by the defendants' ship "Courier." The declaration stated "that the defendants, by their servants, so negligently and unskilfully navigated and managed a ship of the defendants called the "Courier," then being navigated and managed by their servants, that the said ship struck and came into collision with the plaintiff's ship the "Sultana," by which the said last-mentioned ship was greatly and permanently damaged, and the plaintiff was put to and incurred great expense in repairing her, and was deprived of the use of her a long time, and thereby lost great profits which he would otherwise have made by her."

The cause came on for trial before Cockburn, C. J., at the sittings in London after Michaelmas Term, 1856, when a verdict was taken for the plaintiff for the damages laid in the declaration, costs 40s., subject to a reference, as to the amount for which the verdict should finally stand, to Mr. Richards, the average-stater; with a proviso, that, in the event of any application to the court upon the subject of the order, the reference, or the award or certificate, the court might (if it should think fit) refer back to the arbitrator the whole or any part of the matter of the order, or the award or certificate, upon such terms and with such directions as the court should think proper. The arbitrator by his award ordered that the verdict should stand for **[190]** 713l. 8s. 2d., which included a sum of 496l. 6s. 8d. which the arbitrator allowed in respect of a deduction of 710l. 14s. 5d. which the commissioners of the Admiralty had made from what the plaintiff would have been entitled to for the hire of the vessel, for the period of her detention while under repair at Constantinople (*a*). This deduction was made under the following proviso in the charterparty:—

"Provided always, and it is hereby agreed and declared, that, if at any time or times hereafter, it shall be made to appear to the said commissioners for the time being that any loss of time, breach of orders, or neglect of duty by the said master or other person having charge of the said ship, hath happened during the aforesaid service, or that, from any deficiency of men, want of provisions or stores, or any defect or cause whatsoever, the said ship became incapable to perform the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners for the time being to make such abatement, by way of mulct out of the hire and freight of the said vessel, as they shall adjudge fit and reasonable; and that a similar mulct may also be imposed for every deficiency of complement which shall be satisfactorily proved to have taken place, anything herein contained to the contrary thereof notwithstanding: And it is further agreed, on the part of Her Majesty, that, if the said ship shall happen to be burnt, sunk, or taken by the enemy during the aforesaid service, and it shall be made to appear to the satisfaction of the said commissioners for the

(*a*) These repairs had been rendered necessary in part by a collision with another vessel called the "Kangaroo."

time being that the same did not proceed through any fault, neglect, or otherwise in the master or the ship's company, and that they made the utmost [191] defence they were able, the value of her shall be paid for by Her Majesty according to the valuation made thereof on declaration by officers of the said commissioners, reasonable wear and tear first deducted."

By the charterparty, which bore date the 22nd of March, 1854, it was also, amongst other things, provided "that the said ship shall be strong, firm, tight, staunch, and substantial both above water and beneath, and in every respect seaworthy during the time she shall be employed under this charterparty;" and that the owners "shall be allowed and paid for the hire and freight of the said ship at the rate of 32s. 5d. per ton per calendar month for the number of tons above mentioned, during such time as the said ship shall be continued in Her Majesty's employ, and shall duly perform the service for which she is hereby engaged."

Quain, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause "why the award or certificate on the assessment of damages by the arbitrator should not be set aside, or referred back to the arbitrator, or why the damages so assessed by him should not be reduced by the sum of 495*l.* 6*s.* 8*d.*, on the ground that the same was not recoverable as legal damages, and had been improperly allowed by him as a part of the said damages." He submitted that the damage in question was not a damage that could be recovered on the declaration as framed, the deduction having been improperly made by the commissioners of the Admiralty, and improperly submitted to by the plaintiff: and he adverted to the opinion thrown out by Pollock, C. B., in *Greenland* v. *Chaplin*, 5 Exch. 243, 248, where that learned judge says,—"I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under [192] any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this,—that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur."

Byles, Serjt., and Needham, now shewed cause. The plaintiff's vessel, the "Sultana," it appears, was chartered by the Admiralty as a transport, at a certain rate per ton per month, so long as she should duly perform the service for which she was engaged; and, whilst so employed in the Black Sea, she was run into and damaged by the defendants' ship "Courier," and was several months detained at Constantinople under repair. The sum mentioned in this rule is the amount deducted by the commissioners of the Admiralty from the hire of the vessel for the time she was so under repair and disabled from performing service; and the plaintiff claimed before the arbitrator, to whom the damages were referred, to be entitled to recover that sum as a portion of the damages consequent upon the collision. [Cockburn, C. J. I presume you would hardly contend, that, if the vessel were disabled by storm, the Admiralty would be entitled to withhold the payment during the period necessarily occupied in repairing the damage?] It is submitted that they might. [Cockburn, C. J. Where there was no default on the part of the owner or his servants?] Yes. [Willes, J. *Paradine* v. *Jane*, Aleyn, 27, seems to shew that the deduction was properly made: for, "when the party by his own contract creates a duty or charge upon himself, he [193] is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract."] The true answer to this rule, however, is, that the court has no jurisdiction in the matter. The parties, by submitting the question of damages to the decision of Mr. Richards, have agreed to forego the jurisdiction of the court and jury, and to substitute the judgment of the arbitrator, without any power of appeal. They might, if they had thought fit, have stipulated that the arbitrator should raise any points of law for the determination of the court: but they have not done so. [Cockburn, C. J. Suppose the arbitrator had awarded damages in respect of a cause of action not within the declaration,—would you say the court had no jurisdiction to inquire into the matter?] That would be a case of excess of jurisdiction: but here the complaint is, that he has erred in a matter which is within his province; and that cannot be reviewed by the court. It is only where misconduct is imputable to the arbitrator, or some obvious mistake of

law appears upon the face of the award, that the court can interfere. In the case of *In re Hall and Hinds*, 2 M. & G. 847, 3 Scott, N. R. 250, this court set aside an award, on the ground of gross mistake on the part of the arbitrators,—so gross, as Tindal, C. J., observed, as to amount to misconduct. Parke, B., observing upon that case in *Phillips* v. *Evans*, 12 M. & W. 309, says: "I do not mean to say that the decision of the court of Common Pleas was not correct, as it was founded on facts which shewed a clear mistake; but I feel extremely unwilling to enlarge that rule. Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case." In this latter case, the **[194]** arbitrator himself admitted that he had made a mistake, and wished to re-consider the matter: but the court, notwithstanding, adhered to the general rule of not allowing awards to be set aside for mistakes. Again, in *Fuller* v. *Fenwick*, 3 C. B. 705, this court distinctly decided that they would neither set aside nor refer back an award for an objection in point of law not apparent on the face of it,—as, upon a suggestion that the arbitrator improperly treated as a penalty that which was by the express contract of the parties stipulated and ascertained damages; and that whether it was the award of a professional or of a lay arbitrator. Wilde, C. J., there says: "The question as to how far the court will interfere to correct the mistake of an arbitrator in fact or in law, has been presented in every possible shape. In some of the cases, the discussion has proceeded upon a supposed difference, where a matter of law was in question,—between a lay and a professional arbitrator. Lord Ellenborough first (*a*), and, subsequently, all the judges, repudiated any such distinction, holding, that, where the parties have thought fit to withdraw from the decision of the ordinary tribunals, and have selected their own judge, they must be content to abide his judgment. The question has also been discussed in cases where some point of law has suddenly arisen in the course of the inquiry, and where, though the matter was present to the mind of the arbitrator, but little time was afforded for consideration; and the courts have said, that, whether the arbitrator was a professional man or a layman, they would not inquire whether this conclusion was right or not, unless they could, upon the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and **[195]** mistakenly decided contrary to law." And Maule, J., says: "If the case had been left to follow the ordinary course, it would have been decided, as to the facts, by a jury, and, as to the law, by the judge, with an ultimate appeal to a court of error. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the whole to an arbitrator, thinking, probably, that the facts would be more conveniently ascertained, and the law more conveniently determined, by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law than the court. It is quite true that it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, induced the courts to deal much more liberally with awards than was formerly their practice, and, generally speaking, to hold them to be final, unless some substantial objection appears upon the face of them." The same principle was acted upon in *Hagger* v. *Baker*, 14 M. & W. 9, where Pollock, C. B. says,—"The general rule is, that, if an arbitrator makes a mistake, which is not apparent on the face of his award, the party injured has no redress; and there is no difference between a mistake in the law of evidence and in other matters. If no corruption be shewn, the court ought not to interfere." And the rule of law is the same, whether the reference is under an order of nisi prius or under an ordinary judge's order, or whether it be a reference of the cause and all matters in difference, or a mere assessment of damages.

Edward James, Q. C., and Quain, in support of the rule. It is a mistake to suppose that the rule is limited, as suggested, to cases of misconduct on the part of the arbitrator, or to defects apparent on the face of the **[196]** award: the court will always interfere to prevent injustice, where the arbitrator, intending to act according to law, has decided contrary to law. One of the earliest instances of this is the case of *Kent* v. *Elstob*, 3 East, 13, where Grose, J., said: "The award is clearly wrong,

(*a*) In *Sharman* v. *Bell*, 5 M. & Selw. 504.

considering it to be founded upon the reasons stated by the arbitrator in the paper delivered with it (which altogether must be taken as one instrument); for, it appears from thence that he proceeded upon a ground which cannot be supported in our law. And he has done wrong, according to his own principles and view of the subject; for, it is evident that he meant to determine according to law, and he has mistaken it; therefore the award is not such as he intended it to be." And Lawrence, J., said: "It is not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the court to examine them. Here, there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed." In the present case, it is true, it does not appear upon the face of the award, but it appears from the affidavits on both sides that the arbitrator, intending to decide according to law, has decided against it. *Delver* v. *Barnes*, 1 Taunt. 48, proceeds upon the same principle as *Kent* v. *Elstob*. [Williams, J. *Leggo* v. *Young*, 16 C. B. 626, is a strong authority against you. There, by an order made under the compulsory power given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3, a cause was referred, nothing being said about costs: the umpire, by his award, "adjudged that the defendants should pay to the plaintiff 159l. 0s. 9d. in full of all demands in the above-mentioned action." The award was accompanied by a note from the um-**[197]** pire to the plaintiff, on a separate piece of paper, but not annexed to the award, in which the umpire expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order of reference was silent as to costs: and this court held that the parties were to be bound by the award, and that the accompanying note could not be looked at. [Crowder, J. I thought it was an established rule that the courts will not set aside an award on the ground that the arbitrator has by mistake adjudicated wrongly on a matter of law.] *Hutchinson* v. *Shepperton*, 13 Q. B. 955, shews that that is not an inflexible rule. Lord Denman, in delivering the judgment of the court, there says: "Though fully sensible of the propriety of observing the greatest caution with regard to this subject, to avoid inquiries which would unravel by-gone transactions and keep alive the litigation which the parties had hoped to terminate by reference, we cannot think the rule universal and subject to no exception. It is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless." [Crowder, J. In that case, there was no misapprehension of law. Williams, J. The strongest case in your favour is *Jones* v. *Corry*, 5 N. C. 187, 7 Scott, 106, 7 Dowl. P. C. 299, where an arbitrator, with a view of enabling one of the parties litigant to make an application to the court, after the publication of his award stated matters which shewed he had put a mistaken construction upon the rule of reference, and had misdecided accordingly; and the court received affidavits of these facts, and set aside the award, notwithstanding upon the face of it there was no objection.] It clearly is not necessary that the mistake should be brought to the knowledge of the court by what appears **[198]** on the face of the award, or of a paper accompanying it. This is not like the case of a reference of all matters in difference: and, if there be no means of setting right an error of the arbitrator, counsel will be very unwilling to refer questions of this sort. [Cockburn, C. J. All difficulty might be obviated by a stipulation that the arbitrator's decision upon any general principle should not bind the parties.] That could not have been done here; for, it was not known that any claim in respect of the detention of the vessel would be set up, until after the order of reference had been settled. In truth, this was not a matter that was intended to be referred at all. *Broadhurst* v. *Darlington*, 2 Dowl. P. C. 38, is also an authority to shew, that, where an arbitrator to whom a reference is made as to the amount of damages the plaintiff is entitled to, intending to adopt the proper rule, by mistake fails to do so, the court will interpose. At all events, the court may refer the matter back to the arbitrator under the very large powers conferred upon them by the 8th section of the Common Law Procedure Act, 1854, which enacts, that, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." It is not confined to compulsory

references ordered under the powers of the act: *In re Morris*, 6 Ellis & B. 383. [Cockburn, C. J. Is not that a power given to the court, to be exercised in cases where otherwise they must have set aside the award?] It is submitted that the authority is not so limited. [Cockburn, C. J. The attention of the other side has not been called to this point by the form of your rule: and it certainly gives rise to a very grave **[199]** question. The inclination of my opinion is, that that section was only intended to apply to cases where the court sees grounds for setting aside the award, but where the mistake might be set right by sending the matter back to the arbitrator. How can that apply to a case where the court feels that it has no jurisdiction to set aside the award?] It is entirely in the discretion of the court. [Williams, J. The effect of your argument is, that the legislature by this provision for sending back the matter to the arbitrator intended to subvert the whole principles regulating arbitrations, and the authority of the court. It is a monstrous proposition.] In *Burnard* v. *Wainwright*, 19 Law J., Q. B. 423, after an award made in favour of B. against W. on a submission to reference between them, which contained a clause empowering the court to remit the matters to the re-consideration of the arbitrators, W. moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B., which contained material evidence in his favour. The arbitrators deposed that, had such a letter in the handwriting of B. been produced at the reference, their decision would have been materially affected. B. in answer swore that the letter was not in his handwriting, but was an absolute forgery. Wightman, J., remitted the case to the arbitrators, for them to say whether the letter was in B.'s handwriting, and, if they found that it was, then for them to re-consider the matters in difference. [Crowder, J. Was the arbitrator asked to reserve the question for the court under the 5th section of the Common Law Procedure Act, 1854?] He was not.

COCKBURN, C. J. I am of opinion that this rule should be discharged. Without entering into a consideration of the merits of the case, or inquiring whe-**[200]**-ther or not the arbitrator was right in allowing the sum in question as damages in the action, I am of opinion that we have no jurisdiction. It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding, that, unless there be something upon the face of award to shew that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. *Flavell* v. *The Eastern Counties Railway Company*, 2 Exch. 344, is very much to the purpose. There, a writ having issued in an action of debt against an incorporated railway company, the defendants' attorney consented to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed before the arbitrator a sum for extra work occasioned by the defendants' breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The court refused to set aside the award: and, upon a motion to enforce it, under the 1 & 2 Vict. c. 110, s. 18, it was held, that, if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the court to revoke the submission; but, not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous. The court there refused to interfere, upon the general principle, that they will not, as Parke, B., observes in the course of the argument, set aside the decision of one whom the parties have selected to be the judge of the law and the fact. So, here, the parties have selected their own tribunal; **[201]** and they are bound by the decision, be it right or wrong. The only remaining question is, whether or not the court is called upon to interfere by reason of the 8th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. It is true that section gives the court authority, in any case where reference shall be made to arbitration, at any time, and from time to time, "to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards;

but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference. I see nothing on the face of this award that would have justified the court in interfering to set it aside, and therefore I think it is not a case in which jurisdiction to send it back to the arbitrator is conferred upon us by s. 8. I therefore think this rule should be discharged.

One word as to the inconvenience which, it has been suggested, might arise from holding parties conclusively bound by the decision of an arbitrator upon a nice and intricate point of law, in cases where a mere question of amount of damages is referred to him. That inconvenience, if it be one, may always be obviated by introducing into the submission or order of reference [202] a clause enabling either party to call upon the arbitrator to reserve any question of law that might arise for the decision of the court. Besides, there is a provision in this statute (s. 5) enabling the arbitrator, "if he shall think fit, and it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court." That course might have been taken here; but it does not appear that the arbitrator was called upon by either party to do so. They have, therefore, no ground for complaining that their rights are concluded by the award.

WILLIAMS, J. I am entirely of the same opinion. The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, "You have constituted your own tribunal; you are bound by its decision." The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established. This is simply the case of a reference to an arbitrator before whom has arisen a question of law which he has decided, and, for the purpose of this motion, must be assumed to have [203] decided ill. I think we have no right to interfere. But it is said that the law upon this subject has been varied by the 8th section of the Common Law Procedure Act, 1854, and that we ought under the authority of that section to send the matter back to the arbitrator, with an intimation that he has decided wrong, and a direction to decide otherwise. I think it is impossible to say that this clause has so far varied the law as to alter the power and character of the arbitrator, and to enable us to say that this decision shall no longer be final either as to the law or the facts. This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as "Mr. Richards's clause." Nobody ever dreamt that the introduction of that clause into the order had the effect of altering the law as to the decision of the arbitrator being conclusive.

CROWDER, J. I take it that the general rule of law is clear and well ascertained, that the court will not interfere to set aside an award which is good upon the face of it, on the ground that the arbitrator has made a mistake whether of fact or of law. Having selected their own judge, the parties are bound by his decision. That this is the general rule, indeed, is admitted; but it is said that this case forms an exception to that general rule; for that the parties are not to be supposed to have made the arbitrator the judge to decide the particular matter now in question. It seems to me that this is a fallacy. The arbitrator was chosen by both parties to decide upon the amount of damages the plaintiff was entitled to recover. It so happens that a portion of the damages was not contemplated at the time the order of reference was made, viz. the deduction by the commissioners of the Admiralty of freight for the period during which the vessel was under repair, [204] and so unable to perform the service for which she was engaged. That matter was brought before the arbitrator, and he has decided it. I see no reason in this case to depart from the general rule, which seems to me to be

a very convenient and proper one. Even in a case where the arbitrator had made a clear mistake as to figures, *In re Hall and Hinds*, the court doubted its power to rectify it. It was insisted, that, at all events, we ought to interfere by virtue of the power given to the court by the 8th section of the Common Law Procedure Act, 1854. This was an entirely new suggestion, which was started suddenly upon us in the course of the argument. It struck me at once as being highly improbable that that section should have the effect of altering the general rule of law: and, on further reflection, it seems to me to be quite clear that it was not so intended, and does not so operate. The intention of the 8th section evidently was, to give the court the same power in all cases to send back an award for re consideration, as they before had only in those cases where the submission or order contained a special provision to that effect. If, as is suggested, the statute altered the law in this respect, the consequence would be that the court would in almost every case be called upon to interfere,—a consequence which would very materially impair the utility of arbitrations.

WILLES, J. I am entirely of the same opinion, and I should have been of that opinion if I had come to the conclusion that that very experienced arbitrator, Mr. Richards, had decided this matter as erroneously as, upon reading the affidavits, I am satisfied that he decided rightly. The parties agreed to take his decision upon the question of damages instead of that of the court and jury; and, if we were now to substitute ours for his, we should be acting contrary to the agreement [205] of the parties, and without jurisdiction. It is quite clear, that, before the passing of the last Common Law Procedure Act, the court could not, as a general rule, interfere with the discretion of an arbitrator. An exception had been introduced in the case of a mistake of law apparent on the face of the award. I do not say that my reason assents to that exception. We are bound by the course of the decisions. I regret that we are so. However, this case does not come within the exception. Then it is said, that, though irrespectively of the Common Law Procedure Act, the court might have no jurisdiction to set aside the award, yet they have power under s. 8 to send the matter back to the arbitrator for re-consideration. It is obvious that this would open a door to much inconvenience, uncertainty, and fraud, besides leading to the manifest absurdity, that the court would be exercising a jurisdiction, not upon a special case, as is provided by s. 5, but upon affidavit. It would be absurd to hold, that, where no special case was stated under s. 5, the whole matter is to be thrown at large and be disposed of upon affidavit under s. 8. It seems to me that the 8th section was simply intended to enable the court to send back a case to the arbitrator, in all cases where, otherwise, by reason of the want of a clause for that purpose, they would have been precluded from so doing. With respect to the case of *Burnard* v. *Wainwright*, 1 L. M. & P. 455, I neither express assent nor dissent from the doctrine there laid down. The rule must be discharged.

Byles, Serjt., for the plaintiff, asked for costs.

Quain. The rule is not moved with costs.

WILLES, J. Where a rule to set aside an award is discharged, it is always discharged with costs.

Rule discharged, with costs.

[206] CARPENTER *v.* PARKER. Nov. 13th, 1857.

[S. C. 27 L. J. C. P. 78; 6 W. R. 98.]

By a deed of settlement made by the defendant in 1842, under a power contained in his father's will, a term of 1000 years in certain estates was limited to Teed and White, in trust, by mortgage, sale, or otherwise, to raise a sum not exceeding 10,000l. for payment of the defendant's debts; and in 1843 the trustees assigned the term by way of mortgage to A. and B., the defendant being a party to the deed, covenanting for payment of the principal and interest, and also for title in the trustees, and for quiet enjoyment by the mortgagees in case of default. This assignment contained a power to the defendant to lease, by and with the consent and approbation of the mortgagees, their heirs, &c. In 1846, the defendant, without having obtained the consent of the mortgagees, granted a lease of part of the lands to the plaintiff, with a covenant for quiet enjoyment during the term, "without the let, suit, trouble,

denial, eviction, molestation, or disturbance of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them."—The plaintiff in 1851 received a notice from the surviving mortgagee, informing him of the mortgage, and that the principal and interest were unpaid and in arrear, and requiring the plaintiff to pay rent to him. Having consulted his attorney, and finding that he could not successfully resist the claim of the mortgagee, the plaintiff consented to give up possession of the land to him, and the mortgagee entered and took possession,—paying the plaintiff 75*l.* as a compensation for certain improvements.—Upon a case stated for the opinion of the court:—Held, that the plaintiff was entitled to maintain an action upon the covenant for quiet enjoyment,—the facts shewing an eviction, or, at all events, a molestation and disturbance of the plaintiff, by one claiming title by, from, or under the defendant.—The breach assigned in the declaration alleged an "eviction" only, and that by one having title "by virtue of a mortgage theretofore to him made by the defendant:" —The court amended the declaration, by alleging the eviction to have been by one claiming "by, from, or under the defendant," and adding that the plaintiff was "molested and disturbed" in his enjoyment of the premises.

This was an action brought by the plaintiff to recover 1000*l.* damages against the defendant, for an alleged breach of a covenant for quiet enjoyment of a mansion and property at Cherrymount, in the county of Waterford, in Ireland.

The declaration stated, that therefore, to wit, on the 26th of May, 1846, the defendant by deed let to the plaintiff certain lands at Cherrymount, in the county of Waterford, in Ireland, to have and to hold all and singular the said demised premises, together with their and every of their rights, members, and appurtenances, unto the plaintiff, his heirs, executors, administrators, and assigns, from the 29th of September then last past, for and during the natural lives and life of the plaintiff and his the plaintiff's wife, and the survivor of them, or for and during the full term, time, and space of thirty-one years from the said 29th of September, which-[207]-ever of the said terms should longest last: That the defendant did in and by the said deed covenant with the plaintiff that he the plaintiff should and might peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their and every of their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation or disturbance of the defendant or his heirs or assigns, or any person or persons claiming or deriving or to claim or derive, by, from, or under him, them, or any of them: That, by virtue of the said indenture, the plaintiff afterwards, and before this suit, entered into and upon the said demised premises, and became and was possessed thereof for the said term so to him thereof granted as aforesaid: Breach, that, although the plaintiff had always from the time of the making of the said deed thitherto observed, performed, fulfilled, and kept all and singular the covenants and agreements in the said indenture contained on his part to be observed, performed, fulfilled, and kept; yet the plaintiff did not during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises and appurtenances according to the said covenant, [*but, on the contrary thereof,*] (*a*)[1] after the making of the said deed, and during the said term thereby granted, and whilst the plaintiff was possessed of the said demised premises, with their appurtenances, one Hilary Frederick L'Estrange, who before and at the time of the making of the said deed, and continually from thence until and at the time of the eviction and expulsion thereinafter mentioned, had, and who still had, lawful right and title to the said premises, with the appurtenances [to wit, by virtue of a mortgage thereof [208] theretofore to him made by] (*a*)[2] *by, from, and under* the defendant, *and not by or under the plaintiff*, did enter into the said premises, with the appurtenances, *claiming such right and title to the same as aforesaid, and molested and disturbed the plaintiff in his enjoyment thereof*, and ejected, expelled, and removed the plaintiff therefrom, and kept and held out, and still kept and held out, him the plaintiff from his possession and occupation thereof,—by reason of which premises the

(*a*)[1] These words were struck out on the argument, at the suggestion of Willes, J., and the word "and" substituted.

(*a*)[2] The words within brackets were struck out, and those in italics inserted on the amendment.

plaintiff had not only entirely lost and been deprived of the said demised premises, with their appurtenances, but also a large sum of money, to wit, 500l., by him paid, laid out, and expended in and about the repairing and permanently improving the said premises, and was compelled to sell off his the plaintiff's stock of and belonging to the said premises, in great haste, and at a considerable sacrifice and loss: And the plaintiff claimed 1000l.

The defendant pleaded,—first, non est factum,—secondly, that the plaintiff did during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises and appurtenances, according to the said covenant, and that the said premises, with the appurtenances, were not entered into, nor was the plaintiff ejected, molested, disturbed, expelled, or removed therefrom, or kept or held out from his possession or occupation thereof, as alleged. Issue thereon.

The cause came on for trial before Jervis, C. J., at the sittings for London after Trinity Term, 1856, when a verdict was taken for the plaintiff, with 1000l. damages, and 40s. costs, subject to the opinion of the court upon the following case:—

[209] In the early part of the year 1846, the plaintiff was desirous of taking and renting a certain mansion-house, with buildings, lands, and premises, situate at a place called Cherrymount, in the county of Waterford, in Ireland: and, on the 26th of May, 1846, the defendant by lease granted and demised to the plaintiff all that part of Cherrymount then lately in the possession of L. Sheridan, and then in the plaintiff's actual possession, amounting to 61a. 3r. 30p., together with the dwelling-house, offices, and appurtenances, to hold the said demised premises, with their rights, members, and appurtenances, unto the plaintiff and his heirs, from the 29th of September then last past, during the natural lives and life of the said plaintiff and Sarah Carpenter, his wife, and the survivor of them, or for and during the term, time, and space of thirty-one years from the said 29th of September, fully to be complete and ended, whichever of the said terms should longest last, he the plaintiff yielding and paying the annual rent of 92l. 18s., and, amongst other covenants in the said lease was the following,—"And, further, that he the said plaintiff, his heirs, &c., paying the said reserved yearly rent, and performing the covenants and agreements on his and their parts to be paid and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the said defendant, his heirs or assigns, or any person claiming or deriving, or to claim or derive, by, from, and under him or them, or any of them."

The lease was duly executed by the defendant on the day it bears date; and the plaintiff entered into and upon the said demised premises, and took possession thereof, according to the terms of the lease, and continued in possession thereof until the 15th of Sep-**[210]**-tember, 1851, when he received and was served with a notice by one Hilary Frederick L'Estrange, in the words and figures following:—

"Whereas, by indenture bearing date the 15th of September, 1843, and made between John Godfrey Teed, of, &c., and Edmund White, of, &c., of the first part, Henry Parker, of, &c., of the second part, and Thomas L'Estrange, of, &c., and Hilary Frederick L'Estrange, of, &c, of the third part, the lands of Conneragh, situate in the barony of Coshbride, in the county of Waterford, and also the lands of Ballyrussell, situate in the barony of Coshmore and Coshbride, and county of Waterford, and the lands of Old and New Conniky and Moneygowin, consisting of arable, meadow, and pasture, and containing in the whole, by estimation, 905a. 1r. 20p. English statute measure, be the same more or less, situate, lying, and being in the barony of Kynatallon, and county of Cork, were conveyed in mortgage to the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, for a term of one thousand years, to secure the sum of 10,300l. therein mentioned, subject to redemption on payment of the said principal sum, and interest thereon, upon the 15th of September then next following: and it was thereby provided, that, if default should be made in payment of the said sum of 10,300l. and interest, or any part thereof, unto the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, at the time aforesaid, then it should and might be lawful to and for the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, from time to time and at all times there-

after peaceably and quietly to enter into and upon, and to hold, use, occupy, possess, and enjoy, the said lands, and every part thereof, and to receive and take the rents, [211] issues, and profits thereof to and for his and their own use and benefit for the residue of the said term of one thousand years: and it was thereby declared by and between the said Thomas L'Estrange and Hilary Frederick L'Estrange that the said sum of 10,300*l.* was money belonging to them upon a joint contract, and that, in the event of the decease of either of them, the receipt or receipts of the survivor of them should be a good and sufficient discharge or discharges: And whereas the said Thomas L'Estrange is since dead: And whereas the said principal sum of 10,300*l.* was not, nor was any part thereof, paid at the time appointed for payment thereof, but the whole of the same, and a large arrear of interest thereon, still remains due: Now, take notice that I the said H. F. L'Estrange hereby caution the several tenants of the said lands from paying any of the said rents to the said Henry Parker, or any one on his behalf, or to any one save unto me the said H. F. L'Estrange, or to an agent lawfully appointed by me: And I hereby further require the said tenants not to allow the said Henry Parker, or any other person, without permission in writing from me, to cut any of the timber or other trees on the lands, or any part thereof. Dated this 15th day of September, 1851."

(Signed) "HILARY FREDERICK L'ESTRANGE.

"To the several tenants on the lands aforesaid."

The plaintiff, until he received the notice of the 15th of September, 1851, hereinbefore set forth, had no notice or knowledge of the said mortgage, and was not aware of the existence thereof.

The plaintiff's term granted by the said lease had not expired when the said H. F. L'Estrange so took possession; * but the lease was still in force and effect.

In September, 1851, the plaintiff, who up to that time had occupied the premises and spent a considerable sum of money upon them, being advised by his attorney (after [212] investigating the title) that he could not dispute Mr. L'Estrange's title, and under that impression quitted the property, and did not prevent Mr. L'Estrange from entering. Mr. L'Estrange thereupon did enter and take, and has since kept possession without opposition, he paying the plaintiff at the time of his taking possession the sum of 75*l.*, and the plaintiff receiving it without prejudice to his right, if any, against the now defendant.

Proceedings were taken in the Incumbered Estates Court in Ireland, by a judgment-creditor, relative to the said premises so demised by the defendant to the plaintiff; and, the said property being in that court for administration pursuant to the statutes, the following order was made at the instance of the plaintiff:

"Incumbered Estates Court.

"Estate of Henry Parker . . Owner.
"Roger Greene Davis and others . Petitioners.

"It is hereby consented and agreed by Thomas Carpenter, Esq., and Hilary Frederick L'Estrange, that, in consideration of the sum of 75*l.* in hand this day paid to him the said Thomas Carpenter by the H. F. L'Estrange, the said Thomas Carpenter abandons all claim as against the said H. F. L'Estrange, or the funds to be realized by sale of the estates in this matter, for compensation or otherwise under the order of Mr. Commissioner Hargreave, bearing date the 4th of June, 1852, and under the covenant in the lease of the lands of Cherrymount bearing date the 26th of May, 1846, and for the costs of the said Thomas Carpenter of the objections filed by him and of the motion made the said 4th of June, 1852: And it is further consented and agreed that the said H. F. L'Estrange be at liberty to take immediate possession of the said house and lands of Cherrymount, and all fixtures and crops thereon; and that the said Thomas Carpenter do give up all [213] claim thereto, or any compensation in respect thereof, against the funds in this matter: this agreement or consent, however, to be without prejudice to any proceedings which the said Thomas Carpenter may think fit to take, under the said covenant in the said lease, or otherwise, against

* Sic.

Mr. Henry Parker or Mr. M. Greene, or either of them, personally, or against any fund which may become payable or be allocated to them, or either of them, out of the funds in this matter, for compensation, costs, or otherwise. Dated this 12th of June, 1852."

(Signed) "R. G. DURDIN, solicitor for the said Thomas Carpenter.
"THOMAS GRIER, solicitor for the said H. F. L'Estrange."

The said mortgage mentioned in the said notice was made under the power recited therein: and in the same mortgage the following power of leasing was contained:—

"Provided always, and it is hereby declared and agreed by and between the said several persons parties hereto, that it shall and may be lawful for the said Henry Parker, John Robert Theophilus Hastings Parker, Henry Francis Hastings Parker, George Ferdinand Hastings Parker, and Philip Reginald Hastings Parker, and for such other son of the said Henry Parker begotten during the life-time of the said testator, and to be born as aforesaid (if any such there shall be), severally and respectively, at any time or times during their respective lives, when and as they shall respectively, by virtue of any of the limitations hereinbefore contained, be in the actual possession and receipt of the rents, issues, and profits of the said several towns, villages, lands, hereditaments, and premises hereinbefore mentioned and intended to be hereby released, and to and for the guardian or guardians of any and each minor who by virtue of the limitations hereinbefore [214] contained shall for the time being be entitled to the actual possession and receipt of the rents, issues, and profits of the same several towns, villages, lands, hereditaments, and premises, either as tenant for life or tenant in tail male, during his respective minority, by any deed or deeds sealed and delivered in the presence of two or more credible witnesses, to demise or let all or any part or parts of the said several towns, villages, lands, hereditaments, and premises, to any person or persons for any term or number of years not exceeding twenty-one years in possession; and also to demise or lease all or any part or parts of the said several towns, villages, lands, hereditaments, and premises, for one life or for two or three lives in being at the same time, or for any term or number of years determinable on the dropping of one life or two or three lives in being at the same time, either in possession or reversion, but so as to wear out or be determinable on the dropping of the lives of three persons all in being at one and the same time, or for one life or two or three lives in being at one and the same time, with a further term of thirty-one years to take effect after the expiration of the last subsisting life; and also to demise or lease all or any part or parts of the said hereditaments and premises mentioned to be hereby released, to any person or persons who shall be willing and shall accordingly by such demise or lease covenant and agree to improve the same by erecting or building thereon any new house or houses, erections or buildings, or to rebuild or repair any of the messuages, tenements, or buildings which now are or hereafter shall be on the premises, and to expend such sums of money in such improvements as shall be an adequate consideration for the interest to be departed with in such parts of the said hereditaments so to be demised respectively, for one life or for two or three lives as aforesaid, or for any number of years [215] determinable on the dropping of one life or two or three such lives as aforesaid, so as upon every such demise or lease as aforesaid there be reserved and made payable, during the continuance thereof, to be incident to and go along with the reversion expectant thereon respectively, the best and most improved yearly rent or rents that can be reasonably had or obtained for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for or in respect of any such demise or lease, and so as such lessees respectively, and their respective executors, administrators, or assigns, be not made dispunishable of waste by any expression therein, and so as in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby respectively reserved, by the space of twenty-one days after the same, or any part thereof, shall become due, and so as the respective lessees to whom such leases shall be made do seal and deliver counterparts thereof respectively."

It is agreed between the parties that a copy of the lease hereinbefore referred to, and the pleadings on both sides in this action, shall accompany the special case, and be referred to by either of the parties on the argument, and shall form part of the special case.

It is also agreed between the parties, that, should the judgment be in the

plaintiff's favour, the question of amount of damages is to be referred to Mr. Serjt. Borwick, the assistant barrister for the Eastern Division of the county of Cork.

The question for the opinion of the court was, whether the plaintiff was entitled to recover from and against the defendant: and, if the court should be of opinion that he was entitled to recover, then the verdict was to be entered for the plaintiff as aforesaid; but, if the court should be of a contrary opinion, then a verdict was to be entered for the defendant.

[216] The case being set down for argument, Brewer, for the plaintiff, in Trinity Term last, obtained a rule to shew cause why it should not be amended, by setting out therein the leasing powers contained in the mortgage deed of the 15th of September, 1843, by inserting the words "by and with the consent and approbation of the said Thomas L'Estrange and Hilary Frederick L'Estrange, their heirs, executors, administrators, or assigns, during the continuance of the security of these presents, such consent and approbation being under hand and seal."

This amendment was opposed by Stammers, for the defendant; and ultimately the court ordered that "the mortgage deed of the 15th of September, 1843, be made a part of the said case."

The deed bore date the 15th of September, 1843, and was made between John Godfrey Teed and Edmund White of the first part, Henry Parker (the defendant) of the second part, and Thomas L'Estrange and Hilary Frederick L'Estrange of the third part. It recited the marriage settlement of John Robert Parker (the defendant's father), of the 15th of July, 1779, whereby John Robert Parker conveyed certain estates (including the Cherrymount estate), part of which were respectively held under three leases for lives renewable for ever, and other part for three lives determinable, under a lease of the 26th of March, 1744, to Richard Parker and Robert Fitzgerald, upon certain trusts,—that Catherine, the wife of John Robert Parker, died, in the life-time of her husband, on the 31st of December, 1832,—that there were eight children of the marriage, viz. three sons and five daughters,—that John Parker, the eldest son, died in 1834, a bachelor, and that thereupon Henry Parker (the defendant), the second son, became entitled to the settled estates as a quasi tenant **[217]** in tail male thereof expectant upon the decease of his father John Robert Parker, subject to a term and a charge of £2000*l.* for the younger children,—that, in the years 1801 and 1813 respectively John Robert Parker purchased the chief-rents and the fee simple of the lands comprised in the settlement and held under the leases for lives renewable for ever, and so became the absolute owner thereof,—and that the lease of the 26th of March, 1744, had expired. It then recited a settlement made on the marriage of Henry Parker (the defendant) with Lady Frances Theophila Ann Hastings, of the 10th of March, 1822, under which he covenanted with certain trustees to charge any lands he might become possessed of in Great Britain or Ireland with 200*l.* a year for the benefit of his then intended wife. It then recited the will of John Robert Parker, dated the 17th of May, 1842, whereby he devised his Irish estates, including Cherrymount (subject to the rights of renewal of the trustees of his marriage settlement, and of the several other persons for the time being claiming under the same settlement, unless his son Henry Parker should consent to settle such lands as thereinafter mentioned, in which case such rights of renewal would cease), to John Godfrey Teed and Edmund White, upon trust, in case his said son Henry Parker should, within twelve calendar months after his (the testator's) decease, consent to and should accordingly with all convenient speed afterwards, at the request of his trustees, or the survivor of them, proceed to settle all the several lands and hereditaments comprised in his (the testator's) said marriage settlement, and to which his said son would upon his decease become entitled, or which he would then have the full power of disposing of, and also the lands called Summerfield belonging to his said son, for such estate and interest as he originally had therein, to the uses and in **[218]** manner therein and in part herein after mentioned, then and in such case that Teed and White, or the survivor of them, or the heirs of such survivor, should join with his said son Henry Parker in settling and assuring, as well the said several lands and estates thereinbefore devised to them as the said several lands and hereditaments comprised in his said marriage settlement, which in such case would be discharged from all future right of renewal of the leases, and also the said lands called Summerfield (discharged, as to the said lands and estates comprised in his, the testator's, marriage settlement, from the 2000*l.* provided for his younger children, which in such case was to be raised and paid out of

the fund thereinafter set apart for that purpose), to the uses, upon the trusts, and in manner therein and in part hereinafter mentioned, that is to say, as to so many and such part or portion or parts or portions of the said several estates thereby devised and so settled, and the lands called Summerfield, as his said trustees and son Henry Parker, or the survivors or survivor of them, should think proper and sufficient, and should select for that purpose, to the use of his said trustees or trustee for the time being, and their or his heirs and assigns, upon trust by sale or mortgage, or by mortgage and sale afterwards of the same estates, or otherwise, to raise such sum or sums of money as would be sufficient to pay and satisfy and discharge all the debts of his said son Henry Parker, which at the time of his (the testator's) decease might be charged or secured upon the lands and hereditaments comprised in his said marriage-settlement or his said lands at Summerfield, and also all such other debts due and owing from his said son Henry Parker at the time of his (the testator's) decease as he should wish so to charge, and should by writing under his hand direct to be provided for accordingly, **[219]** so that the amount of all such several debts of his said son Henry Parker so charged and to be provided for should not together exceed the sum of 10,000l. ; and, as to so much and such parts of the lands and hereditaments so to be conveyed unto and to the use of his said trustees or trustee for the time being, and their or his heirs or assigns as aforesaid, as might remain after payment of the said several debts thereinbefore mentioned, and to which the same were thereinbefore made liable, and in the meantime subject to the trusts and powers thereinbefore expressed or directed to be limited concerning the same, and also as to all and singular other the said several lands and estates in Ireland lastly thereinbefore devised, and comprised in his (the testator's) said marriage-settlement, and the said lands called Summerfield, and which should not be conveyed unto and to the use of his said trustees or trustee for the time being upon such trusts as aforesaid, to the uses and in manner therein and in part hereinafter mentioned, that is to say, to the use of his (the testator's) said son Henry Parker and his assigns, for life, with successive remainders in tail male to the testator's grandsons, John Robert Theophilus Hastings Parker and Henry Francis Hastings Parker, sons of Henry Parker, with divers remainders over,—with power to the trustees and the testator's son Henry Parker, in the settlement so to be made as therein and hereinbefore mentioned, to charge and provide for the payment of the annuity of 200l. according to the covenant of his said son Henry Parker in the deed of the 10th of March, 1822. The deed then went on to recite the death of John Robert Parker on the 26th of May, 1842, and proof of his will ; that, by indentures of lease and release and settlement of the 26th and 27th of June, 1842, the release and settlement being made between Henry **[220]** Parker and his wife of the first part, Teed and White of the second part, Alexander Shearer of the third part, and Charles Hertslet of the fourth part, a term of 1000 years in the estates comprised in the settlement of the 15th of July, 1779, was limited to the use of White and Teed, in trust by mortgage or sale, &c., to raise a sum not exceeding 10,000l. for the purpose of paying the debts of Henry Parker ; that Teed and White, as such trustees as aforesaid, were desirous of raising 10,000l. for that purpose, and had applied to Thomas L'Estrange and Hilary Frederick L'Estrange to lend them that sum, and also 300l. for the expenses of raising the same, and had agreed to secure the repayment thereof, with interest, by an assignment of the lands and hereditaments comprised in the said term of 1000 years, by way of mortgage ; and that Henry Parker "for the satisfaction only of the said Thomas L'Estrange and Hilary Frederick L'Estrange, and not by way of exonerating the said several lands and hereditaments thereby assigned and mortgaged from the payment of the said sum of 10,000l., or the interest thereof, or the said sum of 300l., or any part thereof respectively, had agreed to enter into the covenant for payment, and also the covenants for title of the same several lands and hereditaments on his part thereinafter contained." The deed then witnessed that Teed and White assigned to the said Thomas L'Estrange and Hilary Frederick L'Estrange the lands and hereditaments comprised in the term created by the indenture of the 27th of June, 1842, for the said term of 1000 years, subject to redemption on re-payment of the principal and interest at certain times : and Henry Parker covenanted to pay the principal and interest on the days named, that Teed and White had good title to assign, and that, in case of default, "it should be lawful for the mortgagees to enter and take the rents, **[221]** &c. to and for his and their own use and benefit for and during all the rest,

residue, and remainder which should be then to come and unexpired of the said term of 1000 years thereby assigned therein, without the let, suit, hindrance, interruption, denial, or demand whatsoever of or by Teed and White, or either of them, or their or either of their executors or administrators, or any of them, or any other person or persons whomsoever; and that free and clear or freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Henry Parker, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, sales, mortgages, assignments, rents and arrears of rent, statutes, judgments, recognizances, titles, charges, and incumbrances whatsoever;" and, also for further assurance. The deed then contained the following power of leasing:—"Provided always, and it is hereby agreed and declared by and between the said several persons parties hereto, that it shall and may be lawful for the said Henry Parker, and for his sons John Robert Theophilus Hastings Parker, Henry Francis Hastings Parker, George Ferdinand Hastings Parker, and Philip Reginald Hastings Parker, when and as they shall respectively, by virtue of any of the limitations contained in the said recited deed of the 27th of June, 1842, be in the actual possession and receipt of the rents, issues, and profits of the said several lands, &c., hereinbefore mentioned, and intended to be hereby released, and to and for the guardian or guardians of any and each minor who by virtue of the limitations hereinbefore contained shall for the time being be entitled to the actual possession and receipt of the rents, issues, and profits of the same several lands, &c., as tenant for life or tenant in tail male, during his respective minority, by and with the [222] consent and approbation of the said Thomas L'Estrange and Hilary Frederick L'Estrange, their heirs, executors, administrators, or assigns, during the continuance of the security of these presents, such consent and approbation being under hand and seal, by any deed or deeds sealed and delivered in the presence of two or more credible witnesses, to demise or let all or any part or parts of the said several lands, &c., to any person or persons, for any term or number of years, not exceeding twenty-one years, in possession, and also to demise or lease all or any part or parts of the said several lands, &c., for one life, or for two or three lives in being at the same time, or for any term or number of years determinable upon the dropping of one life, or two or three lives in being at the same time, either in possession or reversion, but so as to wear out or be determinable on the dropping of the lives of three persons all in being at one and the same time, or for one life, or for two or three lives in being at one and the same time, with a further term of thirty-one years, to take effect after the expiration of the last or subsisting life, and also to demise or lease all or any part or parts of the said several hereditaments and premises mentioned to be hereby released, to any person or persons who shall be willing and shall accordingly by such demise or lease covenant and agree to improve the same by erecting or building thereon any new house or houses, erections, or buildings, or to rebuild or repair any of the messuages, tenements, or buildings which now are or hereafter shall be on the premises, and to expend such sums of money in such improvements as shall be an adequate consideration for the interest to be departed with in such parts of the said hereditaments so to be demised respectively for one life or for two or three lives as aforesaid, or for any number of years determinable upon the dropping of one life or two or three [223] such lives as aforesaid, so as upon every of such demise or lease as aforesaid there be reserved and made payable during the continuance thereof, to be incident to and go along with the reversion expectant thereon respectively, the best and most improved yearly rent or rents that can be reasonably had or obtained for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for or in respect of any such demise or lease, and so as such lessees respectively, and their respective executors, administrators, or assigns, be not made dispunishable of waste by any expression therein, and so as in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby respectively reserved, by the space of twenty one days after the same, or any part thereof, shall become due, and so as the respective lessees to whom such leases shall be made do seal and deliver counterparts thereof respectively." And it was thereby agreed and declared by and between the said several persons parties thereto, and more particularly by the said Thomas L'Estrange and Hilary Frederick L'Estrange, that, until default should happen to be made in payment of the said sum of 10,300*l.* and interest thereby secured as aforesaid, or some part thereof, contrary to the true

intent and meaning of those presents, it should and might be lawful to and for the said Henry Parker and his assigns, or other the person or persons for the time being entitled as aforesaid, to have, hold, use, occupy, possess, and enjoy the said lands, &c. thereby assigned, or intended to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof to his and their own proper use, without the let, suit, trouble, molestation, interruption, eviction, claim, or demand whatsoever of or by the said Thomas L'Estrange and Hilary Frederick L'Estrange, [224] their executors, administrators, or assigns, or any other person or persons whomsoever, claiming or to claim by, from, or under him, them, or any of them: And it was thereby declared and agreed by and between the said Thomas L'Estrange and Hilary Frederick L'Estrange, that the said sum of 10,300l. thereinbefore mentioned to have been advanced by them, and the payment whereof was thereby secured, was money belonging to them upon a joint account, and that, in the event of the decease of either one of them, the receipt or receipts of the survivor of them, or of the executors or administrators of such survivor, or of his or their assigns, should be a good and sufficient discharge or good and sufficient discharges for so much of the said sum of 10,300l. and interest thereby secured, as should be therein expressed to be received.

Byles Serjt. (with whom was Brewer), for the plaintiff (*a*). By the indenture of the 15th of September, 1843, to which the defendant was a party, certain lands in the county of Waterford, including an estate called Cherrymount, were demised by the trustees of the de-[225]-fendant's marriage-settlement for a term of 1000 years, to Thomas L'Estrange and Hilary Frederick L'Estrange to secure a sum of 10,000l. which was raised for the payment of the defendant's debts. This deed reserved to the defendant a power to lease any part of the premises, for a term or for lives "by and with the consent and approbation of the mortgagees, their heirs, &c., during the continuance of the security of those presents, such consent and approbation being under hand and seal." On the 26th of May, 1846, the defendant granted a lease of part of the premises comprised in the mortgage to the plaintiff and his wife, for their respective lives or for thirty-one years, whichever of the said terms should longest last; and, by virtue of that lease, the plaintiff entered into possession of the premises, and expended considerable sums of money upon them. This lease was made without the required consent. In September, 1851, the plaintiff received a notice from Hilary Frederick L'Estrange, the surviving mortgagee, that the mortgage-money was unpaid, and the interest largely in arrear, and that the rent must be paid to him. Upon receiving this notice, the plaintiff inquired into the title of Mr. L'Estrange, and, finding it to be indisputable, permitted him to take possession of the premises. Now, the lease not having been granted in pursuance of the power, was defeasible: but that lease contained a covenant that the lessee, his heirs, &c., paying the rent and performing the covenants, should "peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, &c., during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." The question is, whether the special case discloses a breach of that covenant. In [226] Woodfall's Landlord and Tenant, 7th edit. p. 513, it is said: "A breach of the covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the

(*a*) The following were the points marked for argument on the part of the plaintiff:—

"1. That he was evicted of the demised premises by title paramount, and therefore he is entitled to recover in this action:

"2. That there was a breach of the covenant for quiet enjoyment, by H. F. L'Estrange taking possession:

"3. That there was an eviction from the demised premises:

"4. That the plaintiff had no title or power to prevent or hinder Hilary Frederick L'Estrange taking possession, as the said Hilary Frederick L'Estrange had a superior title to the demised premises than either the defendant or the plaintiff:

"5. That the defendant had no power to grant the lease to the plaintiff as against the title of the said Hilary Frederick L'Estrange."

premises. Of the first sort is a recovery by ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented. Thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, after the expiration of the term: *Lanning* v. *Lovering*, Cro. Eliz. 916: but, where in covenant for quiet enjoyment the breach assigned was 'that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20*s.* costs,'—it was held, on demurrer, to be no breach of covenant, for, the covenant was for quiet enjoyment, and this was a suit for waste,—*Morgan* v. *Hunt*, 2 Ventr. 213. On the other hand, any description of annoyance to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort: thus, if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it: *Andrews* v. *Paradise*, 8 Mod. 318." In order to constitute a breach of the covenant for quiet enjoyment, it is not necessary that there should be an actual eviction: it is enough if the lessee was molested or disturbed in his enjoyment of the demised premises. Here is a notice of a claim given to the lessee by one who is entitled to give it, and has power to enforce it. In what position does it **[227]** place him? [Cockburn, C. J. Suppose the lease had been made with the consent of the mortgagees, the principal and interest due upon the mortgage being unpaid, would not the surviving mortgagee equally have given such a notice? and, suppose he had, would there have then been a breach of the covenant for quiet enjoyment?] It is submitted that there would. [Crowder, J. The notice contains no intimation that advantage will be taken of the irregularity in the lease: all it amounts to is,—"I am mortgagee; pay your rent to me." Is than an eviction?] It is not necessary that there should be an actual eviction. The lessee has a right to the enjoyment of the premises subject to the terms of the contract; one of which is, payment of rent to the lessor. By the notice, he finds himself placed between two contending parties: he is not excused from paying rent to his lessor; and, if he paid his lessor after receiving such a notice, he would be liable to be called upon to pay over again to the mortgagee. The service of that notice, therefore, clearly is a "let, trouble, molestation, or disturbance" by one claiming title. Suppose he had resisted the claim of the mortgagee, and, being sued in ejectment, had let judgment go by default,—could it have been said that the covenant for quiet enjoyment had not been broken, because he offered no defence to a defenceless action? [Cockburn, C. J. My Brother Williams suggests that the strength of your argument is, that the lessee would have no answer to a demand for rent by his lessor. Williams, J. But a payment of rent to the mortgagee would have been good: *Johnson* v. *Jones*, 9 Ad. & E. 809, 1 P. & D. 651.] Precisely so. The plaintiff was in the position of a mere tenant at will to the mortgagee. The effect of the notice is,—"If you do not pay your rent to me, I will turn you out." It amounts to a demand of possession. The case of *Ludwell* v. *Newman*, 6 T. R. 458, goes far beyond what is necessary here. There, in an **[228]** action for the breach of a covenant for quiet enjoyment, the declaration stated, that, before the demise to the plaintiff, the defendant had made a demise to A. which was then subsisting; that, in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he never had been in possession. And the court said "that the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which could not have taken place here on account of the prior lease granted to Rogers, and which was averred to be then subsisting." Here, the lessee could not have continued to hold without the permission of the mortgagee.

Stammers, for the defendant (*a*). There has been no breach of the covenant for

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That there was no such let, suit, trouble, denial, eviction, molestation, or disturbance as to amount to a breach of the covenant for quiet enjoyment contained in the lease:

"2. That there was no such let, suit, trouble, denial, eviction, molestation, or

quiet enjoyment, and no eviction by any person claiming by, from, or under the **[229]** defendant. The terms of the covenant are, that "Carpenter, his heirs, &c., paying the said reserved yearly rent, and performing the covenants and agreements on his and their parts to be paid and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their and every of their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the said Henry Parker, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." And the breach alleged in the declaration is, that "the plaintiff did not during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the demised premises and appurtenances, according to the said covenant; but, on the contrary thereof, after the making of the said deed, and during the term thereby granted, and whilst the plaintiff was possessed of the demised premises, with their appurtenances, one H. F. L'Estrange, who before and at the time of the making of the said deed, and continually from thence until and at the time of the eviction and expulsion thereinafter mentioned, had, and who still hath, lawful right and title to the said premises, with the appurtenances, to wit, by virtue of a mortgage thereof theretofore made to him by the defendant, did enter into the said premises, with the appurtenances, and ejected, expelled, and removed the plaintiff therefrom, and kept and held out, and still keeps and holds out, him the plaintiff from his possession and occupation thereof," &c. That is matter of substance, and the plaintiff cannot vary from it when he comes to prove it: *Harris* v. *Mantle*, 3 T. R. 307; *Hawkes* v. *Orton*, 5 Ad. & E. 367, 6 N. & M. 842; per Lord Ellenborough in *Seddon* v. *Senate*, 13 East, 72; 2 Wms. Saund. 178 a., n. As the plaintiff has thought **[230]** fit to rely upon an eviction and expulsion, he cannot now depart from that. The facts stated upon this special case clearly do not amount to an eviction. All that appears is, that the plaintiff, being in under a lease from the defendant, received a notice from the mortgagee of the premises that he would be required to pay rent to him, and, being advised by his attorney that the mortgagee had a title which he could not resist, voluntarily quitted and allowed the mortgagee to take possession of the premises,—receiving from him a sum of money as the price of his abandonment of them. In Comyns's Digest, Seisin (F. 2), it is said: "An act which does not oust him who has the freehold, though it be tortious, will not be a disseisin; as, if a commoner commands the owner of the soil not to cut down trees, whereupon he desists, and goes off out of the land, it is no disseisin; for, he who has right shall not be ousted of his seisin by parol: 1 Rol. 659, l. 10. So, if A. enters upon the possession of B., but does not expel him, it is no disseisin: *Smartle* v. *Williams*, 1 Salk. 244; Co. Litt 181 a. So, it will not be a disseisin, where a man enters by sufferance of the owner: 1 Rol. 659, l. 20; *Skipwith* v. *Conies*, 1 Anderson, 134." There was no demand of possession here by the mortgagee: no threat of expulsion; nothing but a mere demand of rent. [Williams, J. Was the tenant bound to wait until he was turned out by an action of ejectment?] To constitute an eviction, there clearly must be something more than appears here. Then, there was no eviction by the defendant or by a person claiming title by, from, or under him. There was no mortgage by the defendant to L'Estrange; the mortgage was under the power in the marriage-settlement of the 15th of July, 1799. The term was created by the trustees, Teed and White, in pursuance of the power given to them under the settlement; and they assigned the term to the two **[231]** L'Estranges, by way of mortgage. The

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disturbance by the defendant, or by any person or persons claiming or deriving by, from, or under the defendant:

"3. That the mortgage being in execution of a power, the mortgagees were in under the donor of the power, and not under the defendant.

"4. That the execution of the power to mortgage did not in any way prevent or interfere with the power to lease:

"5. That, notwithstanding the prior execution of the mortgaging power, the subsequent execution of the leasing power was good:

"6. That leases created under power over-reach all the existing limitations to the extent of the interest comprised in such leases; and that, consequently, the lease in question would take priority of and over-reach the mortgage term; and that such lease was valid, notwithstanding the existence of the previous mortgage."

defendant, it is true, is a party to that deed; but it is merely for the purpose of covenanting for payment of the mortgage money and interest, and for title and further assurance. [Cockburn, C. J. The defendant had no power to mortgage.] None: the power was in Teed and White, and they alone exercise it. Hilary Frederick L'Estrange, the surviving mortgagee, therefore, did not enter claiming under the defendant: he claimed under the defendant's father, the creator of the power. In 2 Chance on Powers, p. 2, § 1387, it is said: "The appointee claims through or under the creator of the power: he is in, as it is technically termed, under the instrument by which the power is created: the limitation of the estate or interest appointed is, for many purposes, deemed to be a limitation of the original instrument." If, therefore, L'Estrange had any lawful claim, he has it under John Robert Parker, the settlor, and not under the defendant. Further, it is submitted that the lease is a valid lease, assuming that the leasing power is contained in the settlement. Notwithstanding the mortgage, the lease afterwards made takes precedence. In 2 Chance on Powers, p. 10, § 1410, it is said that "leases created under powers commonly overreach all the existing limitations to the extent of the interests comprised in the leases, whether in possession, in reversion, or in futuro." And the reason for this is given by Lord Eldon, in *Maundrell* v. *Maundrell*, 10 Ves. 246,—"When the tenant for life executes the power (to lease), the effect is not technically making a lease; but that the lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life-estate and the subsequent limitations." It is clear, therefore, that the lease is not invalidated by the term of 1000 years. But it is **[232]** said that this lease was not a good exercise of the power, because it is not made with the consent of the mortgagees. The special case, however, nowhere states that it was made without such consent. [Cockburn, C. J. Is not the absence of a recital in the lease that it was with consent, primâ facie evidence that it was without consent?] Clearly not. The assent need not appear on the face of the lease: it may be given "by any deed or deeds sealed and delivered in the presence of two or more credible witnesses." [Cockburn, C. J. It is a fact within the defendant's knowledge: he should not have leased without consent.] At all events, the absence of assent is condoned by the acceptance of rent. By a recent statute, 12 & 13 Vict. c. 26, s. 3, it is enacted that "the acceptance of rent under an invalid lease, shall, as against the person so accepting the same, be deemed a confirmation of such lease." [Willes, J. That is repealed by the 1st section of a still more recent statute,—13 & 14 Vict. c. 17: and the 2nd section enacts, "that, when, upon or before the acceptance of rent under any such invalid lease as is in the said first recited act mentioned, any receipt, memorandum, or note in writing confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease." Besides there is no statement in the case that any rent had been paid to the surviving mortgagee.]

Byles, Serjt., in reply. It was not necessary that there should be an actual eviction: it was enough that Mr. L'Estrange, having a right to enter by virtue of the mortgage, made a claim which the tenant, finding it to be irresistible, declined to contest. [Cockburn, C. J. The mortgagee gives the tenant notice to pay **[233]** him the rent: the latter finds, that, if he pays him the rent, he may put himself in a false position with his landlord; and, on the other hand, that, if he refuses, the mortgagee may bring ejectment. Under these circumstances, he voluntarily goes out. Is that, within the terms of the breach, "an eviction, expulsion, and removal" of the plaintiff from the premises?] It can hardly be said to be a voluntary going out. The effect of the notice, and of what was done in consequence of it, clearly was an entry by Mr. L'Estrange by virtue of the mortgage. [Williams, J. There certainly is considerable difficulty in the declaration as the breach is framed: in substance, it amounts to an averment that the entry was by one having title to the premises by virtue of the mortgage thereof made to him by the defendant. The facts do not sustain that.] If it be necessary, the breach may be amended, either under the 15 & 16 Vict. c. 76, s. 222, or the 17 & 18 Vict. c. 125, s. 96. The real question in controversy is, whether or not the covenant has been broken. [Willes, J. Both sides should amend. The court may mould the proceedings as they see just. Cockburn, C. J. What do you say as to the precedence of the leasing power?] It is

under the will of John Robert Parker, and not under the settlement of 1779, that the trustees, Teed and White, mortgage. There is no power to lease in the settlement. [Stammers. It is not recited in the mortgage deed; but it is in the settlement.] The court can only deal with what is before it. Can it be said that one who claims under a deed to which the defendant is a party, and which is made for his benefit, does not claim by, from, or under him? Whether the mortgage was by the defendant himself, or made through the intervention of trustees, makes no difference.

Cur. adv. vult.

[234] COCKBURN, C. J. I am of opinion that the plaintiff in this case is entitled to judgment The facts are simple. Parker, the defendant, having been a party to the creation of a term of 1000 years which was to be used by the trustees for the purpose of raising a sum of money to pay his debts, the trustees, in September, 1843, assigned that term by way of mortgage to Thomas L'Estrange and Hilary Frederick L'Estrange, to secure a sum of 10,300l. and interest. Subsequently to the execution of that mortgage assignment, viz., in May, 1846, the defendant granted a lease of part of the lands therein comprised to the plaintiff. The principal and interest due upon the mortgage being in arrear, H. F. L'Estrange, the surviving mortgagee, on the 15th of September, 1851, gave notice to the plaintiff and the several other tenants to pay the rents to him instead of to the lessor. The plaintiff thereupon took legal advice as to the position in which this notice placed him: and it turned out that the lease under which the plaintiff held had been executed by the defendant without the assent of the mortgagees, whereas by the deed of assignment it was expressly provided that the power to lease should be exercised only with their assent and concurrence. The lease, therefore, was defective. Finding himself in this position, and being advised that he could not retain possession of the premises as against the mortgagee, the plaintiff consented to give up the possession to him. Now, though true it is, according to the authority of the cases which have been cited in the course of the argument, if the plaintiff had paid his rent to the mortgagee, such payment would have been an answer to any claim of rent on the part of his landlord, nevertheless the notice from the mortgagee would not have protected him against proceedings taken by his landlord for the recovery of the rent prior to such payment. The plaintiff, therefore, was in this predi-**[235]**-cament, he was liable to a distress at the suit of his lessor (whose title he could not dispute), if called on by him to pay his rent prior to the payment of it to the mortgagee; and, on the other hand, his lease being defeasible, he was liable to be evicted by the mortgagee; or, if he chose to pay rent to the latter, he would, instead of being in the position of a tenant holding under a beneficial lease, have been at the most a mere tenant from year to year. Under these circumstances, finding himself thus in the power of the mortgagee, he consented to give up the premises to him. Upon this part of the case, I was at first during the argument disposed to think, that, independently of any entry by the mortgagee, the position in which the plaintiff was thus placed by finding himself called upon to become practically the tenant of the mortgagee, was in itself a breach of the covenant for quiet enjoyment, "without the let, suit, trouble, denial, eviction, molestation, or disturbance of the said Henry Parker, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." But I do not think it is necessary to decide that point, because, looking at the circumstances, and seeing that there was in point of fact an entry by the mortgagee, which the plaintiff could not resist, and seeing that the plaintiff was not called upon to sustain this double liability, to his lessor on the one hand, and to the mortgagee on the other, it was quite right and proper on his part to decline to remain in a position of so much difficulty and danger; and, when the mortgagee insisted upon his paying rent to him, and threatened, in the event of a refusal, to enforce the power which his position of mortgagee gave him, he (the plaintiff) had a right to give up the possession to him, and that was a sufficient entry by the mortgagee to satisfy this declaration. The only question which re-**[236]**-mains is, whether the eviction, which, if made by a person claiming by, from, or under the lessor, would constitute a breach of the covenant, was made by a person so claiming. As to that, I must confess I entertained some doubt when the case was under discussion yesterday. But, looking at the case with the light thrown upon it by the opportunity we have had of more closely inspecting the deeds, it seems to me to be perfectly clear that the term which was assigned by way of mortgage to the L'Estranges was created with the concurrence

and co-operation of the defendant himself, and was assigned by his desire and for his benefit. There is no doubt, therefore, that the mortgagee claimed adversely to the plaintiff, and that the latter is entitled to say that he is a person claiming by, from, or under the defendant. I therefore think the allegation in the declaration, that the plaintiff was evicted by one claiming title to the premises by, from, and under the defendant, was made out. The only difficulty that arises is one that is capable of being at once rectified, viz. that the claim is alleged to be "by virtue of a mortgage thereof theretofore to him made by the defendant." That is not strictly correct, the mortgage being in fact made by the assignment of the term from the trustees, Teed and White, to the L'Estranges. That being amended, I am of opinion that the plaintiff is entitled to judgment.

WILLIAMS, J. I am entirely of the same opinion. But I think that the declaration should be amended by shewing that the eviction was by one claiming by, from, or under the defendant. Two objections, then, are urged against the plaintiff's right to recover, first, that it is not satisfactorily made out that there has been a disturbance or molestation by a person having legal title, so as to amount to a breach of the covenant **[237]** for quiet enjoyment,—secondly, that it is not shewn that the disturber claimed by, from, or under the defendant. These are the two points into which the argument resolves itself. With regard to the first, I entirely agree in the view that has been presented by the Lord Chief Justice. A tenant who receives a notice from a person claiming title under circumstances such as appear in this case,—a title paramount to that of the landlord,—is placed in a position of considerable peril: and probably the course which a prudent man would pursue would be at once to give up the possession; for, by remaining in, he might be called upon to pay the rent twice over. As long as he retains possession, he is estopped from denying the title of his lessor. It is true that several modes of extrication from the difficulty have been suggested, and some of very high authority. In one case, to which I adverted in the course of the argument, *Johnson* v. *Jones*, 9 Ad. & E. 809, 1 P. & D. 651,—it is said that the tenant may pay the rent to the mortgagee, treating it as an incumbrance on the land; and, having paid it, may avail himself of it as a payment in discharge of his liability to his lessor. But, assuming that that is good law, there is this difficulty in the case, before the tenant has had an opportunity of complying with the requisition of the mortgagee, the landlord may distrain, and the tenant would have no answer to an avowry under such circumstances. Therefore it seems to me that the plaintiff was perfectly justified in law, and certainly in prudence, in declining to have anything more to do with the land: and, if he does so, and the person really having title comes in, that in my judgment amounts to an eviction by one having paramount title. The tenant is virtually compelled to abandon the premises: he is molested and disturbed in the enjoyment of the thing demised, in the strict sense of **[238]** the words. Under all the circumstances of the case,—the plaintiff having received notice to pay rent to the mortgagee, and having abandoned the possession to the claimant, who thereupon entered and took possession, having lawful title, I entertain no doubt whatever that that was a clear disturbance of the tenant, and that it amounts in law to an eviction. And it is not the less an eviction, because on going out the tenant bargains with the mortgagee for a sum of money as a compensation for the expenses he had incurred in improving the premises. That arrangement cannot alter the legal character of the transaction. As to the second question, whether or not it is shewn that the mortgagee was a person claiming by, from, or under the defendant, I think there can be no doubt when the deeds come to be carefully looked at. It may be that Mr. Stammers may be right in one sense in saying that the term of 1000 years is created under the will of John Robert Parker, the defendant's father, inasmuch as that term never could have existed but for that will. That may be the origin of the transaction. But it is quite clear that the term, which is the foundation of the title of the mortgagees, was created by the defendant himself in conjunction with the trustees. There cannot be a doubt, therefore, that the surviving mortgagee, to whose right the tenant attorned, was a person lawfully claiming by, through, and under the defendant. There are some decisions upon this point, though I do not think it is one which needs any authority. Thus, in *Hurd* v. *Fletcher*, Dougl. 43, a fine was levied of a feme coverte's estate, with joint power to the husband and wife to declare the uses: and the uses were declared to the wife for life, &c., with remainder to A.: the husband afterwards made a lease, with a covenant for quiet enjoyment against any

person claiming under him; and A. evicted the tenant: **[239]** it was held that an action lay upon the covenant against the executors of the husband. That was followed by *Evans* v. *Vaughan*, 4 B. & C. 261, 6 D. & R. 349, where A., being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives: A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor, with a covenant that the lessee should quietly hold and enjoy the premises for and during the said term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors: the lease, being for three lives absolutely, was not conformable to the power, and became void on the death of A., and his eldest son brought an ejectment and evicted the lessee, two of the cestui que vies being then living: and it was held that the eldest son was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment: and that, by the words "during the said term" in that covenant, the parties intended a term to continue so long as any of the cestui que vies survived, and not a term to continue only for the life of the grantor. It seems to me that those cases fully establish the principle upon which this case must be decided, and that there clearly was a disturbance by one claiming under the defendant, within the meaning of the covenant for quiet enjoyment.

Crowder, J. I also am of opinion that there must be judgment for the plaintiff. The action is for the breach of a covenant for quiet enjoyment contained in a lease. The breach alleged, and upon which issue is taken, is, **[240]** that one L'Estrange,—who before and at the time of making the deed, and continually from thence until and at the time of the eviction and expulsion thereinafter mentioned, had, and who still hath, lawful right and title to the premises, with the appurtenances, to wit, by virtue of a mortgage thereof theretofore to him made by the defendant, did enter into the said premises, with the appurtenances, and ejected, expelled, and removed the plaintiff therefrom, &c. Two objections have been urged on the part of the defendant,—first, that the fact of eviction is not established on the evidence,—secondly, that, assuming that there was an eviction in point of fact, it was not an eviction by a person claiming or deriving by, from, or under the defendant, within the meaning of the covenant. Upon the first point, I entertained some doubt during the argument. The breach specifically alleges an eviction and expulsion: it seemed to me to be necessary to establish the fact of an eviction, in order to sustain that allegation; and I was at first inclined to think that the facts set out in the case did not shew an eviction, inasmuch as the plaintiff, the lessee, went out of his own accord, and suffered Mr. L'Estrange, the mortgagee, to come in. But, upon further consideration, I think the circumstances of the case merely amount to this, that the plaintiff went out, because, if he had not done so, he would have been turned out. It appears upon the case, that, upon receiving notice of Mr. L'Estrange's right and claim of rent, the plaintiff consulted an attorney, who advised him that he could not dispute Mr. L'Estrange's title, and that he thereupon quitted the premises, and Mr. L'Estrange entered. Suppose the advice of his attorney had been different, and the plaintiff had resisted Mr. L'Estrange's claim, and an ejectment had been brought against him, and possession recovered under it, beyond all question that **[241]** would have been an eviction. I do not think he was bound to incur the expense of an action, the result of which could not for a moment be doubted. Under these circumstances, he enters into an arrangement with the claimant, and abandons a position which he finds to be utterly untenable. I think, therefore, that the fair construction of the evidence in the case is, that there was an eviction and expulsion of the lessee. The next question is, whether, assuming that there was an eviction, it was an eviction by a stranger, or by a person claiming or deriving title by, from, or under the defendant, by virtue of a mortgage of the premises theretofore made to him by the defendant. I think it was not: the mortgage was not made by the defendant, but by the trustees, Teed and White, though the defendant was a party to the deed. The allegation, therefore, that the entry was by virtue of a mortgage made by the defendant to Mr. L'Estrange, is incorrect: but it may be made right by amendment; and, being amended in a way which is suggested by my Brother Willes, it will stand, that the plaintiff was molested and disturbed in his enjoyment of the demised premises by one having lawful right and title thereto by, from, and under the defendant, and not by or under the plaintiff. Throughout the argument yesterday,

the court were not informed how the term was created: and I believe no one of the court was aware that it was in fact created by the deed of 1842, to which the defendant himself was a party. What we were considering, therefore, was, whether that was a mortgage in respect of which the mortgagee could be said to claim by, from, or under the defendant. But, upon a closer examination of the deeds, it is perfectly manifest that the term which was assigned was a term which had no existence prior to 1842. Then it was said that the authority to create the term was derived from the **[242]** will of the defendant's father, and therefore the assignee of the term could not be said to claim title under the defendant. I do not assent to that proposition. It is true that the power to create the term was derived from the will. But, who created the term? Why, the defendant and the trustees, for the purpose of raising a sum of money to pay the defendant's debts. How, then, can it be said that the assignee of that term is not a person claiming by, from, or under the defendant? Though, in point of form, the assignment is made by the two trustees, the assignee clearly is a person claiming through and under the defendant. It seems to me, therefore, that the plaintiff is entitled to judgment upon both points,—subject to the amendment of the breach in a manner which will be more particularly described by my Brother Willes.

Willes, J. I am entirely of the same opinion. The reasons for holding that the mortgagee claimed under the defendant, by virtue of a term created with his concurrence, have been so fully stated by my Lord and my two learned Brothers, that I have nothing to add on that point. With respect to the question whether that which took place was a breach of the covenant for quiet enjoyment, notwithstanding the ingenious argument of Mr. Stammers, I am of opinion that the facts stated in the case do make out a breach of that covenant. This declaration seems to have been very ingeniously framed to throw upon the plaintiff as much proof as possible. It states unnecessarily an eviction by a person claiming title. I am not sure, that, if it were necessary to establish an eviction, there is not enough on the case to do so: but, at all events, there clearly is sufficient to establish a molestation or disturbance. It has been contended by Mr. Stammers that the plaintiff is estopped from relying upon what **[243]** took place between Mr. L'Estrange and himself as an eviction, by the circumstance of his having at the time of giving up possession of the land received from Mr. L'Estrange a sum of 75*l*. I do not, however, think that in any degree alters the rights of the parties. It is like the case of a tenant, on being turned out by one having a title paramount, asking and receiving compensation for expenses incurred by him in improvements. It does not amount to a consenting to be turned out: it was merely the act of a man, who, feeling that he could not resist the claim, makes the best he can of his position. At all events, if there be any difficulty in treating this technically and strictly as an eviction, it clearly amounts to a molestation or disturbance: and, as the declaration must be amended, I think it will be better to insert those words, which are in the covenant. I throw this out in consequence of something which I recollect to have fallen from Mr. Justice Maule in a case that was very much argued in this court a few years ago, but which I do not find to have been reported. I entirely agree with the rest of the court in thinking that the facts stated in the case shew an eviction by one claiming by, from, or under the defendant; but I think it would be safer to allege a molestation and disturbance. Subject, therefore, to the approbation of my Lord and my two learned Brothers, I would suggest that the breach be amended, as follows,—striking out the words "but on the contrary thereof" (which should never be used in a declaration at all), and inserting in lieu thereof the word "and," and also striking out the words, "to wit, by virtue of a mortgage thereof theretofore to him made by," and inserting instead the words, "by, from, and under," and adding after "the defendant," the words "and not by or under the plaintiff," and inserting after the word "appurtenances," in the next line, the words "claiming **[244]** such right and title to the same as aforesaid, and molested and disturbed the plaintiff in his enjoyment thereof." The second plea, of course, must also be amended by traversing the molestation and disturbance. Upon the record as thus amended, the question is fairly raised, whether, upon the facts stated in this case, the plaintiff is entitled to recover. And we are all of opinion that he is.

Cockburn, C. J. I may add that I also thought the facts shewed a molestation and disturbance which would entitle the plaintiff to recover for a breach of the covenant: but, considering that the circumstances amounted to an eviction, I thought it

unnecessary to insist upon that, seeing the amount of amendment of the declaration which would be necessary in that view.

Judgment for the plaintiff.

GILES *v.* SPENCER. May 3rd, 1857.

[S. C. 26 L. J. C. P. 237 ; 3 Jur. N. S. 820 ; 5 W. R. 883. See *In re River Swale Brick and Tile Works*, 1883, 52 L. J. Ch. 640.]

The right of distress is not so inseparable an incident of rent-service as not to be capable of being postponed.—A., who was tenant of a house, let certain rooms on the ground-floor thereof to B., under a written agreement, for one year, and so on from year to year, subject to a quarter's notice, with a stipulation that no action, distress, or other proceeding should be prosecuted by or on behalf of A. in respect of the rent, unless he should have previously paid the rent due from himself to the superior landlord, and should have produced his receipt for the same to B. Upon B.'s death, C. (her daughter and executrix) continued to occupy the premises for some time upon the same terms as her mother had occupied them, and she afterwards agreed verbally with A. to give up the rooms on the ground-floor, and to take other rooms on the first-floor in lieu of them, upon the same terms as to rent and otherwise : —Held, that, by the condition in the original agreement, A.'s right to distrain was postponed until after his rent had been paid ; and that C. was therefore entitled to maintain trespass against a broker employed by A. to distrain without having previously complied with that condition.—And, held, that the substitution of the rooms on the first-floor for those on the ground-floor, was not an alteration by parol of the terms of the original written agreement, but a new contract.

This was an action for breaking and entering the dwelling-house of the plaintiff, and seizing and carrying away her goods. The defendant pleaded not guilty "by statute."

[245] The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Michaelmas Term. The facts were as follows :—On the 20th of September, 1851, an agreement was entered into, in writing, between one Alexander Meredith, who was the tenant of a house in Seymour Street, Euston Square, and one Elizabeth Hales Giles, the mother of the plaintiff, whereby Meredith underlet to Mrs. Giles in the following terms :—

"An agreement made and entered into this 20th day of September, 1851, between Alexander Meredith, of No. 67 Seymour Street, Euston Square, in the county of Middlesex, for himself, his executors, administrators, and assigns, of the one part, and Elizabeth Hales Giles, of the same place, widow, for herself, her executors, administrators, and assigns, of the other part : The said Alexander Meredith hereby agrees to let, and the said Elizabeth Hales Giles agrees to take, the shop and rooms or apartments following, that is to say, two rooms on the ground floor, and the shop at the back or rear thereof, and also two rooms on the second floor, and the back kitchen, with the use of other conveniences, and the appurtenances thereto belonging, and also the fixtures and things in the said rooms and kitchen, being part of a house and premises which the said Alexander Meredith and Elizabeth Hales Giles now occupy situate and being No. 67 Seymour Street, Euston Square, aforesaid, to hold the same for the term of one whole year, from the 29th day of September instant, and so on from year to year until this agreement shall be determined by either of the said parties giving to the other of them six months' previous notice in writing for that purpose, at and under the yearly rent or sum of 44*l.* of lawful money of Great Britain, to be payable quarterly, and by even and equal portions, on the usual quarterly days for payment of rent, the first quarterly **[246]** payment to be made on the 25th day of December next : And the said Alexander Meredith doth hereby agree to pay and discharge all rates, taxes, duties, assessments, charges, and impositions whatsoever, parliamentary, parochial, or otherwise, which now are or shall at any time during the continuance of the said tenancy be assessed, rated, taxed, charged, or imposed upon the said premises, or upon the tenant or occupier in respect thereof. Provided always, and it is lastly agreed by and between the said parties hereto, that no action, distress, or other proceeding shall be commenced or prosecuted by or on

behalf of the said Alexander Meredith, his executors, administrators, or assigns, in respect of the non-payment of the rent hereby reserved, unless and until the said Alexander Meredith, his executors, administrators, or assigns, shall have paid the rent due from him or them to the landlord or landlady of the said premises, and shall have produced and shewn to the said Elizabeth Hales Giles, her executors, administrators, or assigns, the receipt or receipts for such rent. As witness the hands of the said parties, the day and year first above written."

Mrs. Giles continued for some time to occupy the apartments under this agreement: and, upon her death, in November, 1852, the plaintiff, her daughter, who was executrix and trustee under her will, continued the occupation upon the same terms. Some time after Mrs. Giles's death, it was verbally agreed between Meredith and the plaintiff, that, in lieu of the rooms on the ground floor, the latter should have other rooms on the first floor,—the terms of the holding, as to rent and otherwise, remaining the same.

Rent being due from the plaintiff to Meredith in respect of the new occupation, the latter, without having previously paid the rent due from him to the superior landlord, employed the defendant, a broker, to distrain **[247]** the plaintiff's goods, which was the trespass in respect of which this action was brought.

On the part of the defendant, it was insisted, that, as there had been a change in the subject-matter of the demise, such variation in the terms of the agreement ought to have been reduced into writing, and that parol evidence thereof was inadmissible.

His Lordship, thinking there was nothing in the objection, and that it was competent to the parties by parol to modify the right to distrain,—directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that the objection was tenable.

Joyce, in Hilary Term last accordingly obtained a rule nisi to enter a verdict for the defendant, "on the ground that the terms varying the lease as to the premises let ought to have been reduced into writing, and that parol evidence thereof was not admissible;" and also for a new trial, on the ground that the verdict was against the evidence, "the distress being lawful, and the agreement not to distrain mere matter of contract, for which the plaintiff would have her remedy against Meredith by action." He submitted that the common-law right of the landlord to distrain could not be waived by parol.

J. Brown, in Easter Term, shewed cause. The law recognizes only two descriptions of contracts, viz. contracts by deed, and contracts by parol,—whether in writing or by word of mouth: *Bunn* v. *Hughes*, 7 T. R. 350, n. [Cockburn, C. J. The first agreement was in writing. When the change in the occupation took place, there was no writing. The question is, whether this incident,—making the right to distrain conditional, **[248]** —can be introduced into the contract by parol. Cresswell, J. Can the right to distrain, which is incident to the contract of tenancy, be waived by parol?] It is every day's practice to postpone a right of entry: and there can be no valid objection to the postponement of the right to distrain. "Quilibet potest renunciare juri pro se introducto." [Cockburn, C. J. The only question is, whether it can be done by parol.] The right to distrain for rent-service is incident to the reversion: that parted with, the right is gone. Here, the right of distress is postponed originally by the same instrument which gave the right to distrain. In Comyns's Digest, Condition (A. 1), it is said: "An express condition cannot be without deed, and therefore a man cannot plead a condition to defeat an estate of freehold, without shewing the deed." And see the notes to *Pordage* v. *Cole*, 1 Wms. Saund. 320. The second point was not made at the trial. [Cresswell, J. It comes substantially to the same thing. The contention was that the right of distress could not be waived by parol. If it could, it was waived, and, consequently, the defendant was a trespasser.] The demise was for two years certain and no longer, and therefore not within the statute of frauds, 29 Car. 2, c. 3, s. 4, and might be by parol. A man may grant a lease, together with a right of way, by parol, for less than three years; though he could not grant the way per se without deed. In *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 64, 2 N. & M. 28, Lord Denman, in delivering the judgment of the court, says: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to

vary or qualify the written contract: but **[249]** after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." And he adds,—"If the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties by word of mouth to dispense with requiring a good title to the lot in question." So, where money is lent upon mortgage at a certain rate of interest, it is competent to the lender afterwards by parol to agree to reduce the rate: *Lord Milton* v. *Edgworth*, 5 Bro. P. C. 313. Many other instances may be put where a written contract may be varied in part or in whole, by the consent of the parties, after its execution.

Joyce, in support of his rule. The right of distress is put higher than a specialty debt; and, if that cannot be discharged or varied by a parol contract, so the right to distrain cannot. The agreement to waive or postpone the right of distress, is a personal contract, and not a contract running with the land, so as to bind the remainderman or the issue. It is upon this principle that a court of equity will not decree specific performance of a contract to refer. [Cockburn, C. J. This agreement is not depriving any court of jurisdiction: it is merely postponing the remedy.] In Buller's N. P. p. 182, it is laid down, that, "if a landlord accept a bond for the rent, this does not extinguish it; for, the rent is higher, and the accepting of a security of an equal degree is no extinguishment of a debt, as, a **[250]** statute-staple for a bond." So, in *Davis* v. *Gyde*, 2 Ad. & E. 623, 4 N. & M. 462, it was held that a promissory note given and received for rent, does not extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note: nor does the receipt of such note of itself suspend the right of distraining. [Cockburn, C. J. There was no agreement there to take the promissory note in satisfaction of the landlord's right to distrain.] A covenant not to sue upon a simple-contract debt for a limited time is not pleadable in bar of an action for such debt: *Thimbleby* v. *Barron*, 3 M. & W. 210. The true principle is that stated by Maule, J., in the course of the argument in *Avery* v. *Scott*, 8 Exch. 487, 499,—"There is no decision which prevents two persons from agreeing that a sum of money shall be paid upon a contingency; but they cannot legally agree, that, when it is payable, no action shall be maintained for it." So, here, if the parties had agreed that no right to distrain should arise but upon a certain contingency, that might have done: they have not, however, done so: they have merely agreed that the landlord shall be deprived of all legal remedies for his rent, until he shall prove by production of his receipt that he has paid the superior landlord,—a mere agreement to suspend the remedy, which can have no operation at all in law.

Cur. adv. vult.

Willes, J., now delivered the judgment of the court:

In this case, one Meredith, being tenant of a house, underlet certain rooms in it to the plaintiff by a written agreement, providing, inter alia, that no distress should be made for rent until after Meredith had produced to the plaintiff the receipt of the superior landlord for the rent which had previously become due from him.

Some time afterwards, it was agreed by word of **[251]** mouth between the plaintiff and Meredith, that the former should take of the latter other rooms in lieu of the first, but upon the same terms as to the rent and otherwise. The plaintiff accordingly gave up the first rooms, and entered upon and occupied the second until Meredith, without paying his landlord certain rent which had become due, or producing a receipt for it to the plaintiff, distrained, by the defendant as his broker, upon those rooms for rent in arrear from the plaintiff to him since her occupation thereof.

The plaintiff thereupon brought this action; and, at the trial before the Lord Chief Justice, the defendant insisted upon Meredith's right to distrain, arguing "that the terms varying the lease as to the premises let, ought to have been reduced into writing, and that parol evidence thereof was not admissible." The Lord Chief Justice, however, directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the above point.

A rule was accordingly obtained to enter a verdict for the defendant, or for a new trial upon the above ground; and a second point was made, that the verdict was

against the evidence, the distress being lawful, and the agreement not to distrain mere matter of contract, for which the plaintiff would have her remedy against Meredith by action.

Upon the argument before the Lord Chief Justice and my Brothers Cresswell and Crowder and myself, the point reserved was abandoned; nor could it have been maintained, the taking of the second set of rooms having been a new contract by parol upon the terms of the first written contract, and not an alteration of the terms of that contract. The first contract was for this purpose like the written rules in *Lord Bolton* v. *Tomlin*, 5 Ad. & E. 856, 1 Nev. & P. 247. The liability of the plaintiff upon it was probably put an end to by a sur-[252]-render by operation of law, or, if not, then by an implied agreement not to sue for the rent, in consideration of the rooms being given up: see *Gore* v. *Wright*, 8 Ad. & E. 118, 3 N. & P. 243.

The defendant, however, argued, upon the second point in the rule, which was not taken at the trial, and not reserved, that there ought to be a new trial.

The only point argued before us was, that the agreement not to distrain was merely matter of contract, and had no specific effect upon the right of distress, so as to entitle the plaintiff to maintain an action of trespass or replevin.

Upon the argument, the authorities bearing upon the question were not referred to by counsel on either side. We proceed to consider it, with the aid of some of those authorities, which we have found for ourselves.

It is obvious that the argument for the defendant must go the length of saying, not only that rent service and distress, though the creatures of the contract of tenancy, cannot by the same contract be severed from one another, but also that distress is so inseparable an incident of rent-service as not to be capable even of postponement.

It is said, however, in a note to Longo Quinto, T. fo. 41, to have been laid down in 40 Ed. 3 (probably 40 Ed. 3, fo. 22, per Wichingham, J.; see continuation of same case, fo. 47), that even fealty "may be postponed for two or three years." (*a*) This is in effect what the contract purports to do in the present case as to the distress.

There is also some learning upon the point whether the distress may be entirely released, leaving the rent seck. In T. 7 Ed. 4, fo. 11, the Chief Justice assented to the argument of counsel, that distress was an insepa[253]-rable incident to a rent-service, and therefore could not be released: but Nedham, J., was of the contrary opinion, saying, with apparent reason, that the release would be good, and would convert the rent into a rent-seck.

In Brooke's Abridgment, Releases, pl. 47, the case first referred to is cited as an authority, that, even an inseparable incident, such as fealty, may be postponed, though not absolutely released; whilst the case in 7 E. 4 secondly above cited is referred to in different places, – see Incidents, 20, Tenures, 38, – as an authority for each of the conflicting opinions therein expressed by the judges.

The proposition laid down in 40 E. 3, and referred to in Longo Quinto, is confirmed by what is put by Lord Coke in Co. Litt. 204 b., where he says, that, "if a lease be in the affirmative, that, if the rent be in arrear for thirty days, the landlord may distrain, yet he may distrain within the thirty days; for, the words are in the affirmative, and so cannot take away what is incident of common right,"—plainly implying that such a provision in negative words would be valid.

In Viner's Abridgment, Releases (G.), it is laid down, upon the authority of the cases in the Year Books, that fealty or distress may be postponed.

In *Horsford* v. *Webster*, 1 C. M. & R. 696, no difficulty was suggested on the bench or at the bar as to the specific effect of an agreement by a landlord not to distrain the goods of a stranger upon the land.

The above authorities are quite sufficient to shew that what the parties have undoubtedly agreed to in point of fact, is capable of being sustained in point of law. The verdict was therefore right, and the rule to set it aside must be discharged.

Rule discharged.

(*a*) "Jeo puis graunt q. il n'avera fealtie per ceux deux ans, et p. cosequens extinct a touts jours," 40 E. 3, fo. 22, pl. 21.

[254] THOMSON *v.* HARDING, Official Manager of the Royal British Bank.—IN RE HILL. Nov. 17th, 1857.

[S. C. 27 L. J. C. P. 38; 4 Jur. N. S. 94.]

The court will, in virtue of its inherent power to prevent the abuse of its process, discharge from custody one who is improperly detained in execution in respect of a debt from which he is discharged by his certificate under the bankrupt act.—A. obtained judgment in an action against the official manager of a joint stock bank, and, having proved his debt under a fiat against the bank, and also under the 73rd section of the Winding-up Act, 7 & 8 Vict. c. 111, attempted likewise to prove it under a fiat against B., a shareholder, against whom he had obtained an order for execution under the 7 & 8 Vict. c. 113, s. 13: the commissioner declining to admit the debt to proof, but receiving it as a claim, A. afterwards sued out a ca. sa. against B., and took him in execution after he had obtained his certificate:—Held, that B. was entitled to be discharged, on motion,—either by virtue of the 205th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, or by virtue of the general inherent jurisdiction of the court over its own process.

The Royal British Bank became bankrupt on the 9th of October, 1856. On the 13th of December, the plaintiff obtained judgment against the bank in an action brought against Harding, the official manager appointed under the Winding-up Act, 11 & 12 Vict. c. 45; and on the 23rd he proved his debt under the fiat against the bank. On the 31st of January, 1857, the plaintiff obtained an order for execution against Hill, under the 7 & 8 Vict. c. 113, s. 13, and issued a fi. fa. thereon, which was defeated by a bill of sale. On the 13th of February, a fiat in bankruptcy issued against Hill, under which he was duly adjudged bankrupt. In April, the plaintiff applied to the commissioner to be allowed to prove his debt under Hill's fiat; the commissioner refused to allow it as a "proof," but admitted it as a "claim," under the 140th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. On the 13th of May, Hill obtained a certificate of the first class. On the 11th of August, Hill was arrested on a ca. sa. at the suit of the plaintiff. Application was made to Wightman, J., at chambers, for his discharge, but that learned judge referred the matter to the court. The case was afterwards brought before Martin, B., and Willes, J.; but, under the circumstances, they did not think proper to order the discharge of Mr. Hill, but the following order was made by Willes, J., "that, upon payment of the amount of the reserved dividend into court, to abide such order as the court or a judge may **[255]** think fit to make respecting it, having regard to the equities of the case, the defendant [Hill] consenting that the court or a judge may order the plaintiff to re-take him on the writ already issued, or any other writ to be issued, be discharged out of custody as to this action,—the costs of the application to be in the discretion of the said court or judge."

Mr. Hill, being unable to comply with the condition imposed upon him by this order, remained in custody.

Lush, Q. C., on a former day in this term, obtained a rule nisi for his discharge.

Byles, Serjt., now shewed cause. By the 10th section of the 7 & 8 Vict. c. 113, the creditor is bound to prove under the fiat against the bank, and also, by 11 & 12 Vict. c. 45, s. 73, under the winding-up act, before he can obtain an order for execution against a shareholder. The plaintiff claimed to prove under Hill's fiat in respect of the new debt created by that order; but the commissioner held that he was not entitled so to do. [Willes, J. The certificate bars all debts, whether joint or separate.] True; but the debt created by the order of the court is not the same debt as that due from the bank. The law as to double proof is well stated by Lord Justice Turner, in the case of *Ex parte Goldsmid, In re Deane and Youle*, 25 Law J., Bankr. 25. George Deane and Frederick Youle carried on business at Liverpool, under the firm of "Deane, Youle, & Co." They also carried on business at Pernambuco in partnership with one Alfred Philip Youle,—the two firms being perfectly distinct, and Alfred Philip Youle having no interest in the Liverpool business. The Pernambuco house drew bills upon and they were accepted by the Liverpool house bonâ fide and in the ordinary course of business, and two of such bills came into the hands of **[256]** Goldsmid honestly in the due course of trade: the Liverpool firm became bankrupts,

and afterwards the Pernambuco firm entered into a "concordata" with their creditors, under which they vested property in the trustees for the benefit of their creditors: Goldsmid received a dividend under the "concordata," out of the assets vested in the trustees of the Pernambuco firm, as drawers of the bill: they subsequently attempted to prove against the Liverpool firm as acceptors of the bill, but the commissioner held that there was no right of double proof: and his decision was affirmed on appeal,—Lord Justice Knight Bruce dissenting. Lord Justice Turner, in giving judgment, says: "The rule has long been settled, that, in the administration of estates in bankruptcy, the joint-estate is to be distributed amongst the joint creditors, and the separate estate amongst the separate creditors; the surplus of the joint-estate, after payment of the joint-debts, going over to the separate estates, and the surplus of the separate estate, after payment of the separate debts, going over to the joint-estate. In bankruptcy, too, all the creditors upon the same estate stand upon an equal footing: but, as observed by Lord Hardwicke in *Ex parte Bond*, 1 Atk. 98, if a creditor having a joint and separate security, be permitted to prove against both the joint and separate estates, he draws from the separate estate to the prejudice of other joint creditors who have an equal right with himself to come upon that estate. From this consequence, coupled with the analogy derived from the rule at law, that the obligee in a joint and several bond cannot sue the obligors, and each of them severally, at the same time, a further rule has also been established in bankruptcy, that, generally speaking, a joint and separate creditor cannot prove against both the joint and separate estates, but must elect against which of them he will prove. Whether **[257]** these rules are founded upon just principles, or based upon sound reasoning, is not for us to determine. They are woven into the system of the bankrupt laws, and we are bound to abide by them." [Williams, J. I must confess I do not see the applicability of that case to the present.] It shews that the commissioner was right in declining to allow the plaintiff to prove against the separate estate of Hill: and, if so, he had a right to proceed as he has done. But, assuming that Mr. Hill is improperly detained, this is not the proper tribunal to apply to for relief; but the court of review, when it existed, or the Great Seal: *Ransford* v. *Barry*, 7 Dowl. P. C. 807; *Ex parte Diack*, 2 Mont. & Ayr. 675; *Ex parte Bernasconi*, 2 Glyn & J. 381. The 205th section of the 12 & 13 Vict. c. 106, does not apply to this case. The first branch relates to mesne process: it enacts that "any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand provable under his bankruptcy, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence:" and the latter branch relates to final process,—"and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt," &c. Here, no judgment has been obtained against Hill,—only a judgment in an action against the official manager of the Royal British Bank. [Cockburn, C. J. Which is made by the subsequent proceeding **[258]** under the statute equivalent to a judgment against Hill.] The question is, whether the order upon Hill under the 7 & 8 Vict. c. 113, s. 13, is a judgment against him within the meaning of the 205th section of the bankrupt act. It is clearly not within the words. [Crowder, J. Why not? Mr. Hill is detained for a debt or demand for which judgment had been obtained before the allowance of his certificate.] It is not a judgment against him. [Cockburn, C. J. The words of the 205th section do not require that it shall be a judgment against him. The case is certainly within the mischief which the statute intended to remedy.] It is at all events discretionary with the court, to discharge the party from custody or not. [Cockburn, C. J. Justice requires us to discharge him, if a proper case be made out. The whole policy of the law is opposed to his detention.]

Lush, Q. C. (with whom was Griffiths), contrà. Whether the commissioner was right or wrong in refusing to allow the plaintiff to prove this debt under the separate fiat against Hill, is perfectly immaterial. The certificate discharges the bankrupt from all debts, whether joint or separate, due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy: 12 & 13 Vict. c. 106, s. 200. The distribution of the estates is a totally different matter. The case of

Ex parte Goldsmid, 25 Law J., Bankr. 25, has no bearing whatever upon this. This case comes clearly within the words of the 205th section. If this had been an action against Hill, the entry of a claim on the proceedings would have been an election by the creditor to take the benefit of the fiat, and a relinquishment of the action: s. 182. The 9th section of the act for the regulation of joint-stock banks, 7 & 8 Vict. c. 113, enacts that [259] "every judgment, decree, or order of any court of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also subject to the provisions thereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution, in satisfaction of such judgment, decree, or order, against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose:" and then follows a proviso limiting the extent of the liability of former shareholders. Then comes the 13th section, which provides for the mode of enforcing judgments against shareholders, and which enacts, "that, in the cases provided by this act for execution on any judgment, decree, or order, in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company,—or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any money, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company, [260] such execution may be issued, by leave of the court, or of a judge of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or discharge such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit," &c. Reading those sections with the 205th section of the Bankrupt Act, there can be no doubt that the present case falls within the very words as well as within the spirit of that enactment. Knowing that a judgment against a joint-stock bank might become in effect a judgment debt against each of the shareholders, the legislature in s. 205, cautiously abstains from using language limiting it to a judgment against the bankrupt individually. An attachment for non-payment of money or costs is not a "judgment"; and yet the courts always discharged parties from custody under attachments, where they had become bankrupt, and had obtained certificates: *The King* v. *Edwards*, 9 B. & C. 652. [They were here stopped by the court.]

Cockburn, C. J. I am of opinion that this rule must be made absolute. It appears that Mr. Hill was a shareholder or partner in a joint-stock banking company, that the company had become bankrupt, that the plaintiff had obtained judgment in an action against them, that he duly proved the debt against the bank, and, being unable to obtain satisfaction thereof out of the property of the company, afterwards procured an order for an execution against Hill as a shareholder. Hill in the meantime had become bankrupt in his in-[261]-dividual character, apart from his character of shareholder in the company; and, under his bankruptcy, his estate would in the first instance be available for payment of his separate creditors, and any surplus would go towards satisfaction of the debts of the company. The plaintiff applied to the commissioner to be allowed to prove his demand under the fiat against Hill; but the commissioner declined to allow it to be proved, but permitted it to be entered as a "claim," to be postponed until after all the separate creditors should have been satisfied. In either case, Hill would be entitled to the protection of the bankrupt laws. As a member of the partnership he was a bankrupt; and the joint property of the partnership was available in the first instance towards satisfaction of the joint debts.

As an individual bankrupt, his property was available in the first instance to satisfy the debts owing by him individually. When he obtained his certificate of conformity, he was entitled to personal immunity against any execution which might be issued in reference either to a partnership or a separate liability. We are not called upon to decide whether the learned commissioner was right or not in holding that the plaintiff's demand was admissible as a "claim" against the separate estate of Hill. We have nothing whatever to do with that. It is enough for us to say, that, whether as a bankrupt in connection with the company, or on his separate account, he is entitled to personal immunity. The only remaining question is, whether this court is the proper tribunal to resort to for his liberation. I am of opinion that the application is properly made to this court, under whose process he has been arrested. It seems to me that the case is within the terms, and it certainly is within the spirit of the 205th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts "that any bankrupt who shall, after his [262] certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand provable under his bankruptcy, shall be discharged, &c.; and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt," &c. The plaintiff having obtained a judgment against the bank, and failing to obtain satisfaction out of the property of the company, procure an order for an execution against Hill pursuant to the provisions of the 7 & 8 Vict. c. 113. I cannot but think that the language of the 12 & 13 Vict. c. 106, s. 205, applies to such a case, and that this person is in custody substantially under an execution upon the judgment. It has been very properly observed by Mr. Lush, that, when that section speaks of the bankrupt having been taken in execution upon a judgment, it studiously avoids speaking of a judgment obtained against him individually. I think, therefore, we might safely act upon that section, even if we had no jurisdiction independently of it. But I think the court has an inherent jurisdiction to prevent the abuse of its process, and that the moment Hill obtained his certificate, it was an abuse of the process of this court to detain him in custody under it. I therefore am of opinion that Hill is entitled to protection and immunity under the 205th section of the bankrupt act, and that the application for his discharge was properly made to this court.

CROWDER, J. I am of the same opinion. It is unnecessary to determine whether the commissioner was [263] right or wrong in admitting the amount due on the judgment against the bank as a claim under Hill's bankruptcy, because I think that in any view he is improperly detained in custody. It is said that the application for his discharge should have been made to the court of bankruptcy. But it seems to me that the court of bankruptcy can have nothing to do with the detention of a party upon an execution issued under an order of this court. This court clearly must be the proper tribunal for that purpose. I am very much disposed to think that the case comes within the 205th section of the bankrupt act: there is great force in the observation that the language of that section is not limited to a judgment against the individual. At the same time, however, I would rather rest my judgment upon the general inherent jurisdiction of the court to discharge from custody a person found detained under its process, who has a right to be discharged. Under the circumstances, it seems to me that we are bound to discharge Mr. Hill.

WILLES, J. I am entirely of the same opinion. If, instead of proceeding under the 13th section of the 7 & 8 Vict. c. 113, the plaintiff had proceeded under the 10th section, by scire facias, it is quite clear that he would have had a judgment against Hill which would have constituted a debt: *Marston* v. *Lund*, 16 Q. B. 314. Having obtained his certificate of conformity under the fiat against him, Hill would unquestionably have been discharged from that debt; and might either have applied to the court under the 205th section of the 12 & 13 Vict. c. 106, or have proceeded by audità querelâ. The only difference between that supposed case and this is, that here the plaintiff has obtained an order of this court for execution against Hill upon the judgment obtained against the bank, under [264] s. 13, instead of proceeding by scire facias under s. 10. But I think it is quite clear that the legislature intended the effect of the proceedings under both sections in this respect to be the same, the only

difference being that the one is a shorter course than the other. It is said that the case is not within the 205th section of the 12 & 13 Vict. c. 106, because there is no judgment against Mr. Hill: but, if not literally within the words, it is evidently within the intention of the legislature. And I quite agree that the court has power to interfere in all cases to prevent an abuse of its process. I do not wish to impute oppression to the plaintiff in this case: but, under all the circumstances, I do think it would be most oppressive and unjust to allow him to detain Mr. Hill in custody. There is a case of *Woodward* v. *Meredith*, 2 D. & L. 135, where Coleridge, J., stayed proceedings under circumstances very similar to those in *Ransford* v. *Barry*, and giving some very excellent reasons for supposing that the judgment of Lord Wensleydale (for whose opinions one has always the highest respect) is not accurately represented by the reporter. In that case (*Woodward* v. *Meredith*) the plaintiffs recovered a verdict in an action of assumpsit on two bills of exchange, for 68l. 6s. damages and costs, and signed judgment after a fiat in bankruptcy had issued against the defendant: they afterwards proved under the fiat for the amount of the bills, the commissioner refusing to allow them to prove for the costs: the bankrupt never obtained his certificate, nor was any dividend paid: subsequently, the plaintiffs sued out a writ of scire facias to revive the judgment, solely with the view of recovering the costs; and Coleridge, J., in making absolute a rule to stay the proceedings, says,—"It cannot I think, be well doubted, that, in the exercise of that control over the proceedings of parties litigant, which our courts now constantly exercise, we may interfere [265] to stay them when they are clearly in violation of a statute, and can tend to no useful result. The court here sees it admitted that the plaintiff has done that the legal effect of which is a relinquishment of his action, for the present at least, and yet is attempting to proceed to execution in it. If it were not to interfere, it would only drive the defendant to apply to a court of equity for protection, which it ought not to do where it is perfectly competent itself to afford the same. It is quite in analogy with its usual course, to interfere and stay, either absolutely or until the happening of a certain event, or the performance of a certain act, the proceedings in a case which for the present the plaintiff has no right to carry on." Some very strong observations as to the power of the court are made by Alderson, B., in an earlier case of *Cocker* v. *Tempest*, 7 M. & W. 502: "The power," he says, "of each court over its own process is unlimited: it is a power incident to all courts, inferior as well as superior: were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion; and, where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably; but, if it be made out that the process of the court is used against good faith, the court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a court of equity in granting an injunction is, that the injunction stops proceedings in another court, this only in the court in which the proceedings are." Another point arises here. It is plain that this is a debt,—a liquidated money demand; and, but for the circumstance of these banking companies being corporations, there would [266] be no difficulty in dealing with the case: this would be an ordinary partnership debt, and would be discharged by the certificate. But for the provisions (ss. 10-13) of the 7 & 8 Vict. c. 113, the shareholders would not be liable at all. We must, therefore, look and see what remedy those sections intended to give to the creditor. They give him a peculiar remedy by scire facias or motion for execution to recover a debt, a money demand, which would be barred by a certificate. When an order under s. 13 has been obtained against a shareholder, he is at once liable to be taken in execution. If that does not constitute a "debt," I cannot conceive what would bring any liability within that category. With regard to the decision of the commissioner,—all that he seems to have decided was, that, notwithstanding the peculiar machinery provided by the statute, the debt still remained a joint debt, and, having elected to prove against the joint-estate, the creditor could not be allowed also to prove against the separate estate. I am by no means satisfied that his decision was not quite right: but, even if he were wrong, it makes no difference so far as regards the right of the applicant to be discharged from custody. I may add that I should have made an order for the discharge of Mr. Hill in vacation, but for the circumstance of the matter having been already before another judge, who entertained doubts about it.

Rule absolute.

[267] Reynolds *v.* Harris. June 12th, 1858.

[S. C. 28 L. J. C. P. 26; 4 Jur. N. S. 856. See *Brown* v. *Houston*, [1901] 2 K. B. 858.]

Upon a reference of all matters in difference in a cause,—"the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award,"—with power to the arbitrator to direct how the verdict in the cause should be entered; the costs of the cause follow the event of the cause as decided by the award.—In slander, the declaration contained four counts: the defendant pleaded not guilty to the whole declaration, and further to the second count a multifarious plea of justification setting forth three several circumstantial statements of misconduct on the part of the plaintiff, any one of which would be a sufficient answer to the count: the plaintiff took issue on the pleas; and, upon a reference of "all matters in difference in the cause," with a provision that "the costs of the cause, and also the costs of the order and of the reference and award, should abide the event of the award," and that "the arbitrator should have power to direct how the verdict in the cause should be entered,"—the arbitrator found, upon not guilty, for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts; and, as to the second issue, he found that the plea, so far as related to one of the matters justified, was proved, and as to the rest not proved; and, being of opinion that the part proved was an answer to the second count, he assessed no damages for the plaintiff on that count, but assessed his damages on the fourth count at 40s.:—Held, that the proper principle of taxation was, to allow the plaintiff no costs of any part of the plea of justification, and the defendant costs only of the part expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not costs of any evidence applicable exclusively to that part of the plea which was found to be untrue.

This was an action of slander. The first count of the declaration stated, that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), walking in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff was a thief.

The second count stated, that, before and at the time of the committing by the defendant of the grievances next thereinafter mentioned, the plaintiff was and still is carrying on a certain trade and business, to wit, the trade and business of a ship owner, broker for the sale of ships, ship, insurance, and general broker, and seller of shares in ships; and that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said trade and business, [263] the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), walking in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff had been guilty of dishonesty, fraud, and cheating, in and about and in relation to his said trade and business.

The third count stated that the plaintiff, before and at the time of the committing by the defendant of the grievances next thereinafter mentioned, was and still is, to wit, in partnership with a certain other person, the managing owner and ship's husband of certain ships, being employed in such business by the respective part-owners of the said ships; and that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said business as such managing owner and ship's husband as aforesaid, the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff had been guilty of dishonesty, fraud, and cheating in and about and in relation to his said business as such managing owner and ship's husband as aforesaid.

The fourth count stated, that, before and at the time of the committing by the defendant of the grievances thereinafter mentioned, the plaintiff exercised, and thence continually had exercised, and still was exercising, the business of a broker for the sale of ships, and of a seller of shares in ships, and had represented to the defendant that he the plaintiff was of opinion, that, if the defendant would purchase of and from him certain shares in certain ships, which he the plaintiff then **[269]** had to sell, the same would yield profit to the defendant, and the defendant was induced to purchase and did purchase the said shares of and from the plaintiff; that, in and about the said representation concerning and the said sale of the said shares, he the plaintiff conducted himself with fairness, honesty, and integrity; yet that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said last-mentioned business, and of and concerning the plaintiff's conduct in and about the said representation concerning and the said sale of the said shares, the words following, that is to say, "It (meaning the conduct of the plaintiff in and about the said representation concerning and the said sale of the said shares) was a swindle to get the money (meaning the purchase-money of and for the said shares) out of my (meaning the defendant's) pocket for the ships (meaning the said ships), and he (meaning the plaintiff) knew when he (meaning the plaintiff) induced me (meaning the defendant) to take shares (meaning the said shares) that they (meaning the said shares) would not make the profit" (meaning the profit which the plaintiff had represented that in his opinion they would make), the defendant thereby meaning that the plaintiff had by fraudulent representations, and with intent to cheat the defendant, induced the defendant to purchase the said shares. Claim 1000*l*.

The defendant pleaded,—first, not guilty.

Secondly, to the second count, that, while the plaintiff carried on the trade and business therein mentioned, and before the committing of the grievances in that count mentioned, the plaintiff was employed in the way of his said trade and business to negotiate a charterparty of a ship called the "Orynthia," belonging to Messrs. Bradley & Potts, of Sunderland, and which **[270]** ship was accordingly chartered by the said Messrs. Bradley & Potts to a Mr. Goddard through the agency of the plaintiff in the way of his said trade or business; that, before the committing of the said grievances, the plaintiff was employed in the way of his said trade and business to arrange the terms upon which the said charterparty should be cancelled; and that the plaintiff accordingly in the way of his said trade and business arranged the said terms, and induced the said Messrs. Bradley & Potts to agree to pay, and the said Messrs. Bradley & Potts did pay, a large sum, to wit, 300*l*., to the said Mr. Goddard, as the price of the said cancelment, and thereupon the said charterparty was cancelled accordingly; whereas, in truth and in fact the said Mr. Goddard was willing to accept, and did accept, a much smaller sum, to wit, 100*l*., as the price of the said cancelment, as the plaintiff then well knew; and the plaintiff then, and before the committing of the said grievances, and while he so carried on the said trade and business, fraudulently, falsely, knowingly, and dishonestly represented to the said Messrs. Bradley & Potts that the whole amount agreed to be paid by them was the amount which the said Mr. Goddard was willing to accept for the said cancelment as aforesaid, and thereby cheated the said Messrs. Bradley & Potts out of the residue of the said money: that, while the plaintiff carried on the said trade and business in the said second count mentioned, and before the committing of the grievances in the said second count mentioned, the plaintiff was employed in the way of his said trade and business by the said Mr. Goddard, to negotiate for him the purchase of a certain share in a ship called the "Baroness," which ship belonged to the said Messrs. Bradley & Potts, and the plaintiff accordingly in the way of his said trade and business negotiated the said purchase at and for a certain sum, to **[271]** wit, 1200*l*., and the same was then sold by the said Messrs. Bradley & Potts at that price accordingly: and that the plaintiff, before the committing of the grievances, fraudulently, falsely, and dishonestly represented to the said Mr. Goddard that the sum which he had agreed on behalf of the said Mr. Goddard to give to the said Messrs. Bradley & Potts for the sale of the said share as aforesaid, was a much larger sum than that actually agreed upon as aforesaid, to wit, 1400*l*., and thereby fraudulently and dishonestly induced the said Mr. Goddard to pay him such larger sum, and thereby cheated and defrauded the said Mr. Goddard out of the difference; that, while the plaintiff carried on such trade or business as in that count

mentioned, and before the committing of the grievances in that count mentioned, the plaintiff was employed in the way of his said trade and business, by the defendant and the other part-owners of a ship called the "Treasure," to act as broker of the said ship, and it then was his duty, as such broker, to render accounts to the managing owner of the said ship of the various disbursements made by the plaintiff as such broker on account of the said ship: and that, while the plaintiff was so employed in the way of his said trade and business, and before the committing of the said grievances, the plaintiff knowingly, fraudulently, and dishonestly inserted in the accounts of the said ship so rendered by him, as having been paid by him to different persons on account of the said ship, to wit, to Mr. J. Thomas, to Stephenson & Co., to Mr. Hastie, to Mr. Lee, to Mr. Reynolds, to Mr. Surfas, to Mr. Loveland, to Mr. Mason, to Mr. M. Blake, to Mr. Trail, to Mr. Parnell, to Mr. Blythe, and to Mr. Frazer, much larger sums than the amounts actually and really paid, with intent to cheat and defraud the defendant, and the other part-owners of the said ship, and to cause the defendant and the other part-owners to believe that the [272] plaintiff had actually and really paid on account of the said ship the several sums of money inserted by him in the said accounts.

The plaintiff took issue upon the first plea, and joined issue on the second.

By a judge's order made by consent on the 29th of August, 1856, all matters in difference in the cause were referred to an arbitrator,—the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award, the arbitrator to find for the plaintiff or the defendant respectively as he might think fit on each and every of the issues joined in the cause, to have all the powers of a judge at nisi prius as to certifying, amending pleadings and proceedings, or otherwise, and to have power to direct how the verdict in the cause should be entered, and also to direct what (if anything) should be done by either of the parties in reference to the subject-matter of the cause.

On the 4th of May, 1857, the arbitrator made his award, as follows:—

"Upon the first issue, on not guilty, I find for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts of the declaration.

"Upon the second issue, arising out of a plea of justification to the second count, I find that so much of the plea as relates to the plaintiff and the accounts of the ship "Treasure" was proved, and that the rest of the plea was not proved. Being of opinion that the part proved is an answer to the count, I assess no damages for the plaintiff on that count.

"As to the fourth count, I assess the plaintiff's damages at 40s., which sum I order the defendant to pay to the plaintiff, or his attorney, Mr. Cooper, on demand.

"I do not think fit to exercise the power given me by the said order to direct anything to be done by either of the parties in reference to the subject-matter of the said cause."

[273] Upon taxation of the costs, the master allowed the plaintiff the general costs in the cause, including all the costs of the issue upon the plea of justification, and declined to allow the defendant any part of the costs of that issue, upon the ground that the defendant's evidence as to the parts of the plea upon which he succeeded was applicable also to that part of the plea which the finding negatived, and that such finding in the negative of part of the plea was in effect a finding of an issue for the plaintiff within the 74th rule of Hilary Term, 2 W. 4, and the 81st section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

Honyman, in Hilary Term, 1858, moved for a rule to shew cause why the master should not be at liberty to review his taxation. The event of the award,—that is, the event of the whole award, not being in favour of either party, neither is entitled to costs; or, at all events, the defendant ought to be allowed the costs of that part of the plea of justification which the arbitrator has found for him. [Cockburn, C. J. The effect of the finding of the arbitrator is, that the plaintiff had no cause of action, except on the fourth count.] In *Gribble* v. *Buchanan*, 18 C. B. 691, it was held, adopting the rule laid down in Russell on Awards, 2nd edit. 380, that, where by the order the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff, and partly in favour of the defendant, no costs are payable on either side. It is true that that was a reference of a cause and all matters in difference: but the principle is the same. [Cockburn, C. J. It seems to me that the principle adopted in *Gribble* v. *Buchanan* is equally applicable in this case.]

Hannen shewed cause in the first instance. This is a reference of all matters in difference in the cause **[274]** only, and the costs of the cause, as well as of the reference and award, are to abide the event of the award: and the question is, whether the master was not right in taxing the costs precisely as he would have done if the result had been arrived at by the finding of a jury, instead of the award of the arbitrator. Where all the costs are made to depend upon the event of the award, the whole become taxable as costs in the cause: *Wood* v. *O'Kelly*, 9 East, 436; Russell on Awards, 380: and the parties are entitled to costs according to the finding upon the several issues. *The Matlock Gas-Light and Coke Company* v. *Peters*, 6 Ellis & B. 215, is very much in point. By an order of nisi prius, a cause and all matters in difference were referred to an arbitrator, who was empowered to direct a verdict for the plaintiffs or the defendant, or a nonsuit,—the costs of the action to abide the event of the award. The arbitrator directed that a verdict should stand for the plaintiffs, for substantial damages, which he adjudged to be due from the defendant to the plaintiffs, and that certain lamps, in respect of which the plaintiffs made a claim for damages in the declaration, should be delivered up to the defendant: and it was held that the plaintiffs were entitled to the costs of the action. *Boodle* v. *Davies*, 3 Ad. & E. 200, 4 N. & M. 788, and *Yates* v. *Knight*, 2 N. C. 277, 2 Scott, 470, were cited. But Lord Campbell said: "Those cases are clearly distinguishable from the present. The submission here empowers the arbitrator to order a verdict or nonsuit; and the award expressly directs a verdict for the plaintiffs; and that, as to the action, is the event of the award."

Honyman, in support of the application. By the order the parties seem to have dealt as if this were a reference of the cause and all matters in difference. In *Boodle* v. *Davies*, 3 Ad. & E. 300, 4 N. & M. 788, a cause **[275]** and all matters in difference were referred; the arbitrator to have power to state how a certain passage, &c. should be enjoyed, and who should have the management thereof, and to abate illegal erections; the costs of the action, reference, and award to "abide the event of the said award." The action was in trespass; and the arbitrator found that the defendant had committed trespasses in respect of some of the matters complained of in the action; but he decided some matters in favour of the plaintiff, and some in favour of the defendant. He also awarded that the costs of the action, reference, and award should be paid by the defendant. But the court said,—"The costs of the action were to abide the event of the award. There has been no event of the award for this purpose. The arbitrator had no power to say anything of costs." Patteson, J., in that case, observes: "The form of the reference is singular. Where an action is depending, it is reasonable to provide that the costs shall abide the event; but, where all matters in difference are referred, it seems that, under such an order, as to costs, each party must pay his own, unless everything is found in favour of one." So, in *Yates* v. *Knight*, 2 N. C. 277, 2 Scott, 470, where, under a reference of an action and all matters in difference, by which the costs of the suit, and of the reference and award, were "to abide the event of the award," the arbitrator had directed that the suit should cease, each party giving a general release, and that the defendant should give up certain articles to the plaintiff, and the plaintiff pay a sum named to the defendant,—this court held that the event was such that each party must bear his own costs. Both these cases were cited in *Gribble* v. *Buchanan*, 18 C. B. 691, and their principle acted upon. *The Matlock Gas Company* v. *Peters*, 6 Ellis & B. 215, was also referred to in *Gribble* v. *Buchanan*, but without effect. [Willes, J. What is the **[276]** difference between the event of the cause, and the event of an award which disposes of the cause?] The event of the cause may be taken distributively: the event of the award must be the entire event. [Cockburn, C. J. According to your argument, if some little issue is not found in favour of the party who succeeds upon all the rest, he is to have no costs. I must confess I should have great difficulty in bringing my mind to such a conclusion.] There are several causes of complaint here, some of which only are sustained. What substantial distinction can there be between such a case and one where the arbitrator has found the event of the cause one way and that of the matters in difference the other? [Williams, J. Where the reference is of the cause and all matters in difference, and the costs are to abide the event of the award, it means some general event: but, why should that be so where the cause only is referred? Cockburn, C. J. Is not this a new phraseology as applied to the costs of the cause? Hannen. This form of submission appears not to be uncommon.

Willes, J. It is, I think, unusual with reference to matters in difference in the cause.] The language of the submission will fairly bear the construction sought to be placed upon it. It is impossible to say how much of the costs may be attributable to the matters found one way, and how much to those found the other. Another question arises here, viz. whether the master was right in disallowing the defendant the expenses of the witnesses called in support of his justification in reference to the ships "Oryntha" and "Baroness." [Cockburn, C. J. Your plea embraces three separate grounds of justification: you succeed as to one; and you say you are entitled to costs in respect of the other two, as to which you failed?] Yes. The defendant proved enough of his plea to entitle him to a verdict upon it. [Cockburn, C. J. It certainly seems monstrous that a defendant should be entitled **[277]** to the costs of attempting to establish that which a jury or an arbitrator has found to be false. My Brother Willes, however, informs me that there is a recent case in which the court of Queen's Bench has so decided. Willes, J. The case I refer to is *Biddulph* v. *Chamberlayne*, 17 Q. B. 351. It was an action for a libel, with a plea justifying as true part of the libel, which comprised several libellous allegations, the whole of which were put in issue by the general replication de injuriâ. On the trial, the learned judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were not true, and that others, forming an important part of the libel, were true. A general verdict having been entered for the plaintiff, a judge at chambers made an order that the master should not allow the plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true; and, upon a motion to rescind that order, it was held by Lord Campbell, C. J., Patteson, J., and Coleridge, J. (dissentiente Erle, J.), that the order was improper, the issue being indivisible. That case is what is called the converse of this. Lord Campbell, in giving judgment, there says,—"The question raised is, whether, with respect to the allowance of costs, an issue can be considered distributive which cannot be divided on the record because it is taken on one entire plea. I feel great difficulty in seeing how it can be done. In all cases cited (*a*), the issue might have been divided on the record, and a finding might have been entered on one part of it for the plaintiff, and on the other for the **[278]** defendant: but where, as in the present case, the plaintiff is entitled to the verdict on the entire issue, it is difficult to see how, for the purpose of taxation of costs, we can distinguish between the several allegations in the one entire plea. That has never been done hitherto; and it would often have been done, but for the inconvenience of the course." Patteson, J., says,—"This question could not have arisen unless I had put specific questions to the jury as to the different allegations in the plea: for, if I had left the issue generally to the jury, and they had found a general verdict, it could not have been known what allegations they thought disproved. Now, the questions were put by me quite alio intuitu; and I think the fact that such questions were put ought not to affect the costs. In this case, there is one single issue, indivisible so far as regards the verdict. It is contended that the issue may nevertheless be divisible as to costs. It is quite clear that it is not divisible for the purpose of giving the costs of those allegations which were disproved to the defendant; but it is urged that, though not divisible so as to give the defendant those costs, it may be so divisible as to deprive the plaintiff of them. I think the precise question has never before been raised, as the attempt has always been to give costs, not merely to deprive the other side of them: but I am of opinion that we ought not to establish the rule as asked for now." And Coleridge, J., adds,—"If an issue indivisible for the purpose of the verdict may be divided for the purpose of costs, I do not know where to stop: the party would have at least an equitable right in all cases to ask the judge to put the allegations separately, which would be very inconvenient." Cockburn, C. J. I think Mr. Hannen should have an opportunity of considering this point a little. It certainly involves a very important principle. Willes, J. And also the section in the **[279]** Common Law Procedure Act, 1852, which applies to distributive issues,—15 & 16 Vict. c. 76, s. 75.]

Cockburn, C. J. As regards the first part of the motion, I am of opinion that

(*a*) *Prudhomme* v. *Fraser*, 2 Ad. & E. 645, 4 N. & M. 512, *Welby* v. *Brown*, 1 Exch. 770, *Williams* v. *The Great Western Railway Company*, 8 M. & W. 856, *Daniel* v. *Barry*, 4 Q. B. 59, 3 Gale & D. 277, and *Anderson* v. *Chapman*, 5 M. & W. 483.

there should be no rule. The order of reference provides that the costs of the cause, and also the costs of the order and of the reference and award, shall abide the event of the award. The common sense interpretation of that is, that the costs of the cause should abide the event of the award with reference to the cause. I cannot conceive that any other meaning can properly attach to those words even where the reference also involves matters in difference. It appears to have been held in *Gribble* v. *Buchanan*, 18 C. B. 691, that, where by the order the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side. That may have proceeded upon the notion that the parties did not intend the decision of the cause to be the criterion. It is quite possible that the matters in difference dehors the cause may be as important as, or more so than, those which are in issue in the cause. But that observation does not seem to me to apply where the cause only is referred. I quite concur in the view expressed by Lord Campbell in *The Matlock Gas-Light and Coke Company* v. *Peters*, 6 Ellis & B. 215, that, where the reference is of the cause and all matters in difference, the costs of the action to abide the event of the award, and the arbitrator is to be at liberty to direct a verdict, and he does so, that, as to the action, is the event of the award,—the meaning of the words being, the event of the cause as decided by the award. Upon this principle, justice will be done between the parties: where the matters in difference in the cause arise on distinct issues, as the [280] arbitrator awards upon the issues, so the costs will follow. I see no reason why we should depart from that rule: on the contrary, I see every reason why we should adhere to it. Bowing, therefore, to the authorities referred to, I am not disposed to carry the doctrine further, or to apply it to a case which is not clearly within the rule.

WILLIAMS, J. I am of the same opinion. There is no doubt that the case of *Gribble* v. *Buchanan*, 18 C. B. 691, and the authorities upon which it is founded, have established a rule, that, where, by an order, the costs of the reference and award are to abide the event of the award, and the event is divided, neither party is entitled to costs. As a general rule, the event of the award must mean the general event of the award, and each party must pay his own costs, unless the general event is in favour of one. The question is, whether we are bound to put the same construction here, where the submission is of all matters in difference in the cause, and the costs of the cause, and also the costs of the order and of the reference and award, are to abide the event of the award. I am of opinion that we are not constrained so to do. As far as my experience goes, I believe it has been very usual to provide in the submission that the costs of the cause shall abide the event of the cause: and I see no reason for supposing that the parties had any intention here to vary it: and I think no reasonable doubt upon the subject can be entertained, when we find that it is expressly provided by the order that the arbitrator shall have power to direct how the verdict in the cause shall be entered.

WILLES, J., concurred.

Hannen, on a subsequent day, resumed his argument. [281] The case of *Biddulph* v. *Chamberlayne*, 17 Q. B. 351, affords no guide for the decision of this case, assuming it to have been rightly decided, which may fairly admit of doubt. The present case, it is submitted, falls rather within the principle of *Prudhomme* v. *Fraser*, 2 Ad. & E. 645, 4 N. & M. 512. There, a count in libel contained several innuendos connecting the different parts of the alleged libel with the plaintiff. The jury negatived some innuendos, and affirmed others: and a general verdict was taken for the plaintiff. The court refused a rule for a new trial, but held that the defendant was entitled to his costs as to so much of the declaration as charged libellous matter the innuendos respecting which had been negatived. Upon that case was founded the opinion of the dissentient judge (Erle, J.) in *Biddulph* v. *Chamberlayne*. "I should have thought," says that learned judge, "the principle of *Prudhomme* v. *Fraser* was a precedent for this order. The libel in the present case contained several libellous allegations, and was in effect several libels. The defendant pleads a plea justifying both the allegation that there was a nuisance, and those that the plaintiff had otherwise misbehaved himself. The plaintiff puts in issue the whole plea, which, I think, was in substance one plea to two causes of action. The judge had a right, if he thought proper, to ask the jury what their opinion was as to each allegation separately: and the jury had a right, if they pleased, to return a special verdict, finding as to each allegation separately; and,

though perhaps in strictness they ought not to be directed to consider how much of the libellous matter was true, when estimating damages, I suppose there is no doubt the jury would do so in fact. Then, the issue being divisible for all these purposes, I should say, that, according to the principle of *Prudhomme* v. *Fraser*, the issue might be considered divisible for the purpose of taxation; [282] and that we might refuse to allow the plaintiff the costs of attempting to negative that part of the plea which was proved." By the 75th section of the Common Law Procedure Act, 1852, all pleas that are capable of being construed distributively are to be so taken, and, if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. And s. 223 impowers the judges of the superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders for the effectual execution of the act, and the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, and *for apportioning the costs of issues* (*a*), and for the purpose of enforcing uniformity of practice in the allowance of costs in the said courts, and of insuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts, as in their judgment shall be necessary or proper, &c. Here the second plea is capable of being divided: and, in the absence of any general rule upon [283] the subject, it was for the master to consider what costs the defendant had been put to in establishing that part of the plea which the arbitrator found to be true.

Honyman, contrà. The plea presents three substantial defences, —1, as to the alleged fraudulent transaction respecting the chartering of the ship "Orynthia,"—2, as to the alleged fraud on the sale of shares in the ship "Baroness,"—3, as to the falsifying the accounts of the ship "Treasure." The defendant made out his justification so far as it related to the last-mentioned vessel; but failed as to the other two. The master has not only disallowed all the defendant's expenses as to the "Orynthia" and the "Baroness," but he has allowed the plaintiff his costs as to the "Treasure." This, it is submitted, is clearly wrong: the issue on the justification having been found for the defendant, he was entitled to the whole costs it involved. Under the old system, if a plea of justification consisted of two facts, each of which would, when separately pleaded, amount to a good defence, the justification was sustained if one of those facts was found by the jury: *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146; *Baillie* v. *Kell*, 4 N. C. 638, 6 Scott, 379. [Williams, J. But for the case of *Biddulph* v. *Chamberlayne*, 17 Q. B. 351, I must confess I should have thought the chain of reasoning complete.] *Prudhomme* v. *Fraser*, 2 Ad. & E. 645, 4 N. & M. 512, is clearly distinguishable: the libel had several meanings, and the plea was not guilty only, and not, as here, an affirmative plea. The cases upon the subject of distributive pleas, with reference to the 75th section of the Common Law Procedure Act, will be found in Taylor on Evidence, 2nd edit. vol. ii., §§ 221-223. That section, it is submitted, never was intended to apply to such a case as this, which is precisely within *Biddulph* v. *Chamberlayne*. The defendant has succeeded upon the issue on his second plea.

[284] Williams, J. Before we pronounce any decision in this case, we will ascertain more particularly from the master the course he adopted on the taxation.

Cur. adv. vult.

Cockburn, C. J., now delivered the judgment of the court:—

This was a rule obtained by the defendant, calling upon the plaintiff to shew cause why the taxation of costs should not be reviewed.

The action was for slander. The declaration contained four counts. The defen-

(*a*) These words were inserted in the Commons after the bill had been amended and sent down from the Lords.

The power thus conferred upon the judges has not for this purpose hitherto been exercised; neither has the power to make rules for the purpose of "insuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts:" although both, and especially the latter, might be exercised with great advantage to the public.

dant pleaded not guilty to all the counts, and, further, to the second count, a multifarious plea of justification, setting forth a series of statements of fact, any one of which would be a sufficient answer to that count. The plaintiff took issue upon the pleas.

The cause was referred to arbitration; and the arbitrator has found for the defendant upon the plea of not guilty to the first and third counts, as to which no question arises.

Upon the second count the finding is, upon not guilty, for the plaintiff, and, upon the plea of justification, that one of the statements in the plea, forming a sufficient answer to the count, is true, and that the other statements in the plea are untrue. The result is in favour of the defendant as to that plea, and he succeeds accordingly upon the second count.

Upon the fourth count, the finding is for the plaintiff, with 40s. damages.

The question before us is, how the costs of the issue upon the plea of justification ought to be taxed,—whether altogether for the plaintiff; or for the defendant as to the statement proved, and for the plaintiff as to the residue, which the arbitrator has found not proved; or [285] for the defendant as to the part proved, and for neither party as to the residue; or altogether for the defendant.

The master has adopted the first of these courses, upon the ground that the defendant's evidence as to the parts of the plea upon which he succeeded was applicable also to that part of the plea which the finding negatived, and that such finding in the negative of part of the plea was in effect a finding of an issue for the plaintiff, within the statute and rule applicable to the subject. If this was so, the master was right in acting upon the settled practice, by which the party who is entitled to costs of the cause, is entitled to costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him; and that the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded.

This rule of taxation is undoubtedly correct; and the question is, whether it was correctly applied to the facts. The rule of court upon this subject in force before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was that of Hilary Term, 2 W. 4, r. 74, that "No costs shall be allowed on taxation to a plaintiff upon any issue or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." And now, by the 81st section of the Common Law Procedure Act, 1852, it is provided that "the costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."

It appears, therefore, that the master was right, if there was an issue within the meaning of the act found for the plaintiff upon the plea of justification, to which issue the evidence for the defendant upon the portion [286] of the plea found for him was in part applicable: and we are of opinion that there was not.

The defendant might have divided the plea into as many distinct pleas as it contains defences. In that case, he would have had the costs of the defence upon which he succeeded. He, however, has pleaded all his defences in one plea. There is no substantial demerit in that. At the common law, duplicity must have been objected to by special demurrer. If not specially demurred to, a double plea was good, without the aid of any statute of jeofails or act allowing double pleading. A defendant at the common law had no costs of issues found for him, in any case where the plaintiff was entitled to the general costs of the cause. Now he has: but that cannot affect the question what is the issue upon the plea. Now that special demurrers are abolished, the remedy of a plaintiff who may be embarrassed by such a plea is, to apply to a judge to strike it out or (perhaps) to order the defendant to divide it into several: but, if the plaintiff does not think proper to make that application, the consequence is, that the defendant has pleaded in one plea, without objection, several distinct and sufficient defences, any one of which being shewn to be true, the plea is proved, and the defendant succeeds. In effect, therefore, the issue joined upon a double or multifarious plea, is, whether either of the defences set up therein is true. If either of them be true, the verdict upon that issue must be for the defendant. The jury may, undoubtedly, give a special verdict, finding one of the alleged defences for the defendant, and that the residue of the plea is untrue, referring the question whether

the issue is proved to the court; and, if it were questionable whether the matter found to be true constituted a justification, that would be a proper course to take. But if, as here, the matter found to be true clearly constitutes a justification, [287] the latter part of such finding does not alter the effect of the former, which alone constitutes a sufficient defence, in whatever form the finding may be as to the residue of the plea. The issue is disposed of altogether in favour of the defendant.

Reliance was placed by the plaintiff's counsel upon the 75th section of the Common Law Procedure Act, 1852, as making the issue distributable. But that section is inapplicable, being intended to meet cases in which the verdict may be so distributed as to constitute an answer to the previous pleading, though only in part, that is, such an answer as might before the statute have been set up by a pleading expressly limited to part; in which cases injustice was done before the statute, by entering a verdict for the plaintiff or defendant upon the ground that the issue was in form indivisible, though upon the evidence a good defence or cause of action was made out in part. The present taxation, founded upon the assumption that an issue upon the plea of justification was found in favour of the plaintiff, must therefore be set aside.

The rule will, consequently, be absolute, upon that ground. But, as we have thus far only decided that the defendant is entitled to the costs of so much of the plea as was expressly found in his favour, the parties might be involved in needless expense unless we proceed to direct how the taxation is to take place with reference to the further question whether the plaintiff is to have his costs of the part of the plea expressly found to be untrue, and, if not, whether the defendant is to have his costs of such part, or only the costs of the part of the plea expressly found to be true. This subject was discussed in *Biddulph* v. *Chamberlayne*, 17 Q. B. 351, decided in the year 1851, upon the construction of the general rule of court already mentioned. In that case, the plaintiff complained of a libel containing several de-[288] famatory statements. The defendant pleaded a justification. The judge at the trial having asked the jury to find separately as to the truth of the several allegations justified, the jury found some to be untrue, and the others true. The plea being pleaded to more than was found true, and there being then no statute making it distributable, a general verdict was directed and found for the plaintiff; so that nothing appeared upon the record to shew that the jury had found a portion of the matters alleged by the defendant to be true. The majority of the court of Queen's Bench (dissentiente Erle, J.) held that the plaintiff was entitled to the costs of the whole plea; and set aside a judge's order depriving the plaintiff of the costs of witnesses called only to disprove the part of the plea which was found to be true. The reasons of the court fully appear in the judgment of Coleridge, J., who said,—"The safe course is, to limit the rule of Hilary Term, 2 W. 4, r. 74, to issues which may be found on the record That, I think, is the meaning of the general rule made by all the courts for the purpose of rendering the practice uniform; and, if it is to be extended in the manner now sought, it ought to be done by a general rule of all the courts. That alone, I consider a sufficient reason for setting aside this order. But, further, I cannot but think, that, if, to advance what we supposed to be the justice of this case, we were to extend the rule as asked, we should lay down a most inconvenient rule of practice. If an issue indivisible for the purpose of the verdict may be divided for the purpose of costs, I do not know where to stop: the party would have at least an equitable right in all cases to ask the judge to put the allegations separately, which would be very inconvenient. But that is not all: it would follow that the master must, as it were, re-try the cause, so as to ascertain the materiality of each witness as to each allegation. I think it much [289] better to adhere to the rule than wrest it for the supposed justice of the case. I say supposed justice; for, it must be remembered we have not complete knowledge of all the circumstances"

Since the Common Law Procedure Act of 1852, the question will probably not again arise in the same form as in the above case, because, under similar circumstances, the defendant would now, by force of the 75th section, be entitled to a verdict as to the part of the plea which was found to be true: but the case is still in point, where, as in the present case, there is a general denial of a multifarious pleading, which, for the reasons already given, cannot be distributed under s. 75, and a general finding by the jury in the affirmative of the issue so raised. Therefore, if there had been in *Biddulph* v. *Chamberlayne* a special verdict to the effect of the answers of the jury to the judge, that case would have been in point. And that circumstance would probably

have been considered unimportant by the majority of the court. Therefore, if our decision could be taken to a court of error, we should feel bound by that case as a precedent. Doubting, however, as we do, whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a court of error, we think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment, if, upon reflection, we are unable to agree to the decision of the majority in *Biddulph* v. *Chamberlayne*. We proceed, therefore, to consider the points there decided.

First, it was there assumed throughout that the party against whom the issue was found was not entitled to the costs of the averments found in his favour at the trial to be untrue. This, we think, was right, upon the ground already stated, that costs, apart from costs in the cause, are only given by the rule of court and the statute to a party succeeding upon an issue: and the [290] defendant in that case, like the plaintiff in this, had not succeeded upon any issue upon the plea of justification.

The decision in that case, that the plaintiff was entitled to the costs of witnesses called to contradict what was found to be true, rests upon different grounds, stated at large in the judgment of Coleridge, J., already set forth. One at least of those grounds does not exist in the present case, viz the inconvenience that "the master must, as it were, re-try every cause, so as to ascertain the materiality of each witness as to each allegation." That would be unnecessary here; for, the finding of the arbitrator is not general, like that of the jury in *Biddulph* v. *Chamberlayne*, but special, that the plea is as to part true, and as to the rest untrue.

It was contended, for the defendant, that the finding of the arbitrator, so far as it negatived part of the plea, was immaterial: but this argument ought not to prevail. The arbitrator was put, by consent, in the place of a judge and jury; and, if the cause had been tried in the ordinary way, it would have been competent for the jury to find specially in the form of the present finding, every word of which would have been part of the verdict, and must have been considered by the court, if called upon so to do, before pronouncing judgment. A formal reference of the question to the court was unnecessary, because the arbitrator is put in the place of the court as well as of the jury. Treating, therefore, that finding of the arbitrator as an authorized act, the master has here the means of at once determining the question which the general form of the finding left open in *Biddulph* v. *Chamberlayne*.

But we are prepared to go further; for, we should be sorry to admit it possible that there is any imperative rule of law or inveterate practice, by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the [291] information of the judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side. We apprehend that we may, and if we may we ought, to prevent our proceedings from being abused and perverted; and that we ought not to abstain from doing so in a case where the truth appears, because there may arise many others in which we cannot arrive at it. We apprehend that the court is bound not to allow a successful party all the expense he may have thought proper to incur, where we can see that part of it has been needless. If a party were to insist upon calling fifty witnesses to prove a notorious fact formally involved in a disputed issue, we may doubt whether the judge could lawfully reject the evidence of any one of them; but we cannot doubt that the master would not allow, and that the court would uphold the master in not allowing, the expenses of them all. Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be, and is in practice, disallowed. The master ought to look to the finding upon the issue, when there is nothing else in the proceedings to guide his discretion. But where, as here, there is matter ascertained in the cause,—whether appearing upon the face of the proceedings, or established by the statement of the judge founded upon his judicial knowledge of the facts,—whereby the master is satisfied that witnesses called by the successful party have been wholly useless, and their evidence as completely thrown away as if they had sworn to a truism or an irrelevant fact, he ought to disallow the expenses of such evidence, as at least unnecessary. That is so in the present case. The costs exclusively applicable to the part of the plea found to be untrue ought therefore not to be allowed to the defendant.

[292] It follows that the rule to review the taxation ought to be absolute,—with a direction to the master to allow the plaintiff no costs of any part of the plea of

justification, and the defendant's costs only of the part of that plea expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not costs of any evidence applicable only to that part of the plea which was found to be untrue.

Rule absolute.

MOUNTAGUE *v.* HARRISON. Nov. 17th, 1857.

[S. C. 27 L. J. C. P. 24; 4 Jur. N. S. 29; 6 W. R. 43.]

A person attending a police-court as prosecutor or witness on a charge there pending, is privileged from arrest on civil process,—even though he is not attending under compulsion.

Atkinson, Serjt., on a former day in this term, obtained a rule to shew cause why the defendant should not be discharged out of custody as to his arrest under a ca. sa. in this cause. The affidavits upon which the motion was founded, stated, that, on the 4th of August last, the defendant was in attendance at the Mary-le-bone police-court, before Mr. Broughton, the sitting-magistrate, as a prosecutor and witness against certain persons named Morgan, Passmore, and Hayter, who had been remanded on a charge of felony, and that the further hearing of the prosecution was adjourned to the 6th; that, on leaving the presence of the magistrate, and within the precincts of the said police-court, a number of persons (amongst whom were the accused) attacked the defendant with violence, tore his clothes, pulled him out of the court-house, and dragged him into the street, and there forced him into a cab, and conveyed him to prison under arrest on a ca. sa. for 32l. 4s. 2d. at the suit of the plaintiff; and that the **[293]** defendant was a material and necessary witness (and afterwards brought up by habeas), and was bound over to prosecute and give his evidence at the trial.

A similar application had previously been made to Channell, B., at Chambers, who declined to interfere, inasmuch as no authority precisely in point had been adduced before him.

Byles, Serjt., now shewed cause, upon affidavits stating that the arrest was not made until the defendant had got into the street, and denying all complicity on the part of the plaintiff and the officers in the attack alleged to have been made upon the defendant; and further stating that the defendant was not bound over until two days after the arrest. The privilege of a person from arrest eundo, morando, et redeundo, is the privilege of the court, and it is discretionary with the court to allow it or not as will best advance the interests of justice: per De Grey, C. J., in *Cameron* v. *Lightfoot*, 2 W. Bl. 1190. And this is confirmed by the judgment of the court of error in *Magnay* v. *Burt*, 5 Q. B. 381, 393, where it is said, "The broad ground is, that the privilege the breach of which is the subject of complaint, is not to be considered, as it was accurately laid down by Lord Chief Justice De Grey in the case of *Cameron* v. *Lightfoot*, to be the privilege of the person attending the court, but of the court which he attends; and therefore the allowing or not allowing the privilege is discretionary; and it has been disallowed in collusive actions, and in vexatious ones, as in the *Anonymous case* in 11 Mod. 79, or where the party attends as a volunteer, and not upon process." The matter recently underwent considerable discussion in the court of Queen's Bench, in a case of *Ex parte Cobbett*, 26, L. J. Q. B. 293, where it was held that a voluntary prosecutor,—as a common informer,—is not privileged. [Cockburn, C. J. **[294]** The question is whether a party attending to prosecute and give evidence upon a charge pending before a police magistrate, is entitled to the same privilege as a party attending before a court of justice. If it were not so, a man who was in peril of arrest never could perform his public duty.] The duty of prosecuting a felon is one of imperfect obligation, the breach of which is followed by no legal consequences: see the observations of Maule, J., in *Ward* v. *Lloyd*, 7 Scott, N. R. 507. Willes, J. Is he to wait for a Crown-Office summons?] Bail attending to justify in a superior court are privileged: *Meekins* v. *Smith*, 1 H. Bl. 636. Gould, J., there referred to the Year Book, 11 Ed. 4, fo. 3, where it is said by Choke, J., that a "mainpernor" shall have the privilege of the court. In *Ex parte King*, 7 Ves. 312, it was held that a creditor attending before commissioners of bankruptcy (whether under a summons or not), to prove a debt, is privileged. [Willes, J. There the privilege is the creature of the

statute.] In *Anonymous*, 1 Dowl. P. C. 157, it was held that a defendant, when discharged from legal custody, has no privilege from arrest in returning home. In *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 675, a defendant who had been wrongfully arrested upon a Sunday, on a charge of forgery, without any warrant, was held to be properly arrested upon civil process as he was leaving the police-office after he had been ordered by the magistrate to be discharged. In *Anonymous*, 2 Salk. 544, "H. came to confess an indictment, and the court held that he had no privilege eundo et redeundo, because there was no process against him." [Cockburn, C. J. That is a very unsatisfactory report.] *Anonymous*, 11 Mod. 79, is a little more to the purpose,—"When a person complains to this court (B. R.) of a misdemeanor, and it is adjudged that his complaint is vexatious, this court will not allow the privilege of protecting him returning." In **[295]** *Goodwin* v. *London*, 1 Ad. & E. 378, 3 N. & M. 879, 2 Dowl. P. C. 504, a defendant who had been in custody on a charge of felony, and was acquitted and discharged, was held not to be privileged from arrest on his return home, unless it was clearly shewn that his apprehension on the criminal charge was a contrivance to get him into custody in the civil suit. [Cockburn, C. J. The magistrate was seised of the proceeding. The prisoners were under remand. The defendant was a material and necessary witness, and his non-attendance would have been highly culpable.] This certainly is a case of the first impression. There is no instance of such a privilege ever having been allowed or claimed. If a prosecutor is privileged, the privilege must equally extend to all who attend as witnesses. [Willes, J. It seems that a party attending as prosecutor or witness at Quarter Sessions, would be privileged from arrest: Com. Dig. Privilege (A.): but not where he is the party prosecuted. This was decided by the court of Queen's Bench in *Hare* v. *Hyde*, 20 Law J., Q. B. 185. There, the defendant, immediately after his acquittal and discharge on a trial at the Quarter Sessions for embezzlement, and whilst he remained in court, was arrested under a writ of ca. sa.: and the court refused to discharge him. Lord Campbell there says: "I am of opinion that the defendant had no privilege from this arrest, upon the ground of his being tried and acquitted and still present in court when arrested. After having been acquitted, he remained in court like any other of the circumstantes. The cases cited (*a*)[1] shew clearly, that, by the law in England, the defendant would have had no privilege whilst returning home from the court, **[296]** and, if so, he cannot have any such privilege by remaining as a spectator in the court. In some cases, circumstances might make it proper to interfere and discharge a person arrested in a court of justice; but, in this case, the question is whether we will summarily discharge a party from custody simply because he has been arrested in a court of justice: and I think there is no ground for our interference. We are not to vindicate the privilege of the court where the arrest took place, but only to see whether the defendant was entitled to any personal privilege from arrest under the process of this court: and I think he was not. I have the most sincere respect for the opinions expressed by the Irish judges in the cases cited (*a*)[2]: but they are contrary to the decisions of the courts here, and with the latter my opinion concurs."] There is no instance of this privilege having ever been extended to one attending as prosecutor or witness before a police-magistrate: and, at all events, it must be limited to persons attending as witnesses under compulsion of some legal process. There being no precedent for the privilege here claimed, and its allowance being so likely to lead to abuse, the court will pause before they entertain the application.

Atkinson, Serjt. (with whom was Lush, Q. C.), in support of the rule. The grounds of privilege are well stated by Lord Denman, in *Newton* v. *Constable*, 2 Q. B. 157, 1 Gale & D. 408, 9 Dowl. P. C. 933. To disentitle the present defendant to his discharge, it must be shewn, that, in attending at the police-court, he was a mere volunteer,—as in *Ex parte Cobbett*, 26 Law J., **[297]** Q. B. 293,—that he was under no legal obligation to appear and give evidence. It appears that he had been in attendance on the 4th of August, and that his presence was required on the 6th, when he was brought up under a writ of habeas corpus ad testificandum, and was bound over to prosecute and give evidence against the accused. The circumstance of his not having been bound

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(*a*)[1] *Anonymous*, 1 Dowl. P. C. 157, *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 675, and *Goodwin* v. *London*, 1 Ad. & E. 378, 3 N. & M. 879, 2 Dowl. P. C. 504

(*a*)[2] *Callans* v. *Sherry*, 1 Alcock & Nap. 125, *The King* v. *M'Loughlin*, 1 Alcock & Nap. 130, and *Kelly* v. *Barnwell*, and *Cooke* v. *Ale*, 6 Irish Law Rep. 94

over before the arrest makes no difference; he was equally under an obligation, legal as well as moral, to give his attendance. [Willes, J. It is not usual for magistrates to issue summonses for the attendance of witnesses, unless there is reason to believe that they will not attend voluntarily.] *Meekins* v. *Smith*, 1 H. Bl. 636, and the cases there cited, are authorities to sustain this application. And in the case of *In re M'Intosh*, 3 Law Times, 116, a witness voluntarily attending before an arbitrator was held to be privileged from arrest eundo, morando, et redeundo.

Cockburn, C. J. I cannot entertain a shadow of doubt that the rule for discharging the defendant out of custody should be made absolute. It is unnecessary upon this occasion to decide whether or not a party proceeding in the first instance to a police-court for the purpose of putting the criminal law in motion would be entitled to be discharged from arrest on civil process, because here the matter may be disposed of on a narrower ground. It appears that the defendant had gone before a magistrate at the Mary-le-bone police-court, and obtained a warrant against three individuals upon a charge of felony; that the accused were brought before the magistrate and examined, and remanded to a future day; that the defendant attended before the magistrate on the last-mentioned day as prosecutor and witness; that the accused were again remanded; and that, immediately on his leaving the police-court, the **[298]** defendant was arrested on a ca. sa. at the suit of the present plaintiff. Now, it is clear that the magistrate might, if he had entertained any doubt as to the defendant's willingness to attend on the adjourned day, have bound him over to appear, or caused him to be served with a summons for that purpose; and the defendant's legal obligation to appear would have been unquestionable: and I do not see that it can make any difference that the defendant was willing to attend without that ceremony. I have no doubt that a police-court where charges are initiated and investigated before a magistrate, is a court within the rule as to the privilege of witnesses. Therefore, the defendant having been arrested whilst leaving the court where he had been attending to give evidence in a matter pending before the court, is entitled to be discharged. We cannot now go into the collateral question whether or not the prosecution was well founded. It may, however, be observed that the magistrate so far thought it a fit case for investigation, as to remand the prisoners twice, and ultimately to commit them for trial. We must take it, therefore, that it was not a collusive proceeding. The protection must be allowed.

Williams, J. I am entirely of the same opinion. The case admits of no reasonable doubt, when the facts are closely looked at. The magistrate thought the charge one fit for investigation, and the defendant was in attendance in obedience to his request: there can be no doubt, therefore, as to the privilege. It clearly can make no difference that the magistrate did not think it necessary to issue a summons to compel the defendant's attendance. There is no case precisely in point; but all the principles upon which the cases proceed are applicable here. The privilege is not that of the witness, but of the court, for the purpose of insuring a due administration of justice.

[299] Crowder, J. I am of the same opinion. There was a matter pending before the magistrate at which the defendant was attending and expected to attend again on a future day to prosecute and give evidence. That the defendant did not attend by virtue of a summons, clearly makes no difference. It is not usual, as my Brother Willes has observed, to summon witnesses in such cases, where no doubt exists as to their willingness to attend. There is nothing to differ this from the ordinary case of a witness attending court in a proceeding civil or criminal. *Cobbett's case* is altogether distinguishable: there, the applicant was not in the course of performing a public duty; he was, as has been said, a mere volunteer.

Willes, J. I am entirely of the same opinion. The principle upon which the privilege now in question rests is this, -that a suitor who has obtained a judgment in a civil action, cannot use the process of the court for the purpose of withdrawing from another court a witness or other person without whose presence full justice cannot be done. This principle applies to every court of justice, criminal as well as civil: and it seems to have been applied to the case of bail so long ago as the 11th of Edw. 4, —see *Meekins* v. *Smith*, 1 H. Bl. 636. It has been suggested that the privilege must at all events be limited to persons attending under compulsion of process. There clearly is no foundation for that. To hold that a witness is protected only where he attends in obedience to process, would be to say that process must be sued out in every case to enforce the attendance of witnesses; whereas, in practice, it is perfectly

well known that witnesses frequently attend without being subpœnaed. And this is more especially the case in proceedings like that now in question. The 16th section of the 11 & 12 Vict. c. 42, provides that a [300] magistrate may issue his summons to enforce the attendance of a witness, where it is made to appear that his or her evidence is material, and there is reason to believe that he or she will not attend without such summons. It appears, therefore, that it is not only the ordinary course not to issue summonses to compel the attendance of witnesses upon these occasions, where they are willing to attend without: but it is in the due and regular course of law that the attendance of witnesses shall be given without any compulsory process. Here, the defendant was attending in the due and regular course of justice applicable to proceedings in such courts: and I am clearly of opinion that his case falls within the rule.

Rule absolute.

BALFOUR AND ANOTHER *v.* THE OFFICIAL MANAGER OF THE SEA FIRE LIFE ASSURANCE COMPANY. Nov. 7th, 1857.

[S. C. 27 L. J. C. P. 17; 3 Jur. N. S. 1304; 6 W. R. 19.]

Forbearance of a debt due from a third person is a sufficient consideration for the giving of a bill or note.—To an action by indorsees against the drawers of a bill of exchange, the court refused to allow the defendants to plead, by way of equitable defence, that a debt was due to the plaintiffs from a public company which had professed to assign its business and obligations to the defendants, that the bill was afterwards given by the defendants in consideration of that debt, and upon the supposition that the assignment was legal and valid, whereas it proved to be illegal and void,—the proposed plea affording no defence to the action, either legal or equitable.

This was an action on a bill of exchange for 500*l.*, drawn by the Sea Fire Life Assurance Company, at sixty days' date, upon their cashier,—in the same form as the instruments in the cases of *Ellison* v. *Collingridge*, 9 C. B. 570, and *Allen* v. *The Sea Fire Life Assurance Company*, 9 C. B. 574,—and indorsed to the plaintiff.

Garth, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why the de-[301]-fendants should not be at liberty to plead, in addition to a denial of the making of the bill, a plea, upon equitable grounds, to the following effect, —that, before the making of the bill, a debt was due to the plaintiffs from a company called the Port of London Sea Fire and Life Assurance Company, which company had, in October, 1849 (before the date of the bill declared on), professed to assign all their business and obligations to the defendants: that the bill was afterwards given by the defendants upon the mistaken supposition on the part of the plaintiffs as well as of the defendants that the said assignment was valid, and for no other reason whatever; whereas, in truth, the said assignment was a nullity, and the defendants were never under any obligation whatever to satisfy the said debt.

Phipson and G. Tayler now shewed cause. The proposed plea affords no defence to the action. At law, it clearly would be no defence. The defendants, at the time they gave the bill in question, had entered into an agreement whereby they professed to take upon themselves all the obligations of another company; and they gave the bill under an impression that they were bound to give it to satisfy a debt due to the plaintiffs from that other company. That was a perfectly good consideration. It is precisely like the case of *Sowerby* v. *Butcher*, 2 C. & M. 368. There, the defendant drew in favour of the plaintiff a bill which his brother ought to have drawn; and, though it was contended, that, as between the plaintiff and the defendant, there was no consideration for the drawing, the court held, that, as the defendant had chosen to draw a bill under circumstances in which the plaintiff had a right to have a bill, the defendant was bound: and Bayley, B., said: "He (the defendant) might have given a bill or not, as he thought fit, and he might have given a bill stating [302] on the face of it that he drew it for Robert Butcher (his brother); and, if he had stated that he drew it as agent, and had asked for a written acknowledgment that he should only be held liable as agent, he would have acted the part of a prudent man, and got rid of the personal obligation to which, by signing generally, a party is liable. But it

is said there was no consideration for the defendant's binding himself personally. That is not necessary. He professes to bind himself personally: and the answer to the objection that there was no consideration, is, that the plaintiff had a right to have a bill which should bind somebody." By the giving of the bill, the plaintiffs' remedy has been suspended, and the third party has had the benefit of that. Then, it is said that the proposed plea shews a defence upon equitable grounds. That clearly is not so. This is not like a case where a party has been induced to give the bill by fraud or misrepresentation: nor is it a case for an application to a court of equity to reform the contract. The defendant has no claim in equity to be relieved from the performance of his contract merely because it has been decided by the House of Lords that the amalgamation of these two companies, and consequently the agreement upon the faith of which the defendants drew the bill in question, was invalid. The plaintiffs have sustained a detriment by the suspension of their remedy and the insolvency of the other company. The proposed plea was disallowed by Cresswell, J., at chambers, because there was no equity in it.

Garth, in support of the rule. The plea proposed to be pleaded discloses matter which clearly amounts to an equitable defence. The moment after the defendants had given the bill in question, if the plaintiffs had discovered that the assignment of the business by the Port of London Assurance Company was invalid, they might **[303]** have gone to their debtors and insisted upon being paid the amount of their claim, on the ground of the bill having been given under a mistake. Forbearance at his request during the currency of the bill, is the only consideration for the bill from a third party: *Nelson* v. *Serle*, 4 M. & W. 795. There, in a declaration against the defendant as maker of a promissory note, he pleaded that one J. W., before and at the time of his death, was indebted to the plaintiff for goods sold, and that the amount was due at the time of the making of the note; that the plaintiff, after J. W.'s death, applied to the defendant for payment, and the defendant, at the plaintiff's request, for and in respect of the debt so remaining due to the plaintiff, and for no other consideration, made the note and delivered it to the plaintiff; and that J. W. died intestate, and no administration was granted, and there was no executor of his estate, nor any person liable for the debt; and that there never was any consideration for the making of the note except as aforesaid: and it was held by the Exchequer Chamber, — reversing the judgment of the court of Exchequer. — that this was a good plea. [Cockburn, C. J. That is a totally different point.] In Byles on Bills, 7th edit. 109, it is said that "a debt due from a third person is a good consideration for a note payable at a future day; and so is a debt due from the defendant and a third person" (*a*). "At least," adds the learned author in a note, "if the note be payable at a future day, for then the note amounts to an agreement to give **[304]** time to the original debtor, and that indulgence to him is a consideration to the maker. Secus, if the original debtor is dead, and has no representative: *Nelson* v. *Serle*, 4 M. & W. 795, reversing *Serle* v. *Waterworth*, 4 M. & W. 9, 9 Dowl. P. C. 684. But, if the note be payable immediately, it is conceived that the pre existing debt of a stranger could not be a consideration, unless credit had been given to the original debtor at the maker's request. *Crofts* v. *Beale*, 11 C. B. 172, acc." Here, the only consideration there could be was, the plaintiffs' forbearance to sue the original debtors: but, the bill having been given under a mistake, they were not bound to wait the sixty days. [Willes, J. Suppose A. supplies goods to B., and, for the convenience of the parties it is agreed that he shall draw for the amount upon C., who is in the habit of receiving consignments from B., and therefore accepts, — both B. and C. being under the impression that the latter has or will have funds of the former's to meet the bill at maturity, — but it turns out that that expectation is fallacious; would that afford any equitable defence to C. to an action by A. upon the bill?] Clearly not: but that is very foreign to the case now before the court, which is one of mutual mistake. [Cockburn, C. J. Forbearance or delay being the consideration for the bill, what is it to the plaintiffs that the defendants have mistaken their position with relation to the

(*a*) Citing *Popplewell* v. *Wilson*, 1 Stra. 264, *Coombs* v. *Ingram*, 4 D. & R. 211 *Sowerby* v. *Butcher*, 2 C. & M. 368, 4 Tyrwh. 320, *Garnet* v. *Clarke*, 11 Mod. 226, *Rabnet* v. *Bristow*, 1 C. & J. 231, 1 Tyrwh. 84, *Wilders* v. *Stevens*, 15 M. & W. 208: and see *Lechmere* v. *Fletcher*, 1 C. & M. 623, *Baker* v. *Walker*, 11 M. & W. 465, *Walton* v. *Mascall*, 13 M. & W. 452, *Cook* v. *Lamy*, Car. & Marsh. 510.

company whose rights and liabilities they had consented to take upon themselves?] The bill would never have been given, but for the mistake: there was nothing binding the plaintiffs to forbear. [Cockburn, C. J. Suppose A. gives out to the world that he has taken B.'s business, and will liquidate all demands against him; and a creditor of B. comes and asks for payment of a debt, and agrees to take A.'s acceptance for it; and, during the currency of the bill, **[305]** A. discovers that B. has cheated him on the sale of his business,—would that be any answer to the creditor to whom the bill was given, and who has been induced to forbear?] The present case is put upon the ground of mutual error in the original transaction. [Willes, J. The rule is, that, in the case of a mutual mistake, each party must bear his own share of the consequences of the error, unless it be a mistake in the very contract which is sought to be enforced. Have you any authority to shew that equity will reform a contract for some collateral mistake?] In Spence's Equitable Jurisprudence, p. 635, it is said, upon the authority of Brooke, Conscience and Subpœna, pl. 4, who vouches the Year Book, 37 H. 6, fo. 13, "The following case comes very near to relief in respect of mutual ignorance of law, both parties having, from such ignorance, made a mistake as to the materia of the thing sold. The plaintiff had purchased from the defendant certain debts that were due to him, and he gave the vendee a bond for the price. The plaintiff afterwards filed a bill to be relieved from the bond, on the ground that nothing passed to him by the assignment of the debts, they being choses in action, not assignable in law. The Chancellor, with the concurrence of the justices of both benches, whom he called to his assistance, decided that the bond should be delivered up, as given without consideration, 'pur ceo que le plaintiff ne poet aver quid pro quo;' and the defendant, on refusal, was sent to the Fleet." [Cockburn, C. J. There is no mistake here as to the consideration, as between the plaintiffs and the defendants. Willes, J. The case cited from Brooke is wrong for two reasons,—first, that no consideration at all is necessary for a bond,—secondly, that now debts may be the subject of assignment.]

Cockburn, C. J. I am clearly of opinion that the **[306]** proposed plea ought not to be allowed. It seems to me to be a very plain and simple case. The plaintiffs had a claim of 500l against the Port of London Sea Fire and Life Assurance Company. That company was supposed to be amalgamated with another called the Sea Fire Life Assurance Company, the present defendants; but it turned out that the steps taken for the purpose of effecting such amalgamation were insufficient with reference to the constitution of the company. In the mean time, however, and whilst the two companies believed themselves to have been duly and properly amalgamated, the plaintiffs, in satisfaction of their claim against the Port of London Sea Fire and Life Assurance Company, agreed to take a security from the present defendants, and to forbear their claim against the former company. As between the two companies, it appears afterwards that the supposed amalgamation was a mistake, and that there was a failure of consideration for the defendants' taking upon themselves this liability. But that is nothing to the plaintiffs, unless it is shewn that they have done something to contribute to the error. It does not appear that they have. But, in the full belief of the validity of the transaction, they take the bill, and forbear during its currency to press their claim. That forbearance at the defendants' request was clearly a good consideration for the giving of the bill; and there is no ground either in law or equity, or in common justice, why they should not have their remedy against the defendants. The rule must be discharged.

Williams, J. I am entirely of the same opinion. It is a fallacy to say that there has been any mistake about this contract. The defendants intended to give the bill, and they did give it, for a good and valuable consideration, viz. the forbearance of a debt due from **[307]** third parties to the plaintiffs. The mistake, as it is called, was simply this,—the defendants' motive for giving their acceptance was based upon a mistaken state of things. That is their misfortune. But it certainly affords no valid ground for holding that they are not liable upon their contract.

Crowder, J. I also think that the proposed plea would be no defence to the action, either legal or equitable. The whole argument on the part of the defendants proceeds upon the supposition that the contract as between the plaintiffs and the defendants was founded on a mistake. Now, the contract between the plaintiffs and the defendants was merely the giving of a bill by the latter in discharge of a debt due from third parties to the former, the consideration being the forbearance of the plaintiffs during the currency of the bill. The only mistake was, that the defendants

erroneously supposed that the rights and obligations of those third parties had been legally and validly assigned to them. What answer can that be to the plaintiffs' claim? No case has been cited to shew that that would in a court of equity invalidate the plaintiffs' right to sue upon the bill. It is said that the only consideration for the giving of the bill is forbearance; and that the plaintiffs, as soon as they discovered the mistake which had been committed, might have repudiated the transaction, and sued the Port of London Sea Fire and Life Assurance Company. That, however, is assuming the whole question. There is no mistake as to the defendants' intention to give the bill, or as to the plaintiffs' forbearance from suing the other company. The case in no degree differs from the ordinary one where a party gives a bill for the debt of a third person, upon the faith of certain property having passed to him from such third person, and it afterwards turns out to be a mistake. It would [308] not alter the case at all that the plaintiff was under the same misapprehension.

WILLES, J. I am of the same opinion. With regard to the authority cited from Brooke's Abridgment, I should have thought a much better authority might have been found for the proposition that a court of equity would prevent a party from suing upon a security the consideration for which had failed. The court there seem to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, long long since exploded, certainly so long since as the year 1791, and probably two hundred years before, —as appears from *Master* v. *Miller*, 4 T. R. 340, where Buller, J., says: "It is laid down in our old books, that, for avoiding maintenance, a chose in action cannot be assigned or granted over to another: Co. Litt. 214 a., 266 a.; 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case." However, taking the case in Brooke to be an authority, it is only an authority for this, that a bond will be relieved against if it be shewn that the consideration has failed. But, has the consideration for the giving of this bill failed? The plaintiffs have abstained from bringing an action against the Port of London Sea Fire and Life Assurance Company for the debt due from them during the time the bill was running. It is said, that, besides the forbearance, there is also the consideration of the contract under which the defendants thought themselves bound to pay all the obligations of the Port of London Sea Fire and Life Assurance Company. That, no doubt, was the defendants' motive for giving the bill; but it was no part of the consideration as between the plain-[309]-tiffs and the defendants. But then it is said that the defendants acted under a mistake. I think there was no mistake. The defendants intended to give this bill. There was a mistake as to the effect of the amalgamation. But the plaintiffs were no parties to that contract. And there was no misrepresentation. The proposed plea presents no shade of defence. The rule must be discharged, —the plaintiffs' costs to be costs in the cause.

Rule discharged accordingly.

WEAVER, *Appellant*, JOULE AND OTHERS, *Respondents*. Nov. 18th, 1857.

In a case stated by a county court judge, upon an interpleader summons, for the opinion of this court, after setting out the facts under which a bill of sale had been given to secure a past debt and a contemporaneous advance, and finding that the transaction was bonâ fide, the question submitted was, "whether the bill of sale was void as against the execution creditors (the respondents), seizing after the first instalment secured by the bill of sale became due, and whilst the debtor was allowed to remain in possession, and with his name over the door as it had been before,"—Held that, there being nothing to shew that the deed was fraudulent, the appellant was entitled to judgment.

The respondents entered a plaint in the county court of Staffordshire at Wolverhampton, on the 16th of October, 1856, against one Samuel Blainey, then an innkeeper at Tettenhall, near Wolverhampton, to recover a balance of account for goods sold, amounting to 16*l.* 12*s.*, and the summons was served on the said Samuel Blainey on the 22nd of October, 1856. The plaint was heard on the 3rd of November, 1856, when Blainey was ordered to pay the said sum of 16*l.* 12*s.*, together with costs, by instalments of 3*l.* 3*s.* 2*d.* on the 17th of No [310]-vember, 1856, and 2*l.* a month after-

wards. The first instalment not having been paid on the 17th of November, 1856, an execution was afterwards issued for the debt and costs, amounting in the whole to 21l. 5s. 2d., besides possession fees. The high-bailiff of the county-court proceeded to levy upon the goods in the possession of Blainey on or about the 27th of November, 1856; whereupon the present appellant gave a written notice to the high-bailiff stating that she claimed the goods which he had seized in execution, and setting forth the particulars of her claim. An interpleader summons was afterwards issued; and thereupon the judge of the said county-court at Wolverhampton, on the 18th of December, 1856, proceeded to hear and determine as to the validity of the said claim (*a*).

The following facts were proved at the hearing:—

The appellant is an unmarried lady, residing at Oldbury, near Bridgenorth, in the county of Salop, and is the sister of Blainey's wife. In December, 1849, the appellant lent Blainey 100l., for which he gave her his promissory note dated the 5th of December, 1849, payable on demand. Since that time, the appellant has received from Blainey at various times sums amounting to 30l., for interest,—the last sum for interest having been paid on the 5th of December, 1855. Between the month of December, 1849, and the month of July, 1856, **[311]** the appellant, at Blainey's request, advanced him at different times several sums of money amounting in the whole to upwards of 200l., some of which he afterwards repaid. In the beginning of June, 1856, Blainey applied to the appellant for a further loan of 40l., which she at first refused to lend him: but, subsequently, it was arranged that the appellant should advance the 40l., and Blainey should give her a promissory note for that sum and also for the balance of the several sums she had previously lent him. Accordingly, the appellant advanced the 40l., and, on the 18th of June, 1856, Blainey signed a promissory note for 130l., payable to the appellant or order, on demand.

Between the months of July and September, 1856, the appellant received from Blainey 30l. in cash and goods, at different times, on account of the said note.

In September, 1856, the appellant heard that Blainey had been deprived of his spirit-licence, and she thereupon applied to him to re-pay her some of her money, and threatened to proceed against him unless he paid her some or gave her some security for it. Blainey said that, if she would lend him 30l. more, he would give her security. She refused to lend him that sum; but she afterwards saw Blainey, and agreed to advance him the 30l. provided he would assign over to her all his effects as a security not only for the 200l. he then owed her, but also for the 30l. to be advanced. Blainey wanted to give security for the 30l. only, but, as the appellant objected, he said he would assign over the things, provided she would let him have possession of them.

On the 15th of October, 1856, the appellant and Blainey called at the office of Mr. Adams, a solicitor at Wolverhampton, and gave instructions for the assignment. The deed of assignment, of which the following is a copy,—was prepared and executed on the 22nd **[312]** of October, 1856. Mr. Adams acted as the attorney of both parties, and was introduced by Blainey to the appellant, to whom he (Adams) was previously a stranger:—

"This indenture, made the 22nd of October, 1856, between Samuel Blainey, of, &c., common brewer, of the one part, and Emma Weaver, of, &c., of the other part: Whereas the said Samuel Blainey now stands indebted to the said Emma Weaver in the sum of 200l. for money at different times heretofore lent and advanced by the said Emma Weaver to the said Samuel Blainey at his request, which he the said Samuel Blainey doth hereby admit and acknowledge: And whereas the said Samuel Blainey, being in want of money to meet the pressing demands of his creditors, has lately applied to the said Emma Weaver to advance and lend him a further sum of 30l., which she the said Emma Weaver refused: And whereas the said Emma Weaver, immediately before determining to commence proceedings against the said Samuel

(*a*) Under the 13 & 14 Vict. c. 61, s. 14, the superior courts had no jurisdiction to hear an appeal from the decision of the county-court upon an interpleader summons: *Fraser, App., Fothergill, Resp.*, 14 C. B. 298; but the recent statute 19 & 20 Vict. c. 108, s. 68, gives them such jurisdiction where the money claimed, or the value of the goods or chattels claimed, or the proceeds thereof, exceeds 20l., as well as in actions of replevin where the amount of rent or damages exceeds 20l., and in actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20l.

Blainey for recovery of the said sum of 200l., proposed to the said Samuel Blainey to advance and lend him the said sum of 30l., upon having a mortgage of all the personal property of the said Samuel Blainey as security for the said sum of 200l. heretofore advanced, and also as security for the said sum of 30l. now lent and advanced, making together the sum of 230l., with interest: And whereas the said Samuel Blainey, in order to obtain the said sum of 30l. as a further advance for the purposes aforesaid, has consented and agreed to give the security required: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the said sum of 200l. now due and owing by the said Samuel Blainey to the said Emma Weaver; and also in consideration of the further sum of 30l. in hand now lent and advanced by the said Emma Weaver to the said Samuel Blainey,—the [313] receipt whereof he the said Samuel Blainey doth hereby admit and acknowledge,—he the said Samuel Blainey hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said Emma Weaver, her executors, administrators, and assigns, all and singular the household furniture, stock in trade, brewing implements, linen, glass, earthenware, metal ware, cart, harness, pig, and all other goods, chattels, and effects whatsoever belonging to him the said Samuel Blainey, and being in and about the house, yard, and out-offices now in the occupation of the said Samuel Blainey, known or called by the name of the Mitre, situate at the Green, Tettenhall, near Wolverhampton aforesaid,—all of which before-mentioned personal estate and effects are more particularly described in the inventory hereunto annexed; To have, take, receive, and enjoy the said personal estate and effects intended to be hereby assigned, unto the said Emma Weaver, her executors, administrators, and assigns, as her own property and effects, free from all claim and demand of him the said Samuel Blainey, his executors or administrators, and of every other person and persons whomsoever; except and reserved, nevertheless, unto the said Samuel Blainey, his executors and administrators, so long as he shall continue to pay off the said sum of 230l. and interest hereby secured, by the instalments hereinafter stipulated, at the days and times and according to the proviso hereinafter expressed, the free use, possession, and enjoyment of the said personal estate and effects hereby assigned, but subject to the following proviso, namely, Provided always, that, in case the said Samuel Blainey, his executors or administrators, shall henceforth pay or cause to be paid unto the said Emma Weaver, her executors, administrators, or assigns, the sum of 5l. on the 5th of November next, and the sum of 8l. on every suc [314] ceeding twenty-eighth day afterwards until the whole of the said sum of 230l. shall be fully paid and satisfied, together with interest thereon at the rate of 5l. per cent. per annum, then this indenture shall become void: And the said Samuel Blainey, for himself, his executors and administrators, hereby covenants with the said Emma Weaver, her executors, administrators, and assigns, to pay the said sum of 230l., with interest as aforesaid, by the instalments, at the times, and in manner aforesaid, without deduction: Provided also, that, in case default shall be made by the said Samuel Blainey, his executors or administrators, in payment of any one of the instalments at the time the same shall become due, then it shall be lawful for the said Emma Weaver, her executors, administrators, and assigns, at any time afterwards within his, her, or their discretion, to enter the said house, yard, out-offices, and other premises of the said Samuel Blainey, or to enter any other place wherein the said personal estate and effects hereby assigned, or any part or parts thereof, may be supposed to be secreted or placed; and, to give greater facility for the said Emma Weaver, her executors, administrators, and assigns, so to do, it shall also be lawful for the said Emma Weaver, her executors, administrators, and assigns, or for any person or persons by her, his, or their order, to break and force open any outer or inner door of the present or any after-taken dwelling-house and premises of the said Samuel Blainey, or any other place or building wherein any of the said personal property shall be confined, or supposed to be confined, without being liable to any indictment for forcible entry, or any action, suit, or process of law whatsoever, and to receive and take possession of all or any part of the said personal estate and effects hereby assigned, and afterwards to sell and dispose of the same for such price or prices as can be reasonably got for the [315] same, and thereout in the first place to retain to and reimburse herself the said Emma Weaver, her executors, administrators, and assigns, all costs, charges, and expenses which may be incurred in and about making any such sale or sales, and also in and about the receipt and recovery of the

said sum of 230l., and, in the next place, to retain to and reimburse herself the said Emma Weaver, her executors, administrators, and assigns, the said sum of 230l., or such sum of money on account thereof as shall remain after making the deductions aforesaid: Provided further, that, in case the said personal estate and effects intended to be hereby assigned, shall not realize the said sum of 230l. by sale thereof, after payment of all expenses, the remainder shall be applied in part payment of the said sum of 230l. and interest, and nothing herein contained shall prejudice the right or remedy of the said Emma Weaver, her executors, administrators, and assigns, to recover payment of the balance, by action upon the covenant. In witness," &c.

A schedule was annexed to the deed, comprising the furniture and effects in the house and premises, and the stock of ale and porter in the cellars.

The 30l. was then advanced to Blainey by the appellant.

The appellants swore, on the trial, that she did not know the first instalment under the bill of sale fell due on the second day after the court day when judgment was given against Blainey. It was arranged between the appellant and Blainey that the appellant should have power to take possession; and, before she left Adams's office, it was arranged that the first instalment should be payable on the 5th of November. Blainey was to have possession of the effects as long as he paid the instalments. Mr. Adams had not been Blainey's attorney for more than a month previously. When Blainey and **[316]** the appellant left Adams's office, they left the bill of sale there, and went to Blainey's house; and it was then arranged that Blainey should sell the stock of ale, and pay her 1s. a gallon; and Blainey sold one hundred and twenty gallons, for which he had since paid her 6l.; and he was to continue in possession, and his name to remain over the door.

On cross-examination, the appellant also swore, that, when she gave Adams the order for the assignment, she had no knowledge whatever of Blainey being sued, or she would not have lent him the money; and that nothing was said to her about Blainey dividing the money amongst his creditors.

The appellant swore, that, when the assignment was executed, she had no knowledge that Blainey owed the debt of 16l. 12s. to the respondents; but it was proved, that, on the same day, soon after the execution of that deed, and while she was returning with Blainey to Tettenhall, a summons at the suit of the respondents was served upon Blainey in her presence.

A few days afterwards, Blainey brought 20l. to Adams, and desired him to write to all his creditors, offering them a composition of 2s. 6d. in the pound upon the amount of their respective debts. Adams, accordingly, on the 31st of October, 1856, wrote to the creditors, including the respondents, making them that offer. The 20l. above mentioned was part of the 30l. advanced by the appellant at the time of the execution of the assignment. The respondents declined to accept the composition, and treated the assignment as fraudulent.

A copy of the assignment, with an affidavit of its execution, was registered on the 5th of November, 1856, pursuant to the statute 17 & 18 Vict. c. 36.

After the assignment was executed, Blainey remained in possession of the goods assigned, and to all appear-**[317]**-ance carried on the business of a retail brewer as though no such assignment had ever been made; but payments were made by him to the appellant in respect of the ale, &c. included in the assignment, and sold by him in the course of his business.

On the 5th of November, 1856, the first instalment due under the assignment became payable, but was not paid. The appellant, however, did not enforce her power of sale under the assignment, but allowed Blainey to remain in possession as before.

When the respondents levied their execution on the 28th of November, Blainey was still in possession, and his name was still over the door.

On the 20th of January, 1857, the judge of the county-court gave judgment on the interpleader summons in favour of the execution-creditors.

The question for the opinion of the court is, whether the above assignment or bill of sale was void as against the respondents, as execution-creditors of Blainey, seizing after the first instalment secured by the bill of sale became due, and whilst Blainey was allowed to remain in possession, and with his name over the door, as it had been before. If the court should be of opinion that the assignment was void, the judgment of the county-court was to stand; but, if the court should be of opinion that the

assignment was not so void as against the respondents, the judgment of the county-court was to be reversed, and judgment entered for the appellant.

John Gray, for the appellant (*a*)[1]. The facts which [318] the judge of the county-court has found, clearly entitle the appellant to judgment. The learned judge seems to have acted upon *Twyne's case*, 3 Co. Rep. 80, as that decision was understood before it was explained by the recent authorities.

Dowdeswell, for the respondents (*a*)[2]. The assignment was fraudulent. [Cockburn, C. J. The county-court judge has not so found.] The whole was a question of fact. In the notes to *Twyne's case*, in Smith's Leading Cases, vol. i., p. 1, it is said that "it may be safely laid down, that, under almost any circumstances, the question of fraud or no fraud is one for the consideration of the jury;" citing, amongst other cases, *Martindale* v. *Booth*, 3 B. & Ad. 498, and *Lindon* v. *Sharp*, 6 M. & G. [319] 898, 7 Scott, N. R. 730. The judge has done nothing more here than state facts, leaving it to the court to say whether the assignment was bonâ fide or not. [Cockburn, C. J. He evidently founds his judgment upon the fact of the assignor having remained in possession of the goods after the first instalment became due. If the facts which the judge has found do not disentitle the appellant to judgment, she is to have judgment. Unless he has found against the respondents upon the facts, there is nothing submitted to us. He evidently wants to know whether under the circumstances he has stated the assignment was valid.] He does not say so. In truth there is no question of law presented for decision.

Cockburn, C. J. The question submitted to us really is not arguable. Without saying more, I think the appeal must be allowed.

Crowder, J. The judge asks us, in effect, whether, in point of law, under the circumstances he has presented, the appellant is entitled to judgment. I am of opinion that she is.

Willes, J. It is expressly found by the case that the assignment was bonâ fide.

Judgment for the appellant, with costs.

[320] Flight *v.* Gray. Nov. 25th, 1857.

An equitable defence under the 17 & 18 Vict. c. 125, s. 83, is admissible only where it sets up matter in respect of which a court of equity would have granted relief unconditionally.—The court therefore refused to allow a defendant to plead to an action against him as acceptor of a bill of exchange, that the bill was a renewal of a former bill which had been accepted upon a distinct understanding that it was to be renewed from time to time until the defendant should be of ability to meet it, he paying in the meantime interest at 10 per cent., that the defendant had always performed his part of the agreement, but that the plaintiff had refused to renew the

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(*a*)[1] The points marked for argument on the part of the appellant, were,—

"That, there having been a valid consideration for the assignment, and the deed having been duly filed, with an affidavit, pursuant to the 17 & 18 Vict. c. 36, it was not void as against the respondents, and that the case disclosed no such evidence of fraud on the part of the appellant and Blainey, or either of them, as to defeat the legal effect of the assignment, which passed the property in the goods to the appellant, who, by registering the same pursuant to the statute, and before the seizure by the high-bailiff, acquired a good right to the goods as against the respondents."

(*a*)[2] The points marked for argument on the part of the respondents, were,—

"1. That, on the default of Blainey in payment of the first instalment due under the bill of sale of the 22nd of October, 1856, the appellant became absolutely entitled to the possession of the goods and chattels mentioned in the bill of sale; and that the continuance of Blainey in the possession and exclusive use of the said goods and chattels subsequently to the said 5th of November by the appellant's consent, was evidence of fraud, which justified the judge of the county court in deciding that the said bill of sale was void as against the respondents:

"2. That the question whether the bill of sale was or was not void as against the respondents, was a question of fact; and that, the judge of the county court having decided that question in favour of the respondents, no appeal lay against his decision."

bill upon application for that purpose, although he well knew that the defendant was not of ability to pay it.

This was an action by the drawer against the acceptor of a bill of exchange for 75l., bearing date the 2nd of March, 1857, and payable at four months' date; with a count upon accounts stated.

Henderson, on a former day, obtained a rule to shew cause why the defendant should not be at liberty to plead the following pleas,—1. Failure of consideration, the consideration being the granting of a life-policy, which was never granted, that the bill was a renewal of one given for securing the first year's premium, and that no policy had been granted, and alleging that the accounts were stated concerning the bill. 2. An equitable plea, stating, as the fact was, that the bill was a renewal of a bill accepted upon a distinct promise by the plaintiff, that, if the defendant would pay discount at 10 per cent., the plaintiff would renew from time to time until the defendant was of ability to meet the bill; that the defendant accepted the bill upon the faith of that promise, which he would not otherwise have done, and had always kept his part of the contract, but the plaintiff had broken it, and had refused to renew upon the defendant's application to him to do so; and that the defendant had never been of ability to pay the bill declared on, as the plaintiff always knew; and alleging that the accounts were stated of and concerning the bill sued on.

Petersdorff shewed cause. The defendant, by the equitable plea proposed to be pleaded, seeks to set up a contemporaneous oral contract to vary the character **[321]** of the security declared on, which, though it might be the subject of a cross-action, cannot control or suspend the plaintiff's right: *Adams* v. *Wordley*, 1 M. & W. 374; *Ford* v. *Beech*, 11 Q. B. 852; *Webb* v. *Spicer*, 13 Q. B. 886, affirmed in Cam. Scac. 13 Q. B. 894, and in Dom. Proc. 894 (*Salmon* v. *Webb*), 3 House of Lords Cases, 510. [Cockburn, C. J. That will not be disputed by Mr. Henderson: all those cases were before equitable pleas were allowed.] To bring himself within the 83rd section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the defendant must shew that the matter proposed to be pleaded would have entitled him to an absolute perpetual and unqualified injunction in a court of equity: *Mines Royal Societies* v. *Magnay*, 10 Exch. 489, 493; *Steele* v. *Haddock*, 10 Exch. 643; *Teede* v. *Johnson*, 11 Exch. 840; *Wodehouse* v. *Farebrother*, 5 Ellis & B. 277; *Wood* v. *The Copper-Miners Company*, 17 C. B. 561. [Cockburn, C. J. The object of these provisions is, to enable a court of law to do substantial justice between the parties, by doing that at once which might be done by having recourse to a court of equity. What would a court of equity do here? Would an injunction be granted to restrain the plaintiff from obtaining the fruits of a judgment at law?] *Woollam* v. *Hearn*, 7 Ves. 211 b., shews that this would not be a case for relief in equity to the extent required by the authorities to justify such a plea as this. [Cockburn, C. J. The defendant is seeking not to substitute another contract for that declared on, but to bring the real, the entire contract before the court. A court of equity would probably grant an injunction upon terms, on payment of the interest, for instance, and tendering a new acceptance: but that we have no power to enforce.]

Henderson, in support of his rule. The relief which **[322]** a court of equity would grant in this case would be permanent and unconditional as to the bill sued on. [Williams, J. Would it not be part of the decree in equity, that the renewed bill should be given and the 10 per cent. paid?] The plaintiff has brought an action which he ought not to have brought, inasmuch as he is under an obligation to receive a renewed bill, which has been tendered. The defendant could get no relief in equity, unless he shewed that he was prepared to perform his part of the contract. [Cockburn, C. J. The plaintiff is entitled to something more than a tender: the effect of the plea is, to stay his action.] *Innes* v. *Munro*, 1 Exch. 473, shews that this plea presents a substantial defence: for, for all purposes of equity, a contemporaneous oral agreement is as good as a written agreement. [Willes, J. The case you cite from 7 Vesey shews the contrary. Have you any case shewing that *Adams* v. *Wordley* is not good equity as well as law?] This plea may be good at common law. [Cockburn, C. J. We ought to be informed what sort of relief a court of equity would grant in such a case,—whether absolute or conditional, and upon what terms. If conditional relief only would be granted, then, for the reasons stated in the cases referred to, we cannot allow the proposed equitable defence to be put upon the record.]

Henderson, on a subsequent day, stated, that he had ascertained, upon inquiry, that a court of equity, under the circumstances here stated, would only grant the defendant relief upon his tendering a renewed bill and paying the discount, and that an order to do so would form part of the decree.

Cockburn, C. J. This rule must be discharged. I am of opinion that we can only allow an equitable plea [323] under the 83rd section of the Common Law Procedure Act, 1854, where, if the application were made under the 86th section, we would decline to set it aside. The 83rd section, we think, only enables the defendant to plead by way of equitable defence such facts as would entitle him to absolute and unconditional relief in a court of equity. It only applies where this court can deal out the same measure of justice between the parties as the court of equity would do. It seems that, under the circumstances of this case, a court of equity would compel the defendant to do justice, that is, to give the renewed bill and pay the 10 per cent. discount, before they would restrain the plaintiff's proceedings at law. We have no power to enforce this. The plea alleges a tender; but, when the defendant has got the benefit of his plea, what power have we to compel him to carry that tender into effect? The machinery of this court is not adequate to the purpose. The rule will be discharged, the plaintiff's costs being costs in the cause.

The rest of the court concurring,

Rule discharged accordingly.

[324] In the Matter of the Complaint of Joseph Hornby Baxendale and Others, carrying on Business under the Firm of Pickford & Co., Common Carriers, *v.* The North Devon Railway Company. Nov. 9th, 1857.

[S. C. 6 W. R. 38.]

A railway company possessed of a line from B. to C., advertized to convey goods from A. to C. (in conjunction with another company) at the rate of 50s. per ton, provided they were consigned by and to their own agents at those respective places; but, if consigned through any one else, they charged 2s. 6d. per ton more:—Held, ground for an injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31. And the rule was made absolute with costs, although it prayed a writ injoining the company to charge an equal rate for the carriage from A. to C., and the writ was granted as from B. to C. only.—Semble, that both companies ought to have been brought before the court by the rule.

Byles, Serjt., in Trinity Term last, obtained a rule calling upon the North Devon Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, injoining the company to charge the same rate for the carriage of all goods of the same class from Bristol to Barnstaple; and also injoining the company to charge the complainants and the rest of the public for the carriage from Bristol to Barnstaple of goods coming from Manchester, the same rate as they charged for the like goods when consigned by their own agents, and injoining the company not to charge otherwise,—with costs.

The affidavit upon which the motion was founded,—that of Mr. J. H. Baxendale, one of the complainants,—was in substance as follows:—

1. The complainants carry on the business of common carriers and railway agents, under the name and style of Pickford & Co., and as such carry on a goods traffic between the towns of Manchester and Barnstaple in the manner hereinafter mentioned, that is to say, they act as agents at Manchester for the London and North Western Railway Company, and receive and collect and cart to the station of that company at Manchester goods consigned by the public to Barnstaple, to be forwarded as hereinafter mentioned: such goods are [325] then delivered to the complainants at Bristol, from whence they forward them as hereinafter mentioned:

2. The lines of railway between Manchester and Barnstaple are as follows,—the London and North Western and Midland lines from Manchester to Bristol, the Bristol and Exeter line from Bristol by way of Exeter to Crediton, and the North Devon line from Crediton to Barnstaple:

3. The North Devon Railway Company are the owners of such last mentioned

line, and in conjunction, with the Bristol and Exeter Railway Company at Bristol, receive and carry through goods from Bristol to Barnstaple:

4. When goods are received by the complainants at Manchester which are consigned for Barnstaple, the complainants deliver them to the London and North Western Railway Company at their station at Manchester, and that company, in conjunction with the Midland Railway Company, carry them over the London and North Western and Midland railways from Manchester to Bristol. The complainants are charged by these companies a through rate from Manchester to Bristol of 30s. per ton, which they pay, and charge again to the consignors or consignees of the goods: this rate includes delivery by carting to the Bristol and Exeter Railway Company's station at Bristol. The London and North Western Railway Company pay the complainants for such collection and carting at Manchester, and the Midland Railway Company pay the complainants for so carting such goods from the station of that company at Bristol to that of the Bristol and Exeter Railway Company:

5. Such goods having arrived at the station of the Bristol and Exeter Railway Company at Bristol, the complainants then, on their own account as common carriers, consign them at such station to themselves or [326] their agent at the station of the North Devon Railway Company at Barnstaple, and they are then forwarded to Barnstaple over the lines of the Bristol and Exeter and North Devon Railway companies. At the Barnstaple station, the agent of the complainants receives such goods, and delivers them to the consignees in the town. The North Devon Railway Company charge to the complainants and to the public in general at the rate of 1l. 2s. 6d. per ton for such carriage from the Bristol and Exeter station at Bristol to the Barnstaple station at Barnstaple.

6. Until the alteration in their mode of charging made by the North Devon Railway Company hereinafter mentioned, the complainants were in the habit of charging for the through carriage from Manchester to Barnstaple the two rates of 30s. and 22s. 6d. charged by the London and North Western and Midland Railway companies added together, with a small additional charge for delivery in Barnstaple:

7. Messrs. Carver, Chaplin, & Co., of Manchester, are also agents in Manchester of the London and North Western Railway Company, and perform similar services for such company at Manchester as the complainants perform; but Carver, Chaplin, & Co. have nothing to do with such goods at Bristol. The goods for Barnstaple which are collected by them at Manchester are consigned by them to W. J. C. Wall, of Bristol, who is the sole agent there of the Bristol and Exeter Railway Company:

8. The North Devon Railway Company, as the complainants verily believe, have recently entered into and acted upon an arrangement with Wall, by which he receives such last-mentioned goods at the station of the Midland Railway Company, and transfers them to the Bristol and Exeter railway station, and thence forwards them by the Bristol and Exeter and North Devon rail-[327]-ways to Barnstaple, where the agents of the last-mentioned company deliver such goods in the town; and the said company, although they have to pay the said rate of 30s. per ton to the London and North Western Railway Company and the said Midland Railway Company for the carriage from Manchester to the Bristol and Exeter Railway Company's station at Bristol, yet charge only 50s. per ton for the carriage of such goods from Manchester, including the delivery in the town to the consignees at Barnstaple; whereby the said North Devon Railway Company charge and compel the complainants and the public to pay 2s. 6d. per ton more for goods forwarded by them from Bristol to Barnstaple than the said company charge to other persons, besides making no allowance or deduction from the said charge to the complainants for cartage from the station at Barnstaple into the town.

The affidavit then set out certain correspondence between the complainants and their solicitors and the manager and another servant of the North Devon Railway Company, amongst which was the following:—

"Barnstaple, May 5th, 1857.

"Manchester Packs.

"Messrs. Pickford & Co., Barnstaple.

"Gentlemen,—In reply to yours of the 2nd with reference to the above, I beg to say that the only rate we can charge you for Manchester goods as from Bristol, would be our present through rate of 22s. 6d. per ton. Our through rate from Man-

chester direct of 50s. per ton can only be obtained by these goods being consigned from Manchester to Bristol by Carver & Co., and thence to Barnstaple by J. C. Wall. I presume this mode of conveyance would not meet your views."

(Signed) "A. PATEY."

"20 Austin Friars, 9th May, 1857.

"Sir,—Our clients, Messrs. Pickford & Co., have [328] consulted us upon your letter to them of the 5th instant, from which it appears that the North Devon Railway Company charge them 22s. 6d. per ton on goods carried from Bristol to Barnstaple, but that the company only charge the public 20s. if they send through Carver & Co., at Manchester, and Mr. Wall, at Bristol, the agents of the company.

"Out of the 50s. per ton which the company charge on such goods between Manchester and Barnstaple, they have to pay 30s. per ton to the London and North Western and Midland companies for conveyance from Manchester to the Bristol and Exeter company's station at Bristol, thus leaving only 20s. per ton for the conveyance over the Bristol and Exeter and North Devon lines, and delivery in Barnstaple. We have advised Messrs. Pickford & Co., that, under these circumstances, they are entitled to have the goods sent from Manchester through them, and by them delivered at the station at Bristol, and consigned to themselves at Barnstaple station, carried over the company's line at the rate of 20s. per ton, less a fair and reasonable allowance for the delivery in Barnstaple (which they perform themselves), instead of your present rate of 22s. 6d. per ton; and they have instructed us to require you to convey such goods for them accordingly, or, in the event of your still refusing to do so, to refer us to your solicitors, with whom we may arrange to have the question decided in a court of law. "TATHAM, UPTON, UPTON, & JOHNSON."

The reply of the manager was as follows:—

"Messrs. Tatham, Upton, & Co. "Barnstaple, May 15th, 1857.

"Gentlemen,—I beg to acknowledge the receipt of your letter. Your clients appear to possess a faculty in the division of rates, and arrogate to themselves a more perfect knowledge of my business than either [329] their experience or information warrants. I shall be very glad to convey Manchester Packs for Pickfords through my appointed agents on the same terms that I offer to other members of the public; and I decline going any further into the matter." (Signed) "ROBERT OGILVIE."

Milward (with whom was Lush, Q. C.), now shewed cause, upon an affidavit of one Andrew Patey, the general traffic manager of the railway, who deposed in substance as follows:—That Messrs. Brassey & Ogilvie now work, and for some years past have worked, the traffic of the North Devon railway on their own account and for their own profit, Brassey being the lessee of the said railway under an agreement for a lease from the company, dated the 21st of February, 1851; and that the company take no part directly or indirectly in the working or management of the said traffic: That the North Devon railway is connected at Crediton with the Exeter and Crediton railway, which again is connected at Exeter with the Bristol and Exeter railway, so that by the lines of these three railways a continuous communication by railway is formed between Barnstaple and Bristol; and that the Exeter and Crediton railway is leased to and worked by the Bristol and Exeter Railway Company, so that practically the whole line from Crediton to Bristol belongs to or is under the sole control of that company, and the traffic upon and over that line is managed and worked by them: That neither the North Devon Railway Company nor Brassey as their lessee, nor Messrs. Brassey & Ogilvie, have any control over the traffic arrangements of or the rates charged by the Bristol and Exeter Railway Company; and the two railways and the management of them are wholly independent of each other, except that from time to time friendly arrangements have been and are made between the Bristol and Exeter Railway Com [330] pany and Brassey & Ogilvie in respect of the through traffic passing over their respective lines, for their mutual convenience and for the accommodation of the public: That the Bristol and Exeter Railway Company have, and for some years past have had, an engagement or contract with a Mr. Wall, of Bristol, under which Mr. Wall, as their goods agent, conducts the whole or

the greater part of the goods carrying traffic over these lines, including the Exeter and Crediton railway, receiving and collecting the rates of carriage as published and demanded by the Bristol and Exeter Railway Company, and deducting from such receipts, and detaining for his own use, a certain proportion of such rates: That there is a class of goods called "Manchester Packs," which, when consigned to or destined for places beyond Bristol to which the lines of the Bristol and Exeter Railway Company and of the North Devon Railway Company afford access, are conveyed, as stated in the affidavit of the complainants, by the London and North Western and Midland lines, to Bristol, and from thence, when destined, for example, to Barnstaple, would in the ordinary course be conveyed from the station of the Midland Railway Company at Bristol to the station of the Bristol and Exeter Railway Company there, and so be passed on to such destination: That, for the carriage of these packs over the lines of the Bristol and Exeter Railway Company to the North Devon railway from Bristol to Barnstaple, the charge was formerly (as alleged) 22s. 6d. per ton; but, inasmuch as there was a competition for this traffic by steamer from Bristol to Barnstaple, an arrangement was some time ago made between Messrs. Brassey & Ogilvie and the directors of the Bristol and Exeter Railway Company, through Wall, acting as the goods agent of the said company, whereby the through rate upon these packs from Bristol to Barnstaple by the **[331]** lines of the two railway companies was reduced from 22s. 6d. to 20s., thus making the entire rate from Manchester to Bristol 50s., instead of, as before, 52s. 6d.: That this reduction was advertised, and has since been acted upon, and the benefit of it was and is, without exception or distinction, offered to all persons consigning packs from Manchester to Bristol, but with an intimation that such benefit can only be assured to the consignees, by ordering their packs by Carver & Co. from Manchester, to the care of J. C. Wall, Bristol, who will forward them on immediately: That this intimation was given, because, by reason of the before-mentioned contract of the Bristol and Exeter Railway Company with Wall, Messrs. Brassey & Ogilvie had never been able to make any arrangement with that company for the reduction of the through rate on such goods, except on the condition of the consignments being so made through Wall; and the only effect of a refusal on their part to assent to that condition would have been that the public would not and could not have had the benefit of the reduction at all: but that all persons whomsoever consigning their goods through Carver & Co. to the care of Wall, without any exception, favour, or distinction, are entitled to and may and do receive the benefit of the said reduced rate: and that, if this court should determine that the complainants are entitled to send Manchester packs from Bristol to Barnstaple in any other manner than through Carver & Co. to the care of Wall, at the rate of 20s. per ton from Bristol to Barnstaple, or if the court should restrain the North Devon Railway Company in the manner prayed by the rule, the contract with Wall will be at an end, and the public will lose the benefit of the arrangement: And that, except as above mentioned, the imposing of the said condition was in no respect the act of the North Devon Railway Company, or of Brassey as their lessee, **[332]** or of Brassey & Ogilvie: and that, in so far as the North Devon Railway Company, or Brassey, or Brassey & Ogilvie, were concerned, neither of them derived any benefit or advantage from the said arrangement of the Bristol and Exeter Railway Company with Wall, or was interested therein in any respect.

This application should have been addressed against the Bristol and Exeter Railway Company, and not against the North Devon Railway Company: if there be any overcharge, it arises from the act of the former company alone. But it is submitted that there is no pretence for saying that there has been any undue preference. [Cockburn, C. J. The practical result of your arrangement is, that the goods are carried for 2s. 6d. per ton less, if they are sent through Carver & Co. and Wall. What right has the company to impose such a restriction upon the consignors of goods?] The affidavit in answer shews that what is done is done for the benefit of the public, and not for the purpose of giving any undue preference to any one. [Cockburn C. J. How can it be for the benefit of the public that they should be compelled to transmit their goods through a given individual?] *Ransome's case*, ante, vol. i., p. 437, establishes, that, in dealing with this statute, the court will take into the account the fair interests of the company. And *The Caterham Railway Company's case*, ante, vol. i., p. 410, shews, that, to constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an

inequality in the charge for travelling over the same line or the same portion of the line. Here, the inequality, if any, is not for travelling along the North Devon railway. [Cockburn, C. J. The whole is one charge. The North Devon railway forms an integral part of the whole line.] If the goods are not transmitted through Carver & Co., the North Devon Railway Company can **[333]** only be responsible for any inequality of charge for carriage on their own portion of the line. [Cockburn, C. J. The charge is one entire charge; and, unless the whole is justifiable, the injunction must go.] If the Bristol and Exeter Railway Company had been made parties to this rule, the North Devon Railway Company would only have had to sustain their fair share of the responsibility.

Byles, Serjt., and C. Pollock, in support of the rule. The complaint of inequality of charge and undue preference is not answered. [Cockburn, C. J. The rule ought at all events to be limited so as to impose upon the North Devon Railway Company so much only of the burthen as properly belongs to their line.] They do not divide the charge: they advertize and receive the rate for the entire transit: they do not the less misconduct themselves, because another company is associated with them in the illegal act complained of. [Cockburn, C. J. It would have been more convenient if all the parties had been before us. Crowder, J. What charge do these respondents make for the carriage between Crediton and Barnstaple?] They do not carry any goods coming from Bristol for less than 22s. 6d. per ton, unless they are consigned through Carver & Co. [Cockburn, C. J. The rule is too large. The complainants' purpose will be answered probably by making it absolute in the more limited form above suggested.] That will answer every purpose.

COCKBURN, C. J. We entertain some doubt whether the rule might not have been made absolute in its terms: but it is unnecessary to consider that, inasmuch as the complainants are content to take it for a writ against the respondents injoining them to charge the same rates for the carriage of Manchester Packs from **[334]** Crediton to Barnstaple as they charge for the like goods under any circumstances, and injoining them not to charge otherwise.

Lush, for the respondents, submitted, that, as the complainants had asked more by their rule than the court had thought them entitled to, the costs of the application should not be allowed.

COCKBURN, C. J. The complainants have succeeded in substance. As we think they have made out a real ground of complaint, we think the costs should follow.

The rest of the court concurring,

Rule absolute accordingly, with costs.

KNOX *v.* BUSHELL. Nov. 24th, 1857.

A husband is not liable for money lent to his wife, though it be afterwards applied by her in procuring necessaries, for the supply of which he would have been liable. —A. lent B.'s wife 59l. for the purpose of enabling her to pay debts and to provide herself a passage to the Cape of Good Hope, whither she was going to join her husband, at his direction; and she so applied it:—Held, that A. could not recover any part of the amount from B.

This was an action for money lent, money paid, &c. Plea, never indebted.

The cause was tried before Cresswell, J., at the second sitting in London in this term. The facts were as follows:—

The defendant was a merchant at the Cape of Good Hope. Early in the year 1856, he sent his wife with three children and a servant to England, giving her 200l. and a credit on his partner, who resided in Lon-**[335]**-don, for 50l. per month. The partner, however, having failed, all she obtained from him was 20l. In November, 1856, the wife received a letter from her husband desiring her to go out to the Cape. She thereupon applied to the plaintiff for an advance of money, for the purpose of paying some debts which she had contracted for necessaries, and of providing her a passage out. Of the money advanced to her by the plaintiff (59l.), 31l. was applied in part-payment of the passage-money, the rest in payment of debts.

On the part of the defendant, it was insisted that the husband could not be charged for a loan of money to the wife, even though it should be proved to have been borrowed for the purpose of procuring necessaries, and to have been actually so applied.

For the plaintiff it was submitted, that, inasmuch as the wife was here with her husband's consent and permission, and was returning at his express desire, to the extent, at all events, of the sum necessarily paid for her passage out, the plaintiff was entitled to recover.

The learned judge, however, was of opinion that there was no evidence to go to the jury of any authority in the wife, express or implied, to charge her husband either in respect of that portion of the loan which was applied in payment of the passage-money, or of that which was expended in liquidation of the debts: and the plaintiff was nonsuited.

Shee. Serjt., now moved for a new trial, on the ground of misdirection. Admitting that, in general, the husband is not liable for money lent to the wife, it is submitted, that, under the peculiar circumstances of this case, there was evidence of a sufficient authority in the defendant's wife to bind him for the advances in question. The purpose for which the money was lent dis-**[336]**-tinguishes this from all former cases, viz. the payment of her passage-money on going out to the Cape to rejoin him at his express comand. In *Turner* v. *Rookes*, 10 Ad. & E. 47, 2 P. & D. 294, a husband was held liable for costs incurred by an attorney employed by the wife to exhibit articles of the peace against him. [Crowder, J. Have you any authority that money lent to the wife, though for a specific purpose, may be recovered in an action against the husband?] There is no case expressly in point, at law: but there is a case in equity which comes very near this,—*Harris* v. *Lee*, 1 P. Wms. 482. There, J. S. had given his wife the foul distemper twice; upon which the wife, leaving her husband, and coming to town to be cured, borrowed 30l. of the plaintiff, to pay doctors and surgeons, and for necessaries. J. S. afterwards devised some lands for the payment of all his debts, and died. The plaintiff (the lender) brought his bill against the trustees, who were impowered by the will to sell the land for the payment of debts, in order to be paid this money, as a debt within the trust. It was objected that a wife cannot by law borrow money, nor contract a debt by borrowing money, even though such money be afterwards applied for necessaries; because it was in her power to waste the money (*a*): and, if the law be so, it would be hard to have a different rule of property in equity. Sed per Cur. "Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her cure and for necessaries, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons would be creditors of the husband, so the plaintiff shall stand **[337]** in their place and be a creditor also:" and payment was decreed, with costs. [Crowder, J. That seems rather at variance with the rule at law.] An action will lie for a loan to the wife at the request, express or implied, of the husband: *Stevenson* v. *Hardie*, 2 W. Blac. 872. Blackstone, J., thus lays down the rule in that case,—"It is true that no complete or perfect contract can be made by a feme coverte by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case of either sale or loan. This assent may be either express or implied: it may be prior or subsequent to the contract. If prior, and communicated to the husband (as in the present case), the contract is made actually, and not merely virtually, with the husband: if subsequent, the wife's contract is inchoate and imperfect till affirmed or disaffirmed by the husband; and such affirmation, if given, transfers the contract to him." Here, the loan may fairly be said to have been contracted with the implied assent of the husband, inasmuch as it was contracted, and the money actually (in part) applied, in furtherance of the husband's directions, to enable her to obey which the husband had made no other provision. Having obtained the money for that specific purpose, and having so applied it, the question is whether the wife may not be considered as the husband's agent. It is, as De Grey, C. J., observes in *Stevenson* v. *Hardie*, "a poor shift" to evade liability. Probably the only part of the advance that the plaintiff can recover, is, the 31l. paid for the passage-money. [Crowder, J. The whole 59l. was lent to the wife. I cannot see any distinction between the 31l. and the rest of the money. Cockburn, C. J. Was there any evidence that the plaintiff, when he advanced the money, gave any specific direction, or imposed any condition, as to the application of it?] There was not: all that appeared, was,

(*a*) *Earle* v. *Peale*, 1 Salk. 387.

[338] that the wife went to the plaintiff and told him she wanted money for the purposes specified, and that he advanced it, assuming that it would be so applied.

COCKBURN, C. J. I do not think there ought to be a rule in this case. If there had been anything to constitute the wife the agent of her husband in the transaction, the case might have been different. But the money seems to have been advanced as a loan to the wife: and the authorities shew that the fact of its being applied by her in providing necessaries for herself and family, will not make the husband responsible.

WILLIAMS, J. All that the evidence amounts to is this, that the money was advanced to the wife by way of loan, upon her representation as to the way in which she proposed to apply it.

The rest of the court concurring,

Rule refused.

EGERTON AND WIFE *v.* MASSEY AND OTHERS. Nov. 20th, 1857.

[S. C. 27 L. J. C. P. 10; 3 Jur. N. S. 1325; 6 W. R. 130. Distinguished, *Sulley* v. *Barber*, 1888, 59 L. T. 827.]

A testatrix, being seised in fee of certain lands, devised the same to her niece E. for life, remainder to her children, and, in default of issue, to her nephew P. H. in fee: and, by a residuary clause, the testatrix gave "all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto her said niece E., her heirs and assigns, for ever. E. died without issue, having survived the testatrix, and having by lease and release conveyed all her estate to J., in fee:—Held, that the reversion in fee, undisposed of by the former part of the will, passed to E. by the residuary devise; and that, the life estate and the reversion having both become vested by the conveyance in J., the contingent remainder of P. H. was destroyed by the merger thus occasioned.

This was an action brought by the plaintiffs against the defendants to recover possession of a certain messuage and tenement, lands, and premises, called the Asps, situate at Antrobus, in the county of Chester, [339] and, by consent of the parties, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of this court:—

Elizabeth Glover, being seised in fee-simple of the messuage and tenement, lands, and premises, the subject of this ejectment, by her last will and testament, bearing date the 11th of May, 1786, duly executed and attested for the devise of lands of inheritance, gave and devised the same (inter alia) in the words following:—

"I give and devise unto my niece Eunice, the daughter of my sister Eunice Highfield, all that my messuage and tenement called the Asps, with the lands and appurtenances thereto belonging, situate in Antrobus, within the lordship of Over Whitley, in the county of Chester, containing eight acres, or thereabouts." "To hold the same unto my said niece and her assigns for and during the term of her natural life, without impeachment of waste; and, from and after her decease, I give and devise the said premises unto and amongst all and every or such one or more of the children of my said niece, at such time and times, and in such parts, shares, proportions, manner, and form as she my said niece, in and by any her act or deed in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her will, to be by her signed, sealed, published, and declared in the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint." "And, for want of such direction, limitation, or appointment, then I give and devise the said premises unto and amongst all and every the child and children of my said niece, if more than one, who shall be living at her decease, and the issue of such of them as shall be then dead, such issue to take only the share [340] which the parent of such issue could, if living, have taken, as tenants in common, and not as joint-tenants, and to their several heirs and assigns for ever, and, if there shall be but one such child or issue, then to such child or issue, and his or her heirs and assigns, for ever; and, for want of such child or issue, I give and devise the said messuage and tenement called Asps, and the lands and appurtenances thereto belonging, unto my nephew Peter Highfield, the younger

son of my said sister, and to his heirs and assigns for ever: And I give and devise the said three several closes, fields, or parcels of land called the Heathfields, with their appurtenances, unto my nephew John Highfield, the elder son of my said sister, and to his heirs and assigns for ever: Provided always and I do hereby subject and charge my said messuage, tenement, and lands, with the payment of one clear rent or yearly sum of 10l., which I give and bequeath and direct to be issuing thereout, unto my said sister and her assigns, during her natural life, by two equal payments in each year, to wit, the 29th day of September and the 25th day of March, the first payment thereof to be made upon such of the said days as shall happen next after my decease."

And, after giving the usual powers of distress and entry for the recovery thereof, the testatrix continued in the words following:—

"And, if my said niece shall happen to die without issue in the life-time of her said mother, I do from thenceforth order and direct that the said rent or yearly sum of 10l. shall be divided and paid as follows, namely, 6l., part thereof, by my said nephew Peter Highfield, and his heirs, and 4l., residue thereof, by my said nephew John Highfield, and his heirs, from and out or in respect of the premises severally devised to them as aforesaid."

[341] And, after giving various legacies, the testatrix continued, in the words following:—

"And I give and bequeath all the residue and remainder of my estate and effects, whatsoever and wheresoever, not hereinbefore disposed of, unto my said niece Eunice Highfield, her heirs and assigns, for ever."

The said testatrix departed this life on or about the 20th of November, 1789, without having altered or revoked her said will, leaving the said Eunice Highfield and Peter Highfield her surviving; and thereupon the said Eunice Highfield entered into possession of the said messuage and tenement, lands, and premises called the Asps, and continued so possessed up to the 6th of December, 1855, when she died, never having been married.

By indentures of lease and release bearing date respectively the 1st and 2nd of October, 1832, made between the said Eunice Highfield, of the one part, and one Peter Jackson, of the other part, the said Eunice Highfield granted, bargained, sold, released, and confirmed unto the said Peter Jackson, his heirs and assigns (inter alia), the said messuage and tenement, lands, and premises, the subject of this ejectment, To hold the same unto the said Peter Jackson, his heirs and assigns, to the use of the said Peter Jackson, his heirs and assigns, for ever, upon such uses, trusts, and purposes as the said Eunice Highfield should by deed appoint; and, in default of such appointment, to the use of the said Eunice Highfield, her heirs and assigns, for ever.

The plaintiffs claim as devisees under Peter Highfield, who died in 1827, and are entitled to recover, unless the limitation in favour of Peter Highfield was destroyed by the indentures of the 1st and 2nd of October, 1832.

The defendants Eunice Highfield Jones and Hannah Highfield Jones are devisees of the said messuage and **[342]** tenement, lands, and premises, under the will of the late Eunice Highfield, and also claim under a conveyance of the said premises made to them by the devisee of the heir-at-law of the said Peter Jackson, who died intestate as to his trust-estates.

The question for the opinion of the court, was,—whether the limitation in favour of Peter Highfield was destroyed by the indentures of the 1st and 2nd of October, 1832. If the court should be of opinion that it was, then the verdict was to be entered for the defendants: otherwise the verdict was to be entered for the plaintiffs.

The several indentures, and the probate of the will of the said Elizabeth Glover, mentioned in the case, were to be taken as part of it, and might be referred to by either party.

Shapter (with whom was E. Beavan), for the plaintiffs (*a*). The question is,

(*a*) The point marked for argument on the part of the plaintiffs, was,—"that the effect of the indentures of the 1st and 2nd of October, 1832, was, only to convey to Peter Jackson the life-estate of Eunice Highfield in the Asps, devised to her by the testatrix, and that the limitations of the will in favour of Peter Highfield were not affected by that conveyance."

whether the contingent remainder given to Peter Highfield by the will of Elizabeth Glover was destroyed by the conveyance by Eunice Highfield to Peter Jackson in October, 1832. There is no doubt, that, if Eunice Highfield had had an estate for life, with a remainder or reversion in fee in herself, she might have united the two by a conveyance of the entire interest to a third person. But it is equally clear that a fee cannot be mounted upon a fee by way of remainder: and, if Eunice Highfield had not a remainder in fee, her conveyance could not have the effect of destroying the contingent remainders, and con-[343]-sequently the plaintiffs, as devisees of Peter Highfield, are entitled. In Co. Litt. 143, a "remainder" is thus defined, —"Remainder, in legal latin, is, remanere, coming of the latin word remaneo; for that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time." It will be contended on the other side, that Eunice Highfield took a reversion in fee under the residuary devise; but, though true it is, that, if a specific devise comprises only a partial or contingent interest in lands, leaving an ulterior or alternative interest undisposed of, such undisposed of ulterior or alternative interest will pass by a general residuary devise; yet here the whole fee had already been disposed of by the devise to Eunice for life, with remainder to her children, with remainder, in default of children of Eunice, to Peter Highfield in fee. The rule is thus stated in Fearne's Contingent Remainders, 9th edit. 11,— "A residue is defined by Lord Coke, 1 Inst. 143 a., to be 'a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same at one time' It follows from this definition, that, whenever the whole fee is first limited, there can be no remainder, in the strict sense of that word; for, the whole being first disposed of, no remnant exists to limit over. Therefore, if I limit an estate to the use of A. and his heirs till C. returns from Rome, and, after the return of C., to the use of B. in fee, here, the whole fee being first limited to the use of A., there is no remnant left to limit over; and, consequently, the limitation to B. cannot be a remainder within the foregoing definition. But, where I limit an estate to the use of A. until C. returns from Rome, and, after the return of C., to the use of B. in fee; here, I do not limit the whole fee to the use of A. (as in the former case), but only a particular estate to endure till [344] the return of C., which being an uncertain period, such particular estate is a freehold: having, therefore, limited only a particular estate, extending in its first creation no further than to C.'s return, the residue of the estate after C.'s return is a remnant of the whole estate in the lands, expectant on that particular estate; and, if I at the same time limit this remnant to the use of B. and his heirs, it is a remainder within the express words of the above definition." In *Carter* v. *Barnardiston*, 1 P. Wms. 511, there was an alternative gift in fee by way of contingent remainder: and the question was, whether the second remainder could take effect so as to destroy the first. *Plunkett* v. *Holmes*, 1 Lev. 11, 1 Sid. 47, T. Raym. 28, and *Purefoy* v. *Rogers*, 2 Saund. 380, 2 Lev. 39, 3 Keble, 11, were cited. The Lord Chancellor said, "that the case of *Plunkett* v. *Holmes* was a resolution in point, that, where the remainder in fee was devised in contingency, the fee descended to the heir until the contingency happened; and though he should admit that resolution to be extra-judicial, and not directly to the point then in question, yet the opinion of four learned judges must be of great weight, especially against the notion which was contended for by the other side; and that the case of *Purefoy* v. *Rogers* was equally in point, and the interruption which Lord Hale gave to Saunders, who attempted to argue there, did not proceed from any heat or impatience in Lord Hale (who was master of a great deal of temper as well as learning), but from the result of his fixed judgment and opinion, that, when, after an estate for life, the remainder in fee was devised upon a contingency, the fee-simple, not being disposed of until the contingency happened, must in the meantime descend to the heir; and, to say, that, in these cases of *Plunkett* v. *Holmes* and *Purefoy* v. *Rogers*, the devise over of the fee (after the contingent devise in fee) was to the tes [345] tator's right heirs, and that this distinguished it from the principal case, and made the heir take by descent, was hardly agreeable to the rules of law, for, when the testator had devised the remainder in fee upon so remote a contingency, having in that manner given a fee, he could go no further, nor devise any remainder over, and therefore in such case the devise over of the fee-simple would be void, whether made to the heir or to any other person." That, it is admitted, is precisely this case.

Joshua Williams (with whom was Hugh Hill), for the defendants (*a*)[1]. The devise to Peter Highfield was a contingent remainder, which in law is no estate at all; *Montgomery* v. *Montgomery*, 3 Jones & Lat. 62: the reversion in fee expectant on the death of Eunice Highfield would, therefore, but for the residuary devise, have gone to the heir-at-law of the testatrix; *Heardson* v. *Williamson*, 1 Keen, 33. That it is competent to a testator, having this vested estate in him, to devise it to another, is clear. The residuary devise simply places the devisee in the position of heir. In 1 Jarman on [346] Wills, 2nd edit. 550, it is said: "If the specific devise comprise only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed of interest will, even in a will made before the year 1838, pass by a general residuary devise. Thus, where a person by such a will devised certain lands to A. for life or in tail, and the residue of his lands to B. and his heirs, B. under this devise took the reversion in fee not included in the devise to A.(*a*)[2]; and, consequently, if A. died in the life time of the testator, he became, at the testator's death, tenant in fee in possession." Again, at p. 551, that learned author says: "The same doctrine, it is clear, applied to executory and contingent devises in fee; for, if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternative fee depending on the converse event is undisposed of, and therefore is an interest on which the residuary clause will operate. Thus, if a testator devised, in case his personal estate should be insufficient to pay his debts, certain lands to A. and his heirs, in trust to sell and pay them, and devised the residue of his estate to B.; the devise to B. carried the legal fee, in the event of the personal estate being sufficient to pay the debts (*b*). So, if a testator devised real estate to A. for life, remainder to A.'s children living at his decease, in fee, and the residue of his lands to B., it is clear, that, if A. died, either in the testator's life-time or after his [347] decease, without leaving a child surviving him, B. would be entitled under the residuary devise"(*a*)[3]. A further illustration of this doctrine is to be found in the case of *Doe d. Wells* v. *Scott*, 3 M. & Selw. 300. There, the testator devised "all my lands at H. to J. M., my cousin and heir-at-law, his heirs and assigns for ever, provided that he or his heirs do within six months after my decease assure to R. M. and to his children the copyhold premises at R., and, in default thereof, to R. M. for life, and, from and after his decease, to his children living at the time of his decease, their heirs and assigns for ever, as tenants in common: J. M. died unmarried before the devisor; and it was held that this was not a lapsed devise of the whole interest, so as to belong to the heir-at law of the devisor, but, by reason of the contingent interest which remained undisposed of if J. M. should not assure and R. M. should die without children, the residuary devisees, to whom was devised all the rest of the devisor's lands, &c., wheresoever situate, &c., were entitled. Lord Ellenborough, in giving judgment, there said: "The law as laid down in this and the other cases to the same effect, not being disputed by the counsel on either side, it brings it to this mere question arising

(*a*)[1] The points marked for argument on the part of the defendants, were,—

"That the devise to Peter Highfield in fee, for want of a child or issue of Eunice Highfield, created a contingent remainder in fee, dependant upon the life-estate of Eunice Highfield:

"That the vested reversion in fee expectant upon the death of Eunice Highfield would, but for the residuary devise, have descended on the heir-at-law of the testatrix:

"That the residuary devise comprised this vested reversion in fee, and gave it to Eunice Highfield, the tenant for life:

"That, by the indentures of the 1st and 2nd of October, 1832, the life-estate and reversion both became vested in Peter Jackson; and that, by the merger thus occasioned of the particular estate on which the above contingent remainder depended, the contingent remainder was destroyed."

(*a*)[2] Citing *Wheeler* v. *Walroone*, Aleyn, 28, 3 P. Wms. 63, n., *Cooke* v. *Gerrard*, 1 Lev. 212, *Rooke* v. *Rooke*, 2 Vern. 461, 1 Eq. Ca. Abr. 210, pl. 17, *Willows* v. *Lydcot*, 1 Ventr. 285, 2 Mod. 229: and also referring to *Doe d. Briscoe* v. *Clarke*, 2 N. R. 343, *Bennett* v. *Lowe*, 7 Bingh. 535, 5 M. & P. 485, and *Saumarez* v. *Saumarez*, 4 M. & Cr. 331.

(*b*) *Goodtitle d. Hart* v. *Knot*, Cowp. 43.

(*a*) Willes, 300; *Doe d. Moreton* v. *Fossick*, 1 B. & Ad. 186.

on the face of the will, whether, at the time of the making of the will, and upon the face of the will itself, there was any interest in the lands devised not fully disposed of: for, if there was, the consequence is, that the residuary devise must operate upon such interest." [Williams, J. A residuary devise of personal estate covers all that is previously undisposed of: but, does that rule apply to realty? In *Cambridge* v. *Rous*, 8 Ves. 12, 25, Sir W. Grant (M. R.) says,—"It has been long settled that a residuary bequest of personal estate (for, it is **[348]** otherwise as to real) covers, not only everything not disposed of, but everything that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention; for, it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him: no; for, he does not contemplate the case: the residuary legatee is to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estates, the heir-at-law takes; but, in the case of personal property, the residuary legatee is preferred either to the next of kin or the executor."] Under the old law, a residuary bequest, as to personalty, comprised lapsed legacies: but not as to realty. It is otherwise now. The subject is thus treated in 1 Jarman on Wills, 548,—"A residuary bequest, it is well known, operates upon all the personal estate of which a testator is possessed at the time of his death, and consequently includes all specific legacies which are void, or fail by the death of the legatee in the testator's life-time; and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest in terms embracing the 'residue' should become, in event, a gift of the whole. But, as, under the old testamentary law (which, it will be remembered, still applies to all wills made before the year 1838, whatever be the period of the testator's decease), a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific; being, in fact, a specific disposition of the lands not before **[349]** given, or, to speak more accurately, not before expressed to be given, by the will." In *Doe d. Moreton* v. *Fossick*, 1 B. & Ad. 186, a testatrix devised copyhold estates to her mother for life, then to F. and his wife for their lives, and afterwards to their children in fee: all the residue of her estates, of what kind soever, she bequeathed to her mother, her heirs, executors, &c., for ever; but she charged such residue of her estates, both real and personal, with an annuity of 20*l.* to her grandmother for life: and it was held that the reversion of the copyhold estates must pass by the residuary clause, unless a contrary intention could be collected from the will taken altogether; and that the charge of an annuity on the residue was not, under the circumstances, a sufficient proof of such intention. Lord Tenterden there says: "I take the general rule of construction to be, that all the testator has which is not otherwise disposed of, passes under a residuary clause, unless there appear from other parts of the will, when the whole is read, a clear and manifest intention that something should not pass. It is not necessary that the testator should have a particular property or interest in his contemplation when framing the residuary clause; the question is, what intention appears on the whole; and the property will pass, unless it can be shewn that the testator distinctly intended otherwise." Mr. Hayes, in his Principles for Expounding Dispositions of Real Estate, p. 29, says: "If land be devised to A. for life, with remainder to his children and their heirs, and, in default of issue of A., over, the words 'in default,' &c., are referable to the designated objects of the last limitation, i.e. the children of A., and not to an indefinite failure of his issue,—*Goodright* v. *Dunham*, Dougl. 264. If there be a child of A. in being at the death of the testator, the whole fee-simple vests in such child, liable to be partially divested by the coming in **[350]** esse of other children, and the devises over introduced by the words 'in default,' &c., are of course inoperative. If A. has no child in being at the testator's death, but a child afterwards comes into existence, the same effect will then be produced, unless in the interval A. has done some act to determine prematurely his particular estate of freehold; for, such a determination of that estate will, it seems, defeat all the subsequent devises, because there is no child of A. in being to take the remainder when it ought to vest, and the ulterior devises, although persons in being and ascertained, cannot take vested estates, inasmuch as the remainder

limited to the children is a contingent remainder in fee-simple. But, if A. should not have a child in being at the testator's death, nor at any time afterwards, and his estate of freehold should not so determine, but naturally expire, the limitations introduced by the words 'in default,' &c., will on his death take effect, if limited to persons then in being and ascertained, as remainders. This is the result of the doctrine established by *Loddington* v. *Kime*, 3 Lev. 431, 1 Salk. 224, 1 Lord Raym. 203, and cases of that class." The note to that passage, at p. 81, is addressed against the case of *Loddington* v. *Kime:* and the learned writer places his observations upon it in a note, because he knows that the rule is too well settled to be now disturbed. "According to this doctrine," he says, "'whenever a contingent remainder is limited, and is followed by another limitation over, then, if the contingent limitation be not in fee, the subsequent limitation may be vested, if it be made to a person in esse;' 'but, where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested,' or, in other words, 'where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person in esse, vest, but no remainder after a limitation in fee can be vested' (Fearne C. R., 8th edit. pp. 223, 225). In the supposed case of a remainder limited after **[351]** a contingent remainder in fee, there is said to be a contingency with a double aspect: a phrase of which the propriety, or at least the peculiar applicability to the limitations in question, is not very apparent, for, all contingent events may or may not happen, and, whether several remainders limited to arise in the alternative are in fee-simple, in fee-tail, or for life, the aspect of the contingency must be the same. The phrase, indeed, would seem rather to apply, if applicable to any case, to the contingency on which a limitation after a limitation to unborn children in tail depends, for, in that case, the ulterior limitation is described by Lord Hardwicke (in *Southby* v. *Stonehouse*, 2 Ves. sen. 610), to be made 'upon a double contingency, viz. if no children, or all die without issue.' In *Loddington* v. *Kime*, the contingent remainders were described to be 'not expectant upon, and to take effect the one after the other, but contemporary, to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed.' When positions are found entrenched behind hard names, and enveloped in a cloud of contradictory and unmeaning words, a suspicion is apt to arise that there may be something which requires to be screened from too close an examination. It is admitted, that, under a devise to A. for life, remainder to his children (he having none) for life or tail, remainder to B. in fee, the remainder to B., being to a person in esse and ascertained, is vested; but, if the contingent remainder to the children were in fee-simple, B.'s remainder would, conformably to the doctrine above stated, be deemed also contingent; and the ground of the distinction is stated to be, the different quantities of the contingent remainders to the children, the one being in fee-simple, the other for life or in tail only. But, as the contingent remainder confers no estate at all, but only the possibility of an estate, how **[352]** can its quantity affect the vesting of the alternate remainder? There cannot be two legal fees in the same land, but it is clear that a vested remainder in fee, and a contingent disposition of that remainder to take effect in a given event, may co-exist; and, indeed, whenever a contingent remainder in fee is limited, they must co-exist, for, the vested remainder in fee must reside in somebody, and the question here is, whether it shall reside in B., a person in being and ascertained, or go to the heir-at-law, or residuary legatee? To say that it cannot reside in B. because the contingent remainder to the children is in fee-simple, is to assign a cause inadequate to the effect. As that contingent remainder confers no estate, it is to affirm that B.'s remainder is prevented from vesting by a nonentity. We should appear to have as valid and satisfactory a reason, if we were told that B.'s remainder cannot vest because the remainder to the children is in joint-tenancy. It should seem that the remainder to B., unless shewn to be in other respects contingent, might well vest, whether the contingent remainder to the children be in fee or for a less estate; for, being limited as a remainder immediately expectant on the freehold in A., and not as a remainder expectant on the contingent remainder, what possible difference can the quantity of the latter occasion, except that, on the happening of the contingency, if the remainder to the children be in fee, it will wholly divest, and, if for a less estate, only partially divest the remainder of B? If the remainder to B. is not to arise till it shall be ascertained that the remainder to the children cannot arise, if it is contingent from the form of the limitation itself, then it must likewise be immaterial whether the

preceding contingent remainder is in fee or not; in either case, B.'s remainder must be contingent, without reference to the quantity of that remainder. The position is, that, 'where there is a **[353]** contingent limitation in fee absolute, no estate can afterwards be vested (Fearne, Cont. R. 8th edit. 225); yet, if the devise which we have proposed as an example were followed by a devise of the residue of the testator's real estate to C., the remainder in fee immediately expectant on A.'s particular estate would, it seems, be held to vest in C., subject to be divested by the taking effect of the contingent limitations,—*Doe d. Wells* v. *Scott*, 3 M. & Selw. 300; and, what is this but limiting an estate after a contingent limitation in fee absolute! What is it but saying, that, in default of children of A., to which children, if any, I give the fee, I devise the land to C. in fee? And, how does this differ from what the testator had before said in respect of B.? The circumstance of the devise to C. being a residuary devise, cannot alter the case; for, all devises of real estate, of which the testator must be seised, are necessarily specific." At the end of his argument, the learned writer says, —"The mistake (if it be a mistake) into which the courts have fallen upon this subject, has been attended with the important consequence of enabling the first devisee, before he has a child in esse, either alone, if the vested fee be in him as heir-at-law or residuary devisee, or in concurrence with the owner of that fee, to destroy as well the limitation to the children as the substituted limitation (which would not otherwise be exposed to this danger), and acquire the absolute fee-simple." In Preston on Abstracts, vol. ii., 99, the same doctrine is unhesitatingly laid down. "It is also to be observed," says that learned author, "that, when the remainder is placed in contingency by will, the reversion in fee may pass by words in a residuary or specific clause (*a*)[1]; and, for want of such disposition, the fee will **[354]** descend to the heir-at-law (*a*)[2]: thus, A. and B., and the heir-at-law, may pass their estates for life and in fee; and the contingent fee to the survivor of A. and B. may be destroyed by the union and consolidation of the freehold with the fee." The doctrine cited from Fearne, p. 11, to shew that a remainder cannot be limited upon a remainder, is not disputed; but it has no application to this case, for, here the whole fee was not disposed of in the first instance. The estate is not given to Eunice Highfield and her heirs until a certain event has happened; but a particular estate only (for life) is carved out, leaving the whole residue undisposed of: and that that residue would, but for the residuary devise, have descended to the heir-at law, is clear. At p. 353 of the same work, it is said: "Where the inheritance is devised in contingency, it descends, if not otherwise disposed of, to the testator's heir, till the contingency; as, where A. devised lands to B., his heir, for life, and, if B. should die without issue living at his death, that then the same should remain to C. in fee; but, if B. should have issue living at his death, then the fee should remain to the right heirs of B.; it was resolved that B. took an estate for life, with remainder in fee in contingency; and it was said by Wyndham and Twisden, and agreed by the other judges, that the fee descended to B., as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that, in relation to C., B. took only an estate for life; but, in the mean time, by operation of law, he had the fee in such sort as that there should be an hiatus to let in the contingency when it happened:" *Plunket* v. *Holmes*, 1 Lev. 11, T. Raym. 28, 1 Sid. 47. *Crofts* v. *Middleton*, 2 Kay & J. **[355]** 194, is the converse of this case: there, the testator devised real estate to A. for life, remainder to the children of A. in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty one years and without issue, and, if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, to the heirs and assigns of A.; and, although A. had no child at the date of the will or at the death of the testator, it was held that the gift to the heirs of A. was a contingent remainder. [Cockburn, C. J. Your contention is, that the estate for life merged in the remainder in fee?] The moment the two estates vested in the same person after the death of the testatrix, the life estate merged in the remainder in fee. All the authorities are collected in the notes to *Purefoy* v. *Rogers*, 2 Wms. Saund. 380. *Carter* v. *Barnardiston*, 1 P. Wms. 505, is in effect the same case as *Loddington* v. *Kime*, 1 Salk. 224, 1 Lord Raym. 203, 3 Lev. 431, 3 Bro. P. C., Toml. edit. 64.

(*a*)[1] *Rogers* v. *Gibson*, 1 Ves. sen. 192; *Stephens* v. *Stephens*, Cas. t. Talb. 228.
(*a*)[2] *Plunket* v. *Holmes*, T. Raym. 28; *Purefoy* v. *Rogers*, 2 Saund. 380.

Shapter, in reply, referred to Co. Litt. 18 a., n. (4), Fearne, 225, and Plowden, 239.

COCKBURN, C. J. I am of opinion that the defendants are entitled to the judgment of the court The action is brought to try the right to property devised by the will of one Elizabeth Glover, who died seised in fee-simple. The devise was to the testatrix's niece Eunice Highfield, for life, with remainder to her children in such shares as she should appoint, with remainder, in default of issue of Eunice, to her nephew, Peter Highfield, in fee. And the will contained a residuary clause, whereby the testatrix gave and bequeathed all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbe-[356]-fore disposed of, unto her said niece Eunice Highfield, her heirs and assigns, for ever. It appears, that, after the death of the testatrix, Eunice Highfield, by lease and release of the 1st and 2nd of October, 1832, conveyed the premises in question to one Peter Jackson, in fee; and the question is, whether that is a valid conveyance, or whether the testatrix's nephew Peter Highfield,—Eunice Highfield, the tenant for life, having died without issue,—became entitled to the estate. That question turns upon whether by the conveyance to Jackson the life-estate of Eunice Highfield became merged in the reversion, so that, by the failure of the particular estate upon which the contingent remainder of Peter Highfield depended, the contingent remainder was destroyed. I am of opinion that that is the true state of things. The testatrix first creates a life-estate in Eunice Highfield, and then gives a contingent remainder to Peter Highfield, leaving the reversion in fee undisposed of, except for the residuary clause. It is clear that the fee thus undisposed of must have remained somewhere, and that it was not the mere shadowy interest which Mr. Shapter by his very ingenious argument sought to persuade us. The fee, then, being somewhere, what would become of it? If it had remained undisposed of, it would have gone to the heir-at-law of the testatrix. But we find that the testatrix by the residuary clause professes to dispose of it: for, she thereby gives all the residue and remainder of her estate not before disposed of, to her niece, in fee. If, therefore, the fee did not pass,—as, I think, it did not,—by the creation of the contingent estate, then it would appear to follow that it must be included in the residuary devise, the words of which are large enough to embrace it: and, that being so, the effect of the conveyance of 1832 was, to pass not only the life-estate but also the reversion, and, by the merger of the particular estate, on which the [357] contingent remainder depended, in the reversion, to destroy the contingent remainder. The only difficulty suggested upon this, was, whether an estate of this kind must not be made the subject of a specific devise. No authority, however, was cited for that proposition: and, primâ facie, and upon the reason of the thing, if a testator leaves the fee undisposed of by the earlier part of his will, and by a residuary clause professes to deal with "all the residue and remainder of his estate and effects whatsoever and wheresoever, not thereinbefore disposed of," it follows as of course that the fee passes by that. It was said, that, although this would be so as to personalty, a different rule prevails as to realty: but no authority was cited in confirmation of that view: and we have the authority of two very eminent conveyancers, —Mr. Preston and Mr. Hayes,—who seem to take it for granted that all estates previously undisposed of by the will pass by the residuary clause. I am therefore of opinion, that, there being this estate of fee in the testatrix, which, unless disposed of, would have passed to her heir-at-law, and she having disposed of it by the residuary clause in terms capable of passing it, and the estate for life and the reversion in fee being thus united in Eunice Highfield, and she having conveyed the whole of her interest to Peter Jackson, the particular estate became merged in the fee, and the contingent remainder in favour of Peter Highfield was consequently destroyed. For these reasons, I think there must be judgment for the defendants.

WILLIAMS, J. I am entirely of the same opinion. The learned counsel who argued for the plaintiffs rested his case upon the position that the residuary clause in the will could not operate as a devise of the reversion in fee, because it would be a violation of the rule of law that a fee cannot be limited on a fee. The obvious [358] meaning of that is, that, where an estate is so devised that the fee, whether absolute or determinable, is vested in the first taker, the subsequent dispositions cannot be good by way of remainder, but must operate by way of executory devise. And that is reasonable, because, the fee having been given and passed by the first devise, there is nothing further for the subsequent limitations to operate upon. But that rule is wholly inapplicable to a case like this, where all is in contingency, and the fee is out-

standing. If the fee be outstanding, where is it? It is clear that the notion of the fee being in abeyance cannot now be sustained: see *Purefoy* v. *Rogers*, 2 Wms. Saund. 380, 2 Lev. 39, 3 Keble, 11; *Plunkett* v. *Holmes*, 1 Lev. 11, 1 Sid. 47, T. Raym. 28; *Carter* v. *Barnardiston*, 1 P. Wms. 511: but the fee descends to the heir-at-law, to let in the contingency if it happens. I think it is clear that, if the will had contained no residuary clause, the fee would have descended to the heir at-law. The question, then, resolves itself into this, whether the residuary clause passes this reversion in fee which but for such residuary clause would have descended to the heir-at-law. Some passages have been cited from the works of two very eminent conveyancers, which treat it as quite plain that such an estate would pass by a residuary clause. The estate for life did not merge in the fee so long as both remained in the devisee: but they both became united by the conveyance to Peter Jackson. I therefore think the defendant is entitled to our judgment.

The rest of the court concurring,

Judgment for the defendants.

[359] INSULL AND WIFE *v.* MOOJEN. Nov. 24th, 1857.

[S. C. 27 L. J. C. P. 75; 6 W. R. 126.]

Where a reference is made to the master by judge's order under the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), he must proceed with the inquiry, even though a question of fraud should incidentally arise before him.

By an order of the 19th of July, 1856, made upon a petition in chancery on behalf of the plaintiff Margaret Ellen Insull (then Margaret Ellen Chace, spinster), in a suit wherein the said Margaret Ellen Chace (a pauper) was plaintiff, and Thomas Redfern and others were defendants, it was amongst other things ordered that the defendant Redfern should, on or before the 31st of July, 1856, pay 750*l.* to the petitioner, on behalf of herself and three other parties. The money was duly paid by Redfern, and received by one Moojen (who as clerk to the petitioner's attorney had had the management of the suit). It was afterwards agreed between the parties interested in the fund that the petitioner should receive 450*l.* of it, and the other three parties each 100*l.*, and that the costs should be defrayed out of the petitioner's share. This agreement was carried into effect, Moojen retaining 150*l.* for costs, including counsel's fees and court fees (*a*): and the petitioner (then being the wife of Insull), upon Moojen's representation that that sum was fairly due for costs, though no bill was delivered, signed the account produced to her as settled and approved. Conceiving that they had been cheated in the transaction, this action was brought to recover back the 150*l.*; and, upon the application of the defendant, the following order was made by Willes, J., on the 1st of July last:—

[360] "Upon hearing the attorneys or agents on both sides, I do order that this cause be referred to the certificate of one of the masters of this court under the statute 17 & 18 Vict. c. 125, with all the powers as to certifying, of a judge at nisi prius; the costs of the cause to abide the event; the costs of the reference to be in the discretion of the master; and that the plaintiffs shall be at liberty within two days to amend their particulars of demand."

The parties attended before the master on the 8th of July last, when, the counsel for the plaintiffs having opened his case and referred to the statement of account signed by the plaintiff Margaret Ellen Insull, the master at once decided that there was an end of the case, and declined to hear any explanation of the circumstances under which the account was so signed; and he afterwards gave the following certificate:—

"I certify that there is nothing due from the defendant to the plaintiffs; and that the plaintiffs do pay to the defendant his costs of this reference and certificate. 21st July, 1857."

Gibbons, on a former day in this term, obtained a rule calling upon the defendant

(*a*) The affidavit filed in answer to the rule, stated that, on the petition coming on to be heard, the Vice-Chancellor (Sir Page Wood) directed that the court fees should be paid, the suit having by the compromise ceased to be a pauper suit, and that they were accordingly paid.

to shew cause why the certificate should not be set aside, on the ground of misconduct on the part of the arbitrator, in having held that an account stated with the plaintiff's wife was conclusive evidence, and in having refused to go into the account, and in having refused to hear evidence impeaching the accuracy of the account; and on the ground set forth in the affidavit; and also on the ground that the case was not matter of account within the meaning of the statute. He submitted that the signature of the plaintiff's wife to the account did not preclude the master from going into evidence to shew that it had been obtained by fraud.

[361] David Keane shewed cause. Upon the production of the account signed by the female plaintiff as settled and approved, the master very properly held that the plaintiffs' case failed. [Crowder, J. It was only primâ facie evidence, not conclusive.] If the plaintiffs conceived that more was involved than mere matters of account, that should have been stated to the judge when the order under the statute was applied for. The master thought he had no jurisdiction to try the question of fraud. [Willes, J. When an order is made under the statute, the arbitrator must proceed: he cannot be allowed to set himself up as a court of appeal from the decision of the judge.]

Gibbons was not called upon to support his rule.

Cockburn, C. J. I think this case must go back to the master, the judgment signed upon his certificate standing as a security for what he may find to be due. The order having been made referring the matter to the master, whatever might arise incidentally in the course of the inquiry before him,—even if it were a case of fraud,—he was bound to go into, though it might not be strictly matter of account. If there had been any reason for thinking that the matter was not a fit one for a reference to the master, that should have been suggested when the application was made for the order. But, the order having been made, it clearly was the master's duty to proceed with the inquiry, and dispose of the whole matter.

Williams, J. I am of the same opinion. When an order is made under the statute, referring the matter to the master or other arbitrator, it is his duty to proceed with the inquiry just in the same manner as if it had **[362]** been a reference under a judge's order before the passing of the Common Law Procedure Act

Crowder, J. I am of the same opinion. The cause having been referred to him, the master ought to have proceeded with it. The master has evidently misapprehended the effect and intention of the statute.

Willes, J. I am entirely of the same opinion. The master has fallen into a mistake as to the effect of the reference clauses of the Common Law Procedure Act, 1854; and in this he does not stand alone. It is very desirable that this erroneous impression should be corrected. If the jurisdiction of the court or judge under these sections was to depend upon the fact of the matter in dispute consisting wholly or in part of matters of mere account, and after an inquiry before the arbitrator or master it should turn out that they did not so consist, the whole proceedings would have fallen to the ground. But the legislature have carefully guarded against such injustice, by providing in s. 3 that the order to refer may be made "if it shall appear to the satisfaction of the court or a judge that the matter in dispute consists wholly or in part of matters of mere account," and again in s. 6, that "if upon the trial of any issue of fact by a judge under this act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account shall be referred," &c.,—so that it is for the court or the judge to determine in the first instance whether or not the matter is fit to be referred. The order being made, it is the duty of the arbitrator or the master to proceed to act upon it, and not to canvas the propriety of the order. That clearly is no part of his duty. I have thought it **[363]** necessary to say thus much, though, in the present case, I think the matter which was before the master was strictly and properly matter of account. It did not cease to be a matter of account because one party sought to impugn the correctness of the account produced by the other. The rule must be made absolute, but without costs.

Rule absolute accordingly (*a*).

(*a*) That the certificate be set aside without costs, and the cause referred back to the master upon the terms and in the manner mentioned in the order of the 1st of July, 1857.

BAYNE *v.* SLACK. Nov. 25th, 1857.

[S. C. 27 L. J. C. P. 14; 4 Jur. N. S. 192; 6 W. R. 171.]

A writ of summons issued under the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was served on the 17th of September upon a British subject residing out of the jurisdiction (at Jersey): on the 27th of October, the plaintiff obtained an order for leave to proceed, and filed a declaration on the 28th, charging the defendant with a breach of promise of marriage; but the affidavit upon which the order was obtained was not so framed as to bring the case within the statute. —Semble, that the propriety of the order might be impeached on that ground.— But, held, that, in order to take advantage of the irregularity, it was incumbent on the defendant to apply within a reasonable time, according to the exigency of the 135th rule of Hilary, 1853; and that the irregularity was waived by taking the declaration out of the office.

On the 12th of September last, a writ of summons in the form given by the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), issued against the defendant, a British subject residing in the island of Jersey,—without any special indorsement, or anything on the face of it to shew the nature of the cause of action, —and was duly served there (on the defendant personally) on the 17th. No appearance having been entered for the defendant pursuant to the exigency of the writ, an order was made by Martin, B., on the 27th of **[364]** October, giving the plaintiff liberty to proceed by filing a declaration (*a*).

The affidavit upon which the order was obtained, was as follows: "That I (the plaintiff) am unmarried, and the defendant is a widower, residing at Briton Lodge, Bagot, in the island of Jersey, and that the said defendant, in the month of June, 1855, and afterwards, pro **[365]**-posed to marry me, and thereupon I and the defendant agreed to marry one another: and I say that I have hitherto been ready and willing to marry the defendant, but the said defendant hath not married me according to his promise."

The declaration was filed on the 28th of October, and was as follows:—

"Isabella Bayne, by, &c., sues Thomas Furnell Slack, For that the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant,

(*a*) The 18th section of the Common Law Procedure Act, 1852, enacts, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A.) to this act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts: and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always, that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts in the manner hereinafter (s. 94) provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment."

yet the defendant has neglected and refused to marry the plaintiff: and the plaintiff claims 3000*l*."

Indorsed on the declaration was a notice to plead in twenty-one days, otherwise judgment.

On a former day in this term (Nov. 17) and after the defendant's attorney had taken the declaration out of the office, upon an affidavit of the attorney, that "no copy of the order giving the plaintiff liberty to proceed had been served on the defendant, his attorney or agent, to the best of the deponent's knowledge and belief, and that he (the deponent) had not seen the order, or any copy thereof,"

Field obtained a rule calling upon the plaintiff to shew cause why the writ of summons, the order, and all subsequent proceedings should not be set aside, for irregularity. He submitted that the affidavit upon which the order was obtained was insufficient, inasmuch as it contained no statement that the alleged promise was made within the jurisdiction of the court, or that the defendant was within the jurisdiction. [Cockburn, C. J. If the contract is ambulatory, and the defendant a British subject, is it not within the jurisdiction?] It is submitted that it is not.

[366] Joyce now shewed cause, upon an affidavit of the plaintiff's attorney stating that he forwarded the declaration on the 28th of October to his agent in Jersey, together with a copy of the order of Martin, B., for service upon the defendant; that his said correspondent, on the 12th of November instant, wrote to him that he had duly served the said notice and copy of the order at the defendant's lodgings in the Crescent, Jersey, by leaving the same with the defendant's servant there; and that the deponent verily believed his said correspondent's statement to be true. The application is too late; and for this there is an express authority upon this very section, —*Hutton* v. *Whitehouse*, 1 Hurst. & N. 32. There, a British subject residing out of the jurisdiction, having been served with a writ of summons under s. 18, and not having appeared, a judge's order was made that the plaintiff should be at liberty to proceed: judgment was signed on the 28th of November; and on the 12th of March the defendant applied to set aside the proceedings, on the ground that the cause of action did not arise within the jurisdiction of the court: and it was held that the judge's order was not void, and that the application was too late. Martin, B., there says: "The defendant should have come within a reasonable time. By Reg. Gen. H. 1853, r. 135 (13 C. B. 34), no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time (*a*). By the 18th section of the Common Law Procedure Act, 1852, power is given to the court or a judge to direct that the plaintiff shall be at liberty to proceed with the action on being satisfied that the cause of action arose within the jurisdiction. If the judge is satisfied, surely there is jurisdiction. It is no **[367]** new jurisdiction, merely a new process." [Willes, J. The 18th section says that it shall be lawful for the court or judge to make the order to proceed, "upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," &c. Here, the learned judge was not satisfied "by affidavit," for the affidavit is such that no one could have held it sufficient.] It is left to the discretion of the judge. All that the statute requires, is, that the judge should be satisfied; it is not necessary that the fact should exist. [Cockburn, C. J. Exception may be taken to the jurisdiction, by way of appeal.] Here, the defendant was personally served with the writ of summons at Jersey on the 17th of September, 1857: the order to proceed was obtained on the 27th of October, and no application is made to the court until the 17th of November. [Williams, J. When was the order served?] It does not appear. [Cockburn, C. J. The suggestion on the part of the defendant is, that it was never served at all. It it had been served, the plaintiff might have said so in his affidavit.] Then, the defendant has submitted to the jurisdiction. In *Forbes* v. *Smith*, 10 Exch. 717, a British subject residing in France was there served with a writ of summons in the form prescribed by the 18th section of the Common Law Procedure Act, 1852. The writ was specially indorsed with a claim in respect of promissory notes made at Calcutta. The defendant appeared to the writ, and, after declaration, found that the cause of action did not arise within the jurisdiction of the court, and was not in respect of the breach of a contract made within the jurisdiction;

(*a*) "Nor if the party applying has taken a fresh step after knowledge of the irregularity."

whereupon he applied to set aside the writ and proceedings under it: and it was held, that there was no irregularity in the writ itself, and that the defendant, by appearing, had given the court jurisdiction. And **[368]** Parke, B., said: "The writ is perfectly regular. The statute does not require either a statement in the writ itself, or an affidavit before issuing it, that the cause of action arose within the jurisdiction of the superior courts. Therefore, there is no irregularity in the writ itself, although the substituted mode of proceeding under it could not be applied unless the cause of action arose within the jurisdiction of the court, or was in respect of a breach of contract (*a*)[1] made within the jurisdiction. But then the defendant has appeared: and I think that, after appearance, this application cannot be granted. It is indeed said that the defendant appeared because he could not, until declaration, tell what the plaintiffs were going for. If so, the motion ought not to have been to set aside the writ, but the appearance, on the ground that it was entered improvidè. I will not say that in this case such an application would have been successful, because the indorsement on the writ gives information to the defendant that the cause of action arose in Calcutta. At all events, the defendant ought not to have appeared, and, having done so voluntarily, he has given the court jurisdiction. I agree, that, before declaration, there may be difficulty in knowing whether the cause of action in respect of which the plaintiff is suing arose abroad or in this country; but that may be obviated by application to a judge for particulars." Here, the defendant has not appeared; but he has taken the declaration out of the office: and that, according to *Caswall* v. *Martin*, 2 Stra. 1072, which has never been overruled, cures all defects in the process. [Cockburn, C. J. We must hear what Mr. Field has to say upon the subject of the waiver.]

Field, in support of his rule. There can be no waiver **[369]** without knowledge or means of knowledge of the irregularity to be waived. The writ was general, and gave the defendant no information as to the nature of the alleged cause of action. Until explained by the declaration, the defendant could not know that it was sought to charge him in respect of the breach of a contract made out of the jurisdiction. [Cockburn, C. J. In *Forbes* v. *Smith*, 10 Exch. 717, the objection was to the writ itself. Here, the writ only becomes bad by matter ex post facto. That certainly distinguishes the cases. Willes, J. The rule 135 of Hilary, 1853, says that the proceedings shall not be set aside "if the party applying has taken a fresh step after knowledge of the irregularity." The defendant does not tell us whether he had such knowledge or not.] He was never served with the order to proceed. [Willes, J. He clearly had the means of knowledge: for, the affidavit upon which the order was made must have been filed (*a*)[2]. Crowder, J. You appear for the defendant, and yet you have no affidavit from him negativing the service of the order or stating that he was out of the jurisdiction of the court when the promise was alleged to have been made or broken.] The plaintiff's affidavit at least shews that the order was served out of the jurisdiction.

Cockburn, C. J. The general rule is, that taking a step with knowledge or the means of knowledge of a previous irregularity, operates as a waiver. If the client or his attorney had sworn that he was in ignorance as to the nature of the alleged cause of action when the declaration was taken out of the office, this might have formed an exception to the general rule. But there is nothing to shew that the defendant's attorney when he took out the declaration had not seen the affidavit upon **[370]** which the order was obtained. At all events, he had the means of informing himself of its contents. If he had the means of knowing what that document would have shewn him, he has waived the irregularity.

The rest of the court concurring,

Rule discharged, the plaintiff's costs to be costs in the cause.

(*a*)[1] "The breach of a contract."

(*a*)[2] It ought to have been; but in this case it was not filed.

BENNETT AND OTHERS *v.* HERRING. Nov. 6th, 1857.

[S. C. 6 W. R. 37. See *Jacob* v. *Down*, [1900] 2 Ch. 160.]

Quære, whether the assignee of the reversion can avail himself of a forfeiture arising out of a breach of a covenant to complete the premises demised (in carcase) within a given time,—a breach having been incurred before the assignment to him?—A lease was granted of a piece of land with two messuages thereon in course of erection, with a covenant by the lessee to complete the messuages within two months, and also to keep "the said messuages or tenements and premises in repair during the term,"—with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant to repair, in respect of which forfeiture the assignee of the reversion might sue.

This was an action to recover the possession of two plots or pieces of ground, two messuages, four outbuildings, with the appurtenances, situate and being in Northumberland Park, Tottenham, in the county of Middlesex.

The action was brought by the assignees of the reversion, under the proviso for re-entry contained in a lease.

The cause was tried before Crowder, J., at the first sitting at Westminster in Trinity Term last. By lease of the 15th of June, 1853, made between Charles Ansell of the first part, Benjamin Chandler of the second part, and James Stephen Herring (the defendant) of the third part, it was witnessed, that, in consideration of the defendant (the lessee) having erected the messuages thereinafter demised, and of the rent and covenants thereinafter reserved and contained, the lessor, at the **[371]** request of Chandler, testified, &c., demised unto the lessee, all that plot or parcel of ground, &c., together with the messuages or tenements then lately erected and built thereon, &c., to hold the same unto the lessee, his executors, administrators, and assigns, for the term of ninety-nine years from the 24th of June, 1851, at the rent of a pepper-corn for the first thirty months, and at the yearly rent of 7*l.* for each of the said two messuages during the remainder of the term. The lease contained, inter alia, a covenant by the lessee that he would, at his own costs and charges, within two calendar months from the date of the lease, finish and complete in all respects fit for habitation and use, and in a good and workmanlike manner, with sound and proper materials, the said two several messuages, with suitable and proper offices thereto, and the necessary sewers, drains, fences, walls, pavements, railways, and other things; And also should and would, at his and their own costs and charges, when, where, and as often as need should be during the said term, well and sufficiently repair, maintain, paint, pave, scour, empty, cleanse, amend, and keep the said messuages or tenements and premises, and all the party and other walls thereof, and all the glass and other windows, window-shutters, doors, locks, fastenings, partitions, ceilings, floors, chimney-pieces, shelves, water-closets, cisterns, pavements, privies, fences, sinks, drains, sewers, watercourses, ways, paths, and passages thereto belonging, or which thereafter should belong to the same, with all necessary reparations, paintings, cleansings, and amendments whatsoever. The lease also contained the usual covenant to paint the exterior wood and iron-work once in every three years, and a proviso, that, in case of the breach, non-performance, or non-observance of all or any of the covenants therein contained on the part of the lessee to be performed, observed, and kept, it should be **[372]** lawful for the lessor, his heirs or assigns, to re-enter upon the said premises, and the same to have again as in his or their former estate.

By indentures of the 10th of August, 1854, Ansell conveyed the premises in fee to Chandler, subject to the lessee's interest.

On the 11th of August, 1854, Chandler mortgaged to Feltham and others, subject to the lease.

On the 1st of August, 1856, Feltham and others assigned to the plaintiffs, subject to the lease.

At the time of the grant of the lease of the 15th of June, 1853, the two messuages were in carcase only, but roofed in; and they never were finished. And it was proved, that, at the time the action was brought, the roofs were much dilapidated. Rent had

been received under the lease after the expiration of the two months within which the messuages were by the covenant to have been completed.

On the part of the defendant, it was insisted that the right of entry for condition broken was not assignable or assigned to the plaintiff, that the forfeiture in respect of the non-completion of the messuages had been waived by the lessor's acceptance of rent, and that the covenant to repair did not attach until the premises had been completed.

A verdict having been found for the plaintiff, the points made being reserved,

Honyman, in Trinity Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—"first, that the right of entry for a condition broken is not assignable,—secondly, that such right of entry had been waived by the lessor,—thirdly, that such right of entry was not assigned to the plaintiffs,—fourthly, that the covenant to repair did not attach." He referred to *Hunt* v. *Bishop*, 8 Exch. 675, *Hunt* v. *Remnant*, 9 Exch. 635.

[373] F. Edwards now shewed cause. It may be conceded that a right of re-entry for condition broken is not assignable. If the covenant to complete the messuages within two months was exhausted at the expiration of the two months, the assignee would have no right to avail himself of that forfeiture: but, if it be (as it is submitted it is) a continuing covenant, to finish the houses during the term, then there is a continuing breach, in respect of which the assignee might sue. [Crowder, J. There was a complete breach of the covenant before the assignment to the plaintiffs.] There was. Suppose no time had been limited by the covenant for the completion of the houses, the lessee would not have had the whole term for the purpose: the law would have implied a reasonable time. All that this covenant does, is, to fix upon two months as a reasonable time for the purpose. It is a covenant which runs with the reversion. The cases cited have no application. In *Hunt* v. *Bishop*, there was no question whether the breach was a continuing one or not: and in *Hunt* v. *Remnant*, all that was decided was, that the assignment did not shew any intention, or use sufficient words, to pass a right of entry. If this be held not to be a continuing breach, the consequence will be that the lessor must, in all cases of building leases, insist upon the covenant to erect and complete being strictly performed within the time limited. Then, as to the alleged waiver, it was distinctly held in *Doe d. Boscawen* v. *Bliss*, 4 Taunt. 735, that a lessor who has a right of re-entry reserved on a breach of a covenant not to underlet, does not, on waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting (*a*): nor, by waiving his right to re-enter on a breach of a covenant **[374]** to repair, does he waive his re-entry on a subsequent want of repairs. [Cockburn, C. J. You need not labour that point.] Then, as to the covenant to repair,—it is said that cannot attach until the premises were completed. That argument, if allowed to prevail, would have this absurd consequence, that the lessee's failure to perform one covenant would form an excuse for his breach of another and independent covenant. [Willes, J. The covenant now under consideration, is, to repair that which is demised. Crowder, J. It was proved that the roofs of the carcases were out of repair and ruinous.] The lessee was at all events bound to keep the premises in repair such as they were. He was, moreover, bound under this covenant to put them in repair.

Honyman, in support of the rule. *Hunt* v. *Bishop* and *Hunt* v. *Remnant* are distinct authorities to shew that the right of entry for condition broken is not assignable: and here there was a complete breach of the covenant to complete the messuages before the assignment to the plaintiffs. [Williams, J. Does not the covenant to repair equally apply to the premises though unfinished? The lessee covenants to keep the "messuages" in repair, and that is a covenant which runs with the reversion: carcases are messuages.] The lessee is to complete the messuages, and also to keep them in repair, that is, when completed. The whole forms in effect one covenant. [Crowder, J. Your construction makes it necessary to insert the words "when completed. Cockburn, C. J. Is it any answer to an action for a breach of the covenant to repair, for the lessee to say that he is absolved from the consequences of that breach, because he has failed to perform another covenant?] The construction contended for does not oust the plaintiffs of all remedy: it only operates to bar the

(*a*) Unless the first underletting was by license: for, then, the forfeiture once waived, the condition is gone for ever. *Dumpor's case*, 4 Co. Rep. 119.

forfeiture: the plaintiffs may still sue for the breach **[375]** of the first covenant,—supposing the two covenants to be divisible.

COCKBURN, C. J. It is unnecessary to decide the first question. There having been a clear breach of the covenant to repair, the plaintiffs are entitled to retain their verdict.

WILLIAMS, J. I also am clearly of opinion that the right of entry in respect of the breach of the covenant to repair is perfect.

CROWDER, J. At the trial I was inclined to agree with the defendant's view as to the first covenant, though I cannot say I am disposed now to adhere to that opinion. It is, however, quite clear that the covenant to repair has been broken.

WILLES, J. It is perfectly clear that the covenant to repair applies to the messuages as demised. I must confess I should have thought that the former covenant ran with the land in favour of the assignee of the reversion. It is enough, however, for the present purpose to decide the other point. The rule must be discharged.

Rule discharged.

[376] REGISTRATION APPEALS.

(Under 6 & 7 Vict. c. 18.)

COUNTY OF GLAMORGAN.

PHILIP DAVIES, *Appellant*, THOMAS HOPKINS, *Respondent*. Nov. 16th, 1857.

[S. C. 27 L. J. C. P. 6; 4 Jur. N. S. 690; 6 W. R. 68. Followed, *Leonard* v. *Allaways*, 1878, 48 L. J. C. P. 81. Distinguished, *Horsant* v. *Halse*, 1886, 18 Q. B. D. 417; *Jones* v. *Kent*, 1888, 22 Q. B. D. 207.]

The sufficiency of a notice of claim under the 6 & 7 Vict. c. 18, s. 4, is for the overseers; and, where they have acted upon it, by inserting the claimant's name in their list, pursuant to s. 5, it is not competent to the revising-barrister to inquire whether its form is in compliance with the statute.—Whether such notice requires the personal signature of the claimant,—quære?

At a court holden for the revision of the lists of voters for the county of Glamorgan, at Neath, Philip Davies, of Cattle Street, Neath, duly (*a*) objected to Thomas Davies, whose name appeared on the list of claimants for the hamlet of Coedfrank, in the said county, and proved that he gave the notices required by the 6 & 7 Vict. c. 18, and called upon the revising-barrister to require proof that Thomas Davies gave due notice of his claim to the overseers of the said hamlet.

The revising-barrister doubted whether he had power to require such proof from the claimant, when his name had been inserted and published in the list: but, assuming that he had such power, he required him to prove his notice of claim: and thereupon a notice of claim in proper form, and corresponding with the entry in the list, was produced and proved to have been delivered to the overseers in due time; but the claimant's name at the foot of the notice was not written by him, but by another at his request.

The revising-barrister held this notice sufficient; and **[377]** the claimant having proved his qualification as stated in the list, to his satisfaction, he retained his name thereon.

The questions for the opinion of the court were,—first, whether the revising-barrister ought to have put the claimant to proof of his claim,—and, if so, secondly, whether the notice of claim was sufficient.

The validity of the claims of three other persons on the same list having been determined by the revising-barrister on the same points of law, their cases were consolidated with the principal case.

If the court should be of opinion that the revising-barrister ought to have required proof of the notice, and that the notice was insufficient, the list of the said hamlet of Coedfrank was to be amended, by striking out the names of Philip Davies and the said three other persons.

(*a*) The case ought upon the face of it to shew that the party objecting is entitled to object,—that he is on the register of voters: see 6 & 7 Vict. c. 18, ss. 7, 17.

Kinglake, Serjt., for the appellant. Two questions are presented for the opinion of the court,—one, whether a notice of claim under the 4th section of the 6 & 7 Vict. c. 18, requires the personal signature of the party claiming,—the other, whether the fact of the overseers having published the list with the party's name therein raises a presumption that it is properly put there, so as to preclude any inquiry as to the sufficiency of the notice. 1. The 4th section of the act requires the notice of claim to be signed by the party. It enacts "that the overseers of the poor of every parish and township shall, on or before the 20th of June in every year, publish a notice according to the form numbered 2 in the schedule (A.), having first signed the same, requiring all persons entitled to vote in the election of a knight or knights of the shire to serve in parliament in respect of any property situate wholly or in part within such parish or township, who [378] shall not be upon the register of voters then in force, and also all persons so entitled as aforesaid, who, being upon such register, shall not retain the same qualification or continue in the same place of abode as described in such register, and who are desirous of having their names inserted in the register about to be made, to give or send to the said overseers, on or before the 20th of July then next ensuing, a notice in writing, by them signed, of their claim to vote as aforesaid; and every such person, and any person who, being upon such register, may be desirous to make a new claim, shall, on or before the said 20th of July, deliver or send to the said overseers a notice, signed by him, of his claim, according to the form of notice set forth in that behalf in the said form numbered 2, or to the like effect." The 7th section, which provides for the notice of objection, in like manner requires that "every such notice of objection shall be signed by the party so objecting as aforesaid:" and this, it has been held, must be the personal signature of the objector himself: *Toms, App., Cuming, Resp.*, 8 Scott, N. R. 910, 7 M. & G. 88, 1 Lutw. Reg. Cas. 200,—decided upon the authority of *Hyde* v. *Johnson*, 2 N. C. 776, 3 Scott, 289. [Cockburn, C. J. Is it not enough that the revising barrister has before him the list of claimants prepared by the overseers? Must he call for proof of notice in each case?] A proper notice of objection having been given, the whole title of the claimant to have his name upon the register is put in issue. [Crowder, J. Was *Hyde* v. *Johnson* cited with approbation in *Toms, App., Cuming, Resp.*?] It was referred to by Cresswell, J., during the argument, and is noticed by Tindal, C. J., in the considered judgment of the court. "The natural meaning of the words," says that learned judge, "is, that there shall be a personal signature. And there is great reason and good sense in such an enactment. If the objector were [379] unknown, and was at liberty to get some one else to sign the notice, there might be great difficulty in obtaining costs from him. Some shuffling person might be put forward in his stead; and great inconvenience and vexation might be the result. The case of *Hyde* v. *Johnson* corroborates the propriety of this interpretation of the clause in question. 2. The next question is, whether, a notice of claim having been sent in, and published by the overseers, the claimant may not still be called on to prove his notice of claim as part of his title to be on the register. By the 3rd section, the clerk of the peace is directed to send to the overseers his precept requiring them to give notice to all persons entitled to vote, to come in and make their claims. By s. 2, the overseers are directed to issue a notice to that effect in the form given in the schedule, and thereupon the claimants are to forward them the notice already mentioned. Then by s. 5 the overseers are required to prepare a list of such claimants; which list (by s. 6), together with the copy of the register of the preceding year, is to be deemed to be the list of voters of such parish or township, to be submitted to the barrister for revision. The 7th section gives any person on the register a right to object to any other person therein as not entitled to be upon it. And by s. 8, a list of the persons objected to is to be published. By s. 34, the overseers are required to attend the court to be held for revising the lists relating to their parish or township, and to deliver to the barrister holding such court the original notices of claim and notices of objection so given to them as aforesaid. And the duties of the revising-barrister are defined by s. 40, which, amongst other things, enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his [380] behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his

name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." [Cockburn, C. J. You construe the words at the end of s. 40 to have reference, not merely to whether the party has the qualification described in the list, but whether he has complied with all the requisites of the act?] Precisely so: his whole title to be on the register is in issue. [Crowder, J. Can you assign any reason for holding this to be an available objection?] The same that is assigned by Tindal, C. J., in *Toms, App., Cuming, Resp.*, viz. the difficulty in obtaining costs, if the notice were permitted to be signed by a third party. [Williams, J. The objector cannot be founding his objection upon the want of signature by the claimant himself; for, that is a matter which he could know nothing about.] The simple question is, whether the voter has complied with the act, by taking the intermediate steps necessary to entitle him to be placed upon the register. *Burton, App., Gery, Resp.*, 5 C. B. 7, 2 Lutw. Reg. Cas. 4, shews how strict a construction the court will put upon the statute with regard to claims [Williams, J. There was no other list there than the old register. Crowder, J., referred to *Hanaford, App., Whiteway, Resp.*, ante, vol. i, 53, where it was held that a notice of objection sent by post, pursuant to the 6 & 7 Vict. c. 18, s. 100, is not vitiated by **[381]** the fact of the post-master having received it out of the usual hours of business prescribed by the postmaster-general.]

Macnamara, for the respondent. 2. The revising barrister was not bound to put the claimant to proof of his notice of claim: and, if he were, the notice was sufficient. The object of the notice having been accomplished by the placing of the party's name in the list of claimants, there is an end of all inquiry upon the subject. By s. 5, the overseers are to place upon the list of claimants the names of all persons who on or before the 20th of July then next preceding shall have claimed according to s. 4. In so doing, they are performing, not a mere ministerial duty, but one of a judicial nature, which it will be presumed is done properly, and is not reviewable by the revising-barrister. [Cockburn, C. J. Suppose the overseers put one on the list who had never made any claim at all?] Even then, it is submitted, the revising-barrister would have no power to question it. Where a party complains that he is omitted from the list, although he has given due notice of his claim, it is but reasonable that he should be put to proof of the fact: and this accounts for the difference of language used in s. 37. In the case of a claim by a borough voter under s. 15, he is not in terms required to sign the notice, and yet the form in the schedule (B.) No. 6, is the same as that under s. 4. The 40th section, which defines the duties of the revising-barrister, only authorizes him to expunge the voter's name where he shall fail to prove to his satisfaction that he is entitled to have his name inserted in the list of voters in respect of the qualification described in the list. The 41st section gives the revising-barrister power to determine upon the validity of "claims and objections," but not of "notices." The allowance **[382]** of costs by the revising-barrister is regulated by s. 46; but the court will not merely upon a question of costs impede the exercise of the franchise. By s. 51, the revising-barrister is impowered to fine the overseers for any wilful neglect of duty,—amongst others, wilfully and without any reasonable cause omitting the name of any person duly qualified to be inserted in the list: and this the legislature evidently thought a sufficient guarantee for the due performance of this part of their duty. 1. Then, as to the sufficiency of the notice. Assuming that the revising-barrister had power to call upon the claimant to prove that due notice was given, it is submitted that the personal signature of the party is not necessary, but that the notice may be signed by another in his name and at his request. [Crowder, J. That point is decided against you in the two cases referred to, of *Hyde v. Johnson*, and *Toms, App., Cuming, Resp.* However erroneous we may think those decisions, we cannot over-rule them. Willes, J. They may probably be questioned in a court of error; but not here.] The circumstance of there being no appeal from the decision of this court in these cases, would probably take them out of the ordinary rule. In *Morgan, App., Parry, Resp.*, 17 C. B. 334, the 13th section, which requires the lists of voters prepared by the overseers to be signed by them, was held to be only directory in this respect.

Kinglake, Serjt., in reply. The overseers have no means of inquiring whether the

signature to the notice is in the handwriting of the claimant or not. Unless, therefore, there be some means of investigating the matter before the revising-barrister, this provision of the statute can never be enforced. Suppose the claim be signed with the initials only of the party, or the claim be made orally, or suppose the overseers choose [383] to dispense with notice altogether,—is their decision to be conclusive? Under s. 37, where a claim has been sent in, and the claimant's name omitted, whether accidentally or otherwise, the party is compelled to come and prove that he gave due notice, before he can call upon the revising-barrister to investigate his right to be on the register. [Crowder, J. The argument drawn from that section by the other side, is, that, where the legislature intended the notice to be proved, they have said so in terms.] The claimant does not prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list, unless he proves that he has taken all the preliminary steps necessary to entitle him to have his claim entered in such list.

COCKBURN, C. J. I am of opinion that the revising-barrister was right in allowing the vote in this case. It appears that the voter sent in a claim to the overseers, in due time and in proper form, to have his name inserted in the list of claimants, but that, instead of being signed by himself, it was signed by some one else in his name and by his authority. The overseer, acting upon the notice, inserted the name of the party in the list of claimants. The vote being objected to, the qualification was proved: and the only objection now, is, that the act requires that the notice of claim shall be signed by the party's own hand, and that this vicarial signature is not sufficient. The opinion I have formed, is, that this is in the first instance a matter between the claimant and the overseers. If the overseers are satisfied that the notice is the notice of the person who claims to be entitled to vote, and choose to act upon it, and to place the claimant's name upon the list of claimants,—which together with the old register constitutes the list to be revised,—it seems to me that the revising-[384]-barrister has nothing to do but to consider whether the claimant makes out his right to be upon the register in respect of the qualification described in the list. The question turns upon that part of the 40th section of the 6 & 7 Vict. c. 18, which enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, &c., such barrister shall expunge the name of every such person from the said lists." Now, the first observation that arises upon that, is, that, before the revising-barrister is called upon to act, the claimant is to prove that he has given the notices required by the act to be given by him; and then the revising barrister is to require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list. What is meant by these words? It seems to me that full light is thrown upon that part of the section by the 37th, which enacts, "that, if any person who shall have given to the overseers of any parish or township due notice of his claim to have his name inserted in the list of persons entitled to vote in the election of a knight or knights of the shire, shall have been omitted by such overseers from such list, it shall be lawful for the revising-barrister, upon the revision of such list, to [385] insert therein the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister that such person gave due notice of such his claim to the said overseers, and that he was entitled on the last day of July then next preceding to be inserted in the said list of voters." So, in s. 38, which, though it relates to city and borough lists, is in pari materia, and very much to the purpose as shewing the intention of the legislature, it is in like manner enacted "that the revising barrister shall insert in any list of voters for any city or borough the name of every person omitted who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in such list, and to have been entitled on the last day of July then next preceding to have his name inserted therein in respect of the qualification described in such notice of claim." So that, under these

sections, the revising-barrister is to require it to be proved both that due notice has been given to the overseers, and that the party claiming has the qualification represented,—distinguishing between the mere proof of title to be inserted in the list, and the preliminary matters which relate to the giving of the notice. This difference of language seems to me to shew that the statute contemplated a totally different state of things in the case of the insertion of an omitted name, from that of the expunging of a name inserted in the overseers' lists. That being so, I do not think we ought to be astute to give effect to objections of this sort, but rather to give effect to the general intention of the act of parliament, that all duly qualified persons should be on the register. The objection is one of a strictly technical nature: and, when we find in the act a plain distinction taken between that which is matter of substance and that which is matter of mere form, I think we are justified in saying that the form and service of the notice to the over-[386]-seers under s. 4, is a matter which rests between them and the party claiming, and that all the revising-barrister has to do under s. 40, is, to see that the qualification as described in the list is proved to his satisfaction.

WILLIAMS, J. I am entirely of the same opinion. Two questions are reserved for the opinion of the court by the revising-barrister in this case,—first, whether he ought to have put the claimant to proof of his claim,—secondly, whether the notice of claim was sufficient. In the view I take, it becomes unnecessary to decide the second question. I am clearly of opinion that the revising-barrister was wrong in putting the claimant to proof of his claim. It may be that the notice was so imperfect that the overseers were not bound to place the claimant's name upon the list: but, they having done so, the maxim "fieri non debuit, sed factum valet" (*a*), applies; and, the name being there, all that the revising-barrister was called upon to do, was, to ascertain that the claimant possessed the qualification stated therein. The question turns upon the meaning of that part of section 40 which directs, that, where a notice of objection has been given, the barrister "shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list. My Brother Kinglake insists that the being entitled to have his name inserted in the list in respect of the qualification therein described, necessarily includes the claimant's having given a proper notice of claim to the over-[387]-seers, for that otherwise he would not be entitled to have his name inserted in the list at all. If the legislature really did intend that such proof should be given, it is somewhat strange that they did not in terms say so. One would naturally have expected, if such had been the intention, that the section would have gone on to say that the claimant should be put to proof that he had duly given the notice required by s. 4. According to the ordinary rule of construction of acts of parliament, the same construction must be put upon the same language in different parts of the act: and, when we turn to s. 37, we find, that, where the legislature intended to require proof of the giving of a notice of claim, they have expressly said so; for, where the claimant's name is omitted by the overseer, the revising-barrister is to insert it, in case it shall be proved to his satisfaction that the claimant "gave due notice of such his claim to the said overseers, and that he was entitled on the last day of July then next preceding to be inserted in the said list of voters." If the latter words in s. 37 exclude the proof of due notice having been given to the overseers, it follows that the same words in s. 40 must receive the same construction. It is obvious, therefore, that it was not competent to the revising-barrister to insist upon the notice being proved. The principle upon which this our decision rests undoubtedly goes the whole length of holding,—and I have not the slightest hesitation in saying so,—that, if no notice at all had been given to the overseers, and they had thought fit notwithstanding to put the party's name in the list, that would have been sufficient to entitle him to be upon the register, the other condition being fulfilled.

CROWDER, J. I am of the same opinion. I think the vote should have been retained, not on the ground that the claimant had proved his qualification, but that [388] it was wholly unnecessary to go into the question of notice. The whole question turns upon a few words in the 40th section of the 6 & 7 Vict. c. 18. My Brother Kinglake has contended that the words which direct the revising-barrister to require

(*a*) Shep. Touch. 6; 5 Co. Rep. 39; T. Raym. 58; 1 Stra. 526. And see per Platt, J., in *Nichols* v. *Ketcham*, 19 Johns. (American), 84, 92.

it to be proved that the person objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list, are to be interpreted as involving proof of all matters the due performance of which are conditions precedent to the claimant's right to have his name in the list, and that the party is not entitled to have his name in the list unless he has given a notice of his claim to the overseers within the terms of the act. It appears to me, that that is not the meaning of the statute at all; but that it is confined to proof of the title or qualification as described. I entirely agree with my Lord and my Brother Williams that the question how the party gets on the list of claimants is between him and the overseers only. The notice of objection is required to be strictly proved; but not the notice of claim. The 37th section shews that the same language as is used in s. 40 excludes the interpretation which my Brother Kinglake insists on. The same construction must be put upon the same words in both instances. It seems to me, therefore, that it was not necessary for the revising-barrister to do more than enter upon the question of title. It becomes needless, therefore, to decide whether the notice of claim was sufficient or not. Whatever may be our opinion as to the two cases which have been cited, I think it would not be proper for us to over-rule them. That must be done, if at all, in a court of error.

WILLES, J. I am of the same opinion, and for the same reasons. But I think it right to add, that it is [389] not to be supposed, that, because we hold the 40th section to be satisfied without there having been any notice of claim at all,—for I agree with my Brother Williams in his application of the principle fieri non debuit, sed factum valet,—the overseers are therefore to take upon themselves to disregard the provisions of the statute. On the contrary, if they improperly insert a claimant who has not given due notice, they may be indicted, and subjected to severe penalties.

Appeal dismissed, with costs.

BOROUGH OF WARWICK.

RICHARD CHILD HEATH, *Appellant*; SAMUEL WILLIAM HAYNES, *Respondent*.
Nov. 16th, 1857.

[S. C. 27 L. J. C. P. 50; 4 Jur. N. S. 664; 4 W. R. 52. See *Durant* v. *Kennett*, 1869, L. R. 5 C. P. 272; *Ford* v. *Harrington*, 1869, L. R. 5 C. P. 286.]

The inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations:—Held, that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered. Rating is not the test of occupation as tenant.

At a court held for the revision of the lists of voters for the borough of Warwick, Richard Child Heath duly objected to the names of Jesse Boddington and of nine others similarly qualified and described being retained on the 10*l.* householders' list of voters for the parish of St. Mary, in the said borough.

The description of the said Jesse Boddington on the register was as follows:—

Name.	Place of Abode.	Nature of Qualification.	Street, &c., where the Property situate, &c.
Jesse Boddington.	High Street, Warwick.	Part of Earl Leicester's Hospital.	High Street.

[390] The said Jesse Boddington was one of the brethren of the hospital hereinafter described, and known by the name of Earl Leicester's Hospital, and as such occupied the premises in respect of which he claimed to vote.

By an act of parliament passed in the 13th year of the reign of Queen Elizabeth, Robert, Earl of Leicester, was impowered to establish within the town of Warwick,

an hospital for "the finding, sustentation, and relief of poor, needy, and impotent people," and it was enacted that such hospital "should be incorporated and have perpetual succession of such members and numbers of poor, needy, and impotent people as should be appointed by the said earl, his heirs, executors, or assigns;" and that the said corporation should have power to hold lands, and should have a common seal, and should be governed by such rules as the said earl, his heirs or assigns, should appoint.

By a private act of parliament of the 53 G. 3, c. 213,—after reciting, that, by a deed bearing date the 21st of November, 1585, the said earl granted land and established the hospital in the town of Warwick, and directed that it should consist of a master and twelve brethren, and should form a body corporate by the name of "The Master and Brethren of the Hospital of Robert, Earl of Leicester;" and that, by a writing under seal, dated 26th of November, 1585, the said earl established rules and ordinances for the government of the hospital,—certain alterations were made in the rules and ordinances, and in the constitution and government of the hospital, for the purpose of authorising the appointment of additional brethren, and for the better application of the income of the corporate estates: and the hospital is now governed in accordance with the provisions of the said act of parliament. The said rules and ordinances and the said last mentioned act of parliament are to be read or referred to by either party as **[391]** part of the case, if required. Lord De Lisle and Dudley, as heir of the founder, has now the right of appointment of the brethren, whose appointments are for life, subject to removal or deprivation for the causes in the said rules specified.

The income of the corporation is derived from land; and there are chosen from the brethren annually two stewards, who receive the rents and make all payments for repairs and taxes, and also for coals and candles, and other payments for the general purposes of the hospital, which are called kitchen expenses, out of the corporate funds.

The hospital consists of a chapel, hall, and kitchen, apartments for the master and brethren, and a garden within the walls of the hospital, part of which garden is appropriated for the use of the master, and the other part is divided into specific portions, one for the use of each of the brethren.

The apartments of the master are one side of a quadrangle. The common hall and the apartments of the brethren form the other sides. There is a gateway on one side of the quadrangle, which opens upon an elevated inclosed platform overlooking the High Street in Warwick, and at one end of this platform are large gates which form the communication with the street. These gates are locked at nine o'clock every night, the key thereof being kept by the porter of the hospital, who resides in a lodge adjoining thereto; and, after that hour, it is contrary to the rules of the hospital for any brother to be absent from the hospital without permission of the master. There is no other entrance to the hospital.

Each of the brethren occupies exclusively two rooms, a sitting room and a bed-room, and a cellar, and a portion of the garden, which together are of greater value than 10*l.* per annum. Each of the brethren wears a cloak and badge, which are the property of the corpo **[392]**-ration. Each person, upon being elected a brother, makes oath that he will be obedient to the master, and that he will not infringe the rules. Each brother is entitled, under the provisions of the lastly hereinbefore mentioned act of parliament, to receive, and does receive annually, the sum of 80*l.* out of the income of the corporation exclusive of taxes, and of all payments for coals, candles, and kitchen expenses, and has received that money within twelve months previous to July last. The name of each of the brethren appears upon the rate-book of the parish, as occupier of a house and garden of the gross annual value of 12*l.*

The said Jesse Boddington, whose vote was objected to, had occupied as one of the brethren aforesaid, a sitting-room and bed-room, a small cellar, and a portion of the said garden, being part of the said hospital, for the necessary period in order to entitle him to vote in respect thereof. He was also duly rated for the same, and all rates in respect thereof had been duly paid. The outer door of the sitting-room so occupied by him opened into the court-yard of the hospital, which is within the outer gates: and of this door he kept the key. The bed-room opened out of the sitting-room: and the said Jesse Boddington had the exclusive use and occupation of the premises so occupied, which were together of the value of upwards of 10*l.* a year.

The votes were objected to on the grounds,—that the brethren were members of a corporation aggregate, and were occupying the corporate property for the purposes of the corporation, and were therefore not entitled to vote,—that they were not occupiers, within the meaning of the 27th section of the Reform Act, 2 W. 4, c. 45, of any property in respect of which they were entitled to be registered,—and that the hospital was a charitable institution of the Leicester family, and the brethren had been in receipt of disqualifying alms [393] within twelve months next previous to the last day of July last.

The revising-barrister decided against each of these grounds of objection, and retained the names on the list of voters; and, it appearing to him that the validity of the objections to the several names of voters thereunder written (nine others besides that of Jesse Boddington) depended and had been decided by him upon the same state of facts and upon the same points of law, he declared the same consolidated with the principal case.

The following were the rules and ordinances of the foundation, which were appended to the case:—

"Ordinances, statutes, and rules made by us, Robert Earl of Leicester, Baron of Denbigh, &c., &c., the 26th day of November, in the 28th year of the reign of Elizabeth, by the grace of God, Queen, defender of the faith, &c., for the order and government of the hospital in the town of Warwick, in the county of Warwick, called the hospital of Robert Earl of Leicester in Warwick, founded by us the said earl:—

"1st. Master, and his qualities. Imprimis, we will and ordain that none shall be elected or preferred to be master of the said hospital, but such one as shall be an ordained preacher of God's word, and of good life and conversation: and, if any other elected, &c., it shall be lawful for the visitors of the said hospital, or two of them, to deprive the said master:

"2nd. Vicar of St. Mary's. Item. Forasmuch as the portion of living now allowed to the vicar of St. Mary's, in Warwick, is very small for so great a cure and charge as belongs to the said vicar, We therefore will, ordain, and require, that, after the death of the said earl, from time to time as the said mastership shall become void, the vicar of St. Mary's, in Warwick, for the time being, shall be preferred to the said mas-[394]tership, if he be a man of the qualification before specified; and that the heirs of us the said earl, or such other person as we have or shall appoint, to have the nomination and election of the said master, &c.:

"3rd. Oath of master for the supremacy. That the person and persons hereafter elected master of the said hospital, before he takes upon himself the said mastership, &c, shall take the oath of supremacy, &c.:

"4th. Oath of the master for the government of the house. Item. The same elected master, before he take upon himself the mastership or shall be master of the said hospital, in the presence aforesaid shall take a corporal oath upon the Holy Evangelists, to the effect following, viz. 'I, J. S., shall govern and order this hospital and the poor thereof in the fear of God, according to the laws, statutes, and ordinances of the founder thereof. I shall not willingly defraud the poor, or any of them, of any right or duty to them assigned or belonging. I shall not consent or agree to any act or thing whatsoever whereby the poor of this house may be defrauded, or the good intent of the founder thereof made frustrate. I shall, as near as I can, keep all the statutes, ordinances, and rules instituted by the founder of the said hospital, not contrary to the law of God or the laws of this realm. I shall not take, directly or indirectly, any reward or promise of reward for the placing of any poor brother or brethren in this house. So help me God:'

"5th. Magistre sede vacante. Item. That, as often as the said hospital shall be vacant of a master by death, resignation, or otherwise, the vicar of St. Mary for the time being shall be, sede vacante, the governor and ruler of the said hospital and the poor people therein until the same shall be provided of a master, according to the foundation and corporation thereof:

"6th. Oath of the brethren. Item. Each person to [395] be elected a brother of the said hospital, before he be admitted a brother of the same, shall take a corporal oath upon the Holy Evangelists before the master and most part of the brethren, and, for want of a master, in the presence of the vicar of St. Mary's aforesaid for the time being, hereafter, viz. 'I, J. S., during the time I shall be a brother of this

hospital, shall be obedient to the master of the same hospital in all lawful and honest things not contrary to the statutes and ordinances of the founder of the same. I shall not willingly infringe or break any of the laws, statutes, or ordinances of the founder thereof, but, living peaceably and quietly in this hospital, shall to the best of my power maintain and uphold the same. So help me God:'

"7th. Number of the poor, and their qualities. Touching the poor of the same hospital, we will they shall be twelve in number, besides the master: and we ordain that such poor and impotent persons not having of their own to relieve themselves, as shall be hereafter maimed or hurt in the wars, in the service of the Queen's Majesty, her heirs and successors, especially such as shall be under conduct or leading of us or our heirs, or the servants and tenants of us and of our tenants, shall be preferred before all others to the place and room which shall become void in the said hospital:

"8th. Item. We ordain that none shall be preferred to any place or room in the said hospital but such as shall be born in the counties of Warwick or Gloucester, or there dwelling and abiding by the space of four or five years at the least:

"9th. Item. We will, that, if there be no poor people which have been maimed or hurt in the wars as aforesaid, that then such poor and impotent persons as shall be decayed by sickness or some other misfortune, and not by their own wicked wastefulness and riotous consuming, and especially the tenants and servants of [396] us or our heirs, shall be preferred to the place and room of a brother in the said hospital:

"10th. Item. We ordain that the lame and maimed soldiers and poor people of the quality and conditions aforesaid, which shall happen to be in the town of Warwick, Kenilworth, and Stratford-on-Avon, in the said county of Warwick, or in the lordship of Wooten-under-Edge, and Ealingham, in the county of Gloucester, shall be preferred to the place and rooms aforesaid, before any other, viz. first, the town of Warwick, second, the town of Kenilworth, thirdly, the town of Stratford-on-Avon, fourth, the lordship of Wooten-under-Edge, and fifth, the lordship of Ealingham, alterius viscibus; and, for default of such poor and maimed people in the towns aforesaid, then the same poor and brethren to be taken and chosen out of any town in the said county of Warwick:

"11th. Item. We ordain that such as shall be admitted a poor brother of the said hospital after the death of us the said earl, shall be commended by the minister and churchwardens of the parish where he was last abiding, by writing under their hands and seals, to be of honest life and conversation:

"12th. Repair to church by brethren. Item. We will and ordain that the poor brethren of the said hospital for the time being shall duly resort and decently go together, in their liveries, to the ordinary service and sermons in the parish church of St. Mary's, and especially on the sabbath days; and, if any make default, unless it be by reason of sickness or some other lawful impediment, that then the person offending shall forfeit for every offence 6d., to be deducted from such money or allowance as he shall have in the said hospital:

"13th. Vice punished in the brethren. Item. We ordain, that, if any brother of the said hospital shall commit adultery or fornication or other uncleanness, [397] and that duly proved, or shall steal, within the house or without, to the value of 1s., and shall be convicted thereof by sufficient testimony, that then, ipso facto, the said brother be expelled:

"14th. Item. If any brother shall be an heretic or notorious blasphemer, or a drunkard, or a quarreller in the house or abroad, to be for the first fault sharply reprehended, for the second to be removed from his commons fifteen days, or lose fifteen days' allowance; in which time, if he make his humble suit to the master, and reconcile himself to the brethren, shewing himself penitent for his evil example, then to be again received, by the special assent of the master and most part of the brethren, or else to be removed for ever: and, the third fault, to be ipso facto disabled to be a brother of the said house, and deprived for ever:

"15th. Item. If any brother shall behave himself stubbornly or disobediently or contemptuously or in any respect disorderly towards the master for the time being, in check, taunt, or slander, he to be punished as in that last article for every several offence:

"16th. Lodging out of the house. Item. That no brother lodge in the night out of the hospital, without leave of the master or his deputy, upon pain of deprivation and the loss of his living:

"17th. Lodging of strangers. And that no brother shall lodge any strangers in his chamber with him, upon pain of forfeiting fifteen days' commons, or the value thereof:

"18th. Going in their liveries. Item. That no brother go into the town without his livery on his back, upon pain of losing his commons or allowance for eight days:

"19th. Riding out of the town. That no brother shall go or ride forth out of the town, without leave of the master or his deputy, upon pain, for the first offence, [398] to lose one month's commons or allowance, and for the second offence, to be put out of the house:

"20th. Keeping of hawks and dogs. Item. That no brother, without leave of the master, keep dog or hawk within the hospital, upon pain of losing his commons and his allowance of money during the time he shall so keep dog or hawk.

"21st. Unlawful games and suspected houses. Item. That no brother use any unlawful games, either in the house or abroad, or frequent any suspected house, or admit any such to his chamber customably as are or have been infamous for lewdness, upon pain, for the first offence, to lose fifteen days' commons, or the allowance thereof, and, for the second offence, to be removed out of the house till he shall reconcile himself, and confess his fault before the master and all his brethren, and, for the third offence, to be ipso facto deprived for ever:

"22nd. Laundresses. Item. That no brother take any woman to serve or tend upon him in his chamber, without special licence of the master, or any with licence under the age of three score years, except she be his wife, mother, sister, or daughter, upon the pain last before mentioned for their several offences:

"23rd. Filthiness and uncleanness. Item. That every brother of the said hospital shall keep his chamber sweet, without wilfully annoying any of his brethren in any filthy or unseemly manner, upon pain of loss of his commons fifteen days for the first default, for the second, the loss of wages and commons for the space of three months, for the third, to be removed for ever:

"24th. No brother to have 5*l.* yearly living. Item. That no person shall be a brother of this hospital, or enjoy any part of the living or benefit allowed or to be allowed for a brother, if he shall have any manner of way any living to the clear value of 5*l.* per annum or above; and, if any such hereafter shall be, he shall be ipso facto deprived:

[399] "25th. Marriage. That no brother shall in this hospital marry a wife, without special consent of the master, upon pain of forfeiting his place ipso facto:

"26th. Property of the goods, in whom it shall be. Item. That the property of the livery, bedding, and every other thing which every brother shall enjoy of the liberality or gift of us, our heirs, or at the charges of the said hospital, shall be in the master and brethren, and not in any private person, and shall be delivered to every brother upon condition that he shall not alienate the same or alter the property thereof from the said corporation, and not otherwise:

"27th. Begging and breaking of hedges. That, if any brother of this hospital shall be found begging either at or about the hospital itself, or elsewhere abroad, or shall be found unlawfully breaking any hedge, or unlawfully cutting or carrying away any wood, the same shall for the first offence lose 1*s.* 6*d.*, for the second 6*s.*, to be deducted and divided off his wages and allowance for commons, and for the third offence shall be forthwith expelled the said hospital for ever:

"28th. Railing. We ordain that no brother of this hospital shall give any railing words or uncharitable speech to the master or any of the brethren of the said hospital, under the pain of 3*s.* 4*d.* for every such offence against the master, and upon pain of 6*d.* for every such offence against any brother; the said forfeitures to be deducted and divided out of his wages and allowance for commons:

"29th. Striking and fighting. That no brother of this hospital shall give any blow or strike to the master, or any of the brethren of the said hospital, under the pain of forfeiture of one whole month's wages or commons for the first offence, to be deducted and divided as is last above said, and, for the second offence, to be expelled for ever out of the said hospital:

[400] "30th. Prayers in the house. We ordain that the master or his deputy, and the poor brethren of this hospital, or so many of them as shall not be impotent, sick, or pressed by great business, every evening, immediately after shutting of the gates, and every morning before 8 o'clock, shall assemble together in the chapel or

common hall of the said hospital, at the sounding of the hand bell, which the brethren each one each day by turns shall ring, and which shall be left at the lodging of him whose turn it is to ring it; and then, upon their knees, with loud and audible voices, shall all together say in English these prayers following at large, that is to say,—'Prepare our hearts, oh Lord, and open our mouths to prayer:' then, for the morning and evening daily, this,—'Almighty God, and most merciful Father, we have erred and strayed, &c. &c.:'

"31st. Absence of master. Item. We ordain that the master of the said hospital for the time being shall be resident and abiding in the said hospital, and shall not be absent from it above one week at a time, or above one month in a year at several times, without licence of the Bishop of Worcester, the Recorder of Coventry, the Recorder of Warwick, for the time being, or two of them, and always in his absence, with licence or without, to have a sufficient deputy in the said hospital, to order the same, upon pain to forfeit for every offence the fourth part of that year's allowance in commons, money, and otherwise, to be divided among the brethren of the said hospital:

"32nd Visitors. We ordain that the Bishop of Worcester, the Dean of Worcester, and the Archdeacon of Worcester, for the time being, or any two of them, after the death of us the said earl, shall be visitors of the said hospital, and that it shall be lawful for them or any two of them to visit the said hospital at any time at their pleasure, so be it not above once in three **[401]** years, and to correct, punish, and reform all abuses and offences to be committed or done by the said master and brethren, or any of them, and to see these our ordinances truly executed, according to the meaning of the same: Provided always that the master or brethren, or any two of them, shall not be compelled to go out of the town of Warwick to any such visitation:

"33rd. It is ordered that these ordinances shall hang continually in the chapel, &c. &c.:

"34th. Order of the lands. Touching the lands, tenements, possessions, and hereditaments already given or granted for the relief or maintenance of the said hospital, or the master or brethren of the same, we will and ordain that the rents, revenues, and profits thereof coming and growing, all ordinary and necessary charges deducted, shall be divided into four equal parts, whereof one fourth part, so it do not exceed yearly 50*l.*, or so much thereof as shall amount to 50*l.* yearly if the said fourth part do exceed the sum of 50*l.*, shall be allowed and paid to the master, or such person as shall supply the master's place, according to these ordinances, and the other three, residue of the said revenues and profits, to be employed upon the twelve brethren of the hospital for the time being equally in meat, drink, money, and other necessaries, or in money alone, according as we the said earl during our lives, or, after our deaths, the Bishop, the Recorder of Coventry and Warwick for the time being, or any two of them, shall think fit: Also we ordain that the lands, tenements, possessions, and hereditaments already given or granted, or hereafter to be given or granted, for the relief and maintenance of the said hospital, or the master and brethren thereof, other than the site of the hospital itself, shall from time to time be granted, let out, and demised to honest and sufficient persons that will live upon the dwelling-houses of the same, if there be any, for terms **[402]** of years, or for term of one, two, or three lives, by copy of court rolls, according to the custom of the manors whereof they be parcel, and the same to be done to the best advantage and improvements in yearly rents that with conscience may be, and with such cautions, conditions for reparation, or otherwise, as the change of times shall require and the wisdom and discretion of the recorders for the time being shall devise for the most benefit of the poor of the said hospital: Provided, nevertheless, and we ordain that it shall not be lawful for the master and brethren of the said hospital for the time being to make any lease or leases of the said lands, tenements, and possessions, or any part thereof, for any larger or longer estate therein or term than twenty-one years or under, to be accounted from the making of such lease or leases, nor without impeachment of waste, nor of any lands or tenements whereof any further demise or lease shall then continue or be, or else which shall not be expired, surrendered, or determined within one year next after making of the same new lease or leases: Provided also, and we ordain, that, if any person or persons now being, or which shall hereafter be, master of the said hospital, at any time, hereafter advisedly determine, or effectually attempt,

practise, or go about act or acts, thing or things whatsoever, for or concerning any bargain, sale, discontinuance, alienation, exchange, or charge, to be had, made, done, or suffered of, on, or out of any lands, tenements, or hereditaments heretofore given, granted, or conveyed or assured, or hereafter to be given, granted, conveyed, or assured, for the maintenance and relief of the said hospital, or the master and brethren of the same, or of any part thereof, otherwise than before in these presents is limited, expressed, and allowed, without the consent of the bishop and recorders aforesaid for the time being first had and obtained in writing under their hands; **[403]** and also the same act or acts, thing or things, shall execute and put in use or effect by any overt act or deed,—that then every such master, immediately after every such attempt, practice, or going about, shall thereupon, by virtue hereof, and by force of the statute made in the thirteenth year of the reign of our sovereign Lady the Queen's Majesty that now is, for the erecting and founding of the said hospital, be ipso facto deprived of the said mastership, and be disabled to be master of the said hospital."

Pickering, Q. C. (with whom was Byles, Serjt.), for the appellant (*a*). The brethren of the Earl of Leicester's Hospital, being members of a corporation aggregate, are not entitled to be registered. In Dalton's Sheriff, 334, it is laid down that "fellows of houses or colleges in universities are holden to have no voices (in the election of knights of the shire) for or by reason of their chambers or other avails, &c., in their colleges." And the same principle applies to borough voters. The point seems to have been assumed by the court in *Simp* **[404]***-son, App., Wilkinson, Resp*, 7 M. & G. 50, 8 Scott, N. R. 814. [Williams, J. It is so laid down in Heywood on County Elections, 115.] Corporations sole have been allowed to vote, but not corporations aggregate. [Cockburn, C. J. Mr. Rogers does not see the distinction. In his treatise on the Law of Elections, 7th edit. 150, he says,—"Sole corporations vote without objection. It is difficult to understand the principle upon which individuals who are members of corporations aggregate are disabled from voting in right of the interest they possess as members of a corporate body. The disability cannot arise out of the tenure by which they hold, because such would also apply to corporations sole; nor can any valid objection be found in the circumstance that they do not hold their interest in severalty, because such would also exclude joint-tenants, tenants in common, and co-parceners." In the preceding page, however, he distinctly states the law to be so. "The individual members of corporations aggregate have not separate voices at elections, in respect of their corporate interest in land,"—citing Dalton's Sheriff, 334. And he also refers to the Cambridge Case of May 28, 1624: "The freeholders complained that the scholars and fellows of colleges and halls gave voices at the election. The House resolved 'that members of colleges, halls, or corporations, not having freehold, saving in right of their colleges, halls, or corporations, ought not to have votes in elections of knights or burgesses:' and, upon a second question, 'that fellows and scholars that have fellowships and chambers above 40s., ought not to have voices in elections.'"] The reason is that given in Com. Dig. Franchises (F. 14), that "a corporation cannot do a personal act, which requires knowledge." [Cockburn, C. J. The majority binds the minority; therefore, the corporation would have to vote en masse. If not entitled to vote as owners, are they

(*a*) The points marked for argument on the part of the appellant, were,—

"1. That a member of a corporation aggregate is not, quâ such member, entitled to be placed on the list of voters for a borough:

"2. That the property in respect of which alone each of the respondents claims to be entitled to vote, is property exclusively belonging to and occupied by a corporation aggregate:

"3. That neither of the said respondents is an owner, tenant, or occupier of any house, warehouse, counting-house, shop, or other building, of the clear yearly value of not less than 10*l*., within the meaning of the 27th section of the Reform Act, 2 W. 4, c. 45:

"4. That neither of the respondents is entitled to be placed on the register of voters, by reason of his receipt of disqualifying alms within twelve calendar months prior to the last day of July last:

"5. That neither of the respondents appears to have paid rates for the relief of the poor."

as tenants?] That **[405]** question depends upon the 27th section of the Reform Act, 2 W. 4, c. 45, which enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately or jointly with any land within such city, borough, or place occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10l., shall, if duly registered according to the provisions thereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough." These parties do not occupy as tenants, but simply as brethren or members of the corporation. The rules and ordinances preclude the notion of an occupation such as is contemplated by the statute. The occupation of each individual brother or member commences when he becomes a brother, and terminates when he ceases to fill that character. [Cockburn, C. J. Can his lodgings or chambers be changed?] It does not appear very precisely on the case: but probably the oath of obedience required by the 6th rule would enable the master to change them. Then, if he is tenant, he has no control or dominion over the outer door, the key of which is kept by the master; and he cannot absent himself at night without leave,—rule 16. It is like the case of the landlord residing upon the premises. [Crowder, J. How does the corporation reside?] The position of the parties is certainly an anomalous one.

The receipt of alms also operates a disqualification, by virtue of s. 36.

[406] Hayes, Serjt., for the respondent (*a*). The only question is, whether the persons named had a right to vote under the 27th section of the Reform Act. It is submitted that they had. In Elliott on Elections, p. 142, it is said: "The claimant must occupy in his own right, and not as servant of another: and he must have some interest, such as tenant at will at least, in the premises. But, as observed by Mr. Rogers, p. 147, 'It is not necessary for him to shew that he is actual owner or actual tenant: if a party occupy under a claim of title or right, it will be sufficient; for, no investigation can be had into conflicting claims of title; the words as owner and as tenant shew that it is the character in which the party has actually occupied which is to be ascertained, and not his strict right to occupy in that character.'" Again, at p. 144, Mr. Elliott says: "It is conceived that the liability to be rated will, in general, be found to be a safe test as to the character in which a person occupies, for the purpose of voting." These parties are rated, and properly rated as occupiers: *The King* v. *Watson*, 5 East, 480; *The King* v. *The Mayor, &c., of Sudbury*, 1 B. & C. 389, 2 D. & R. 651; *The King* v. *Munday*, 1 East, 584. [Crowder, J. Do you contend, that, in all cases where the **[407]** party is liable to be rated he is entitled to vote?] In all the text-books, the liability to be rated is put as the test. [Cockburn, C. J. The statute 43 Eliz. c. 2, does not apply. The question is whether the parties occupy "as owner or tenants."] An occupation as owner or tenant embraces every conceivable description of occupation, except an occupation as servant. In *Hughes, App.*, v. *The Overseers of Chatham, Resp.*, 5 M. & G. 54, 7 Scott, N. R. 581, 1 Lutw. Reg. Cas. 51, *Dobson, App., Jones, Resp.*, 5 M. & G. 112, 7 Scott, N. R. 80, 1 Lutw. Reg. Cas. 105, and *Clark, App.*, v. *The Overseers of St. Mary, Bury St. Edmunds, Resp.*, ante, vol. i., p. 23, a distinction was taken between an occupation by a government officer or a servant by the permission of the employers, as part remuneration for his services, and a compulsory occupation for the purpose of the better performance of his duties as such officer or servant: in the former case, the party was held entitled to be registered;

(*a*) The points marked for argument on the part of the respondent, were,—

"1. That Jesse Boddington was entitled to be registered, and was rightly registered, as a 10l. occupier within the 27th section of the Reform Act:

"2. That the circumstance that the corporation of which Boddington was a member owned the property, is immaterial, the occupation being by Boddington himself for his own personal benefit, and not by the corporation, and the revising-barrister having so found:

"3. That no disqualification arose from the alleged receipt of alms,—the benefits which Boddington was entitled to and received as a brother of the Hospital not being in the nature of parochial alms, nor indeed of alms at all."

in the latter, not. In the former of those cases, Tindal, C. J., in delivering the judgment of the court, says: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and, if he does so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy, in the performance of his contract to serve his master. The settlement cases cited in argument established and proceeded on this distinction. We think it applicable to the present question; **[408]** and, as there is nothing in the facts stated to shew that the claimant was required to occupy the house for the purposes of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services, and, as the case expressly finds, that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived [disallowing the objection] is wrong." In *Dobson, App., Jones, Resp.*, the same learned judge says: "In delivering our opinion upon a former case, we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employ of government are permitted to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be, that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allotted to them, have had an additional allowance for lodging-money; whilst at the same time we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the **[409]** service required from such officer or servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at the park gate, cannot be considered to occupy as tenants, but as servants merely, whose possession and occupation is strictly and properly that of their masters." And the conclusion the court arrived at was, that the case in hand fell within the latter class, and that consequently there was no occupation in the legal relation of tenant to a landlord, and no right to vote. In *Davis, App., Waddington, Resp.*, 7 M. & G. 37, 8 Scott, N. R. 807, the trustees of an alms-house were impowered by letters-patent of incorporation to appoint and remove the twenty-four inmates "toties quoties sibi conveniens fore videbitur:" and it was held that the inmates appointed under this power did not take an estate for life in the property enjoyed by them as such inmates, and were therefore not entitled to be registered as freeholders. The subject is ably discussed in some very learned notes by Serjt. Manning to that case and also to the case of *Wynne* v. *Wynne*, 2 M. & G. 19. There are many sorts of tenancies which would suffice to confer the franchise: one who is let in under a contract to purchase would be a tenant at will,— *Doe d. Gray* v. *Stanion*, 1 M. & W. 695, 700,—and as such might acquire a right to vote. [Willes, J. Suppose he occupied for more than twenty years, would he acquire a fee?] Possibly. [Cockburn, C. J. You say these parties are tenants. Are they tenants from year to year, or at will, or on sufferance?] Their tenancy is to enure so long as they shall observe the rules of the hospital: *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168. [Cockburn, C. J. That would be in law a tenancy for life, a freehold interest. May there not be a permissive occupation **[410]** without creating a tenancy?] A permissive tenancy is synonymous with a tenancy at will: Elliott on Registration, p. 143.

Pickering, Q. C., in reply. The circumstance of the party being rated affords no

evidence of an occupation as tenant. By the statute of Elizabeth, every person is liable to be rated who has a beneficial occupation. It is no part of the duty of parish officers to inquire into titles. In *Dobson, App., Jones, Resp.*, 5 M. & G. 112, 8 Scott, N. R. 80, 1 Lutw. Reg. Cas. 105, and in *Clark, App., The Overseers of St. Mary's, Bury St. Edmunds, Resp.*, ante, vol. i., p. 23, the parties had a beneficial occupation, and were rated, and yet they were held not entitled to vote. In the present case, the ownership is in the corporation, and each of the brethren, by allotment of the master, as a member of the corporation, but not as tenant in any sense, occupies certain rooms,—acquiring no right whatever until the allotment takes place.

Cockburn, C. J. I am of opinion that these votes must be disallowed. The question arises upon the construction of the 27th section of the Reform Act, 2 W. 4, c. 45, which enacts that every male person of full age, and not subject to any legal incapacity, who shall occupy, as owner or tenant, any house, &c., of the clear yearly value of not less than 10l., shall, if duly registered, be entitled to vote. These persons occupy tenements which would suffice to entitle them to vote if their occupation were such as the statute requires. But it appears to me that they do not occupy either as owners or as tenants. We are bound by the words of the section: it is not enough to shew a beneficial occupation, unless it be an occupation as owner or in the legal relation of tenant to a landlord. Now, it is clear, and indeed it is **[411]** conceded, that these parties do not occupy as owners,—the ownership of the property being ex concessis in the corporation aggregate. Then, do they occupy as tenants? It appears to me that they do not. There is nothing in the circumstances under which their occupation arises which creates either expressly or by implication the legal relation of landlord and tenant. The corporation, as it seems to me, occupies in the persons of its several members. If any individual member of the body were improperly interfered with in his occupation, his only remedy would be by an application to the court of Chancery, to have the charity administered according to the will of the founder. Cases of rateability under the 43 Eliz. c. 2, have been referred to. But in these, it is to be observed, the party occupying is to be rated without any qualification whether as owner or as tenant: therefore, any beneficial occupation is sufficient. If similar words had been used in the Reform Act, those cases might have been important to shew that these persons had such a beneficial occupation as would give them a right to vote. But this statute requires something more. I think the appeal must be allowed, but without costs.

The rest of the court concurring,

Appeal allowed, without costs.

[412] County of Northampton.—Southern Division.

William Faulkner, *Appellant*, The Overseers of Upper Boddington, *Respondents*. Nov. 19th, 1857.

[S. C. 27 L. J. C. P. 20; 4 Jur. N. S. 692; 6 W. R. 101.]

Pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as "the six beadsmen of Daventry," as to whose origin there was no evidence. The persons thus described had received 50s. a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills:—Held, that the parties so appointed had not an estate which came to them by promotion to an office within the meaning of the 2 W. 4, c. 45, s. 18, and therefore were not entitled to be registered.

At a court holden for the revision of the list of voters for the parish of Upper Boddington, in the southern division of the county of Northampton, Samuel Hull duly objected to the names of William Faulkner and five others (thereunder written) being retained on the list of voters for the said parish of Upper Boddington; and, it appearing to the revising-barrister that the validity of the objections to the several

names of persons thereunder written (five) depended and had been decided by him upon the same state of facts and the same points of law, he declared that the several appeals against such decision ought to be consolidated; and he named William Faulkner to be the appellant, and the overseers of the parish of Upper Boddington to be the respondents, in such consolidated appeal.

The following were the facts of the case:—

The six persons objected to are called "The Beadsmen of Daventry;" and they claim a right to vote in respect of their freehold estates in a certain piece of land in the parish of Upper Boddington.

The said piece of land was purchased about the year 1776, with moneys bequeathed by one Edward Sawbridge and one Mary Walford for that purpose, and was conveyed to trustees, in compliance with the wills of the said Edward Sawbridge and Mary Walford, upon trust to apply the rents to various charitable purposes, and, amongst other things, in trust to pay to and divide **[413]** amongst the six Beadsmen of Daventry a certain portion of the said rents.

The land is let to one Baseby, and the net amount of rent received by the trustees is 100*l.*; out of which the trustees have, under the above-mentioned trusts, annually for the last twenty years paid to each of the six beadsmen the sum of 50*s.* Previously to that time the amount paid to them was not so large; but the increase arose partly from the rent of the land being raised, and partly from some of the other objects of the charity ceasing to exist.

No evidence was given respecting the first appointment of six beadsmen at Daventry: but, from very early times, the same number had been kept up; the appointment of them being vested in the bailiff and burgesses of Daventry, who were also trustees under the wills of the said Edward Sawbridge and Mary Walford.

The beadsmen are now appointed by a resolution of the trustees entered in their minute-book in this form,—"A. B. is appointed a beadsman, in the place of C. D., deceased:" and the appointment is for life.

All the six persons objected to have been appointed since the passing of the Reform Act, 2 W. 4, c. 45.

Neither under the trusts above referred to, nor in their character as beadsmen, are they liable to be called upon to perform duties or services of any kind; nor have they in fact ever been so called upon.

It was contended, on the part of the respondents, that the persons objected to had no estate, either legal or equitable, in the land out of which the said rent of 100*l.* issued; and that, if they had, it was not of sufficient value to confer the franchise, having been acquired since the passing of the Reform Act.

On the part of the appellants, it was contended that the persons objected to took, as "beadsmen," an equit-**[414]**-able estate in the land, of sufficient value; because the term "beadsman," necessarily imported the holding a "benefice, office, or employment," having been originally applied to persons who were employed in the pious office of praying for others, and upon whom, according to the usage of former times, benefactions were frequently conferred in consideration of such employment.

The revising-barrister held that the six persons objected to had an equitable estate in the land, but that the same had not come to them by promotion to any benefice or office within the meaning of the 18th section of the 2 W. 4, c. 45, and, consequently, that their estate was of insufficient value: and he accordingly expunged their names from the list.

The name, residence, and nature of the qualification of William Faulkner appeared on the list of voters, as follows:—

Christian name and Surname.	Place of abode.	Nature of qualification.	Street, lane, or other like place, &c., where the property is situate, or name of the property, and the name of the tenant, &c.
Faulkner, William.	Daventry.	Freehold land.	Upper Boddington. William Baseby.

The name, residence, and qualification of each of the other five persons objected

to, viz. Joseph Goodwin, John Newitt, Abraham Pool, Thomas Wadams, and Thomas Woolf, were similarly described in the same list.

Hayes, Serjt., for the appellant. The question turns upon the construction of the 18th section of the Reform Act, 2 W. 4, c. 45, which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof **[415]** such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage-settlement, devise, or promotion to any benefice or to any office, or except the same shall be of the clear yearly value of not less than 10l. above all rents and charges payable out of or in respect of the same; any statute or usage to the contrary notwithstanding: Provided always that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained." These parties, it is submitted, are entitled within the fair construction of that section to be registered, as coming within the exception of persons having an (equitable) estate of freehold of the required value coming to them by "promotion to an office." [Cockburn, C. J. Is it disputed that they have an equitable interest?] That question was disposed of by the case of *Simpson, App., Wilkinson, Resp.*, 7 M & G. 50, 8 Scott, N. R. 814, 1 Lutw. R. C. 168. [Cockburn, C. J. The point is not open to the respondents upon the case as stated.] Before the passing of the Reform Act, these persons would have had an undoubted right to vote; and they clearly are not within the object of the disfranchising part of the section in question, the manifest design of which was to prevent the acquisition of collusive or colourable freeholds for life for the purpose of voting. [Cockburn, **[416]** C. J. To what "office" are these persons promoted?] The office of beadsman. [Cockburn, C. J. Would that be an office such as would, if conferred by the Crown, disqualify the parties from sitting in parliament?] That is hardly the test. Dr. Johnson,—and Webster adopts the definition (*a*),—defines "Beadsman" thus,—"A man employed in praying, generally in praying for another," and he quotes the following lines from Spencer's Faerie Queene, book i. canto x. 36,—

> "An holy hospitall
> In which seven bead-men, that had vowed all
> Their life to service of High Heaven's King."

And he also quotes a portion of Proteus's farewell to Valentine, from "Two Gentlemen of Verona," Act 1, Scene 1,—

> "Wilt thou begone? Sweet Valentine, adieu!
> Think on thy Proteus, when thou, haply, seest
> Some rare note-worthy object in thy travel:
> Wish me partaker in thy happiness,
> When thou dost meet good hap; and, in thy danger,
> If ever danger do environ thee,
> Commend thy grievance to my holy prayers,
> For I will be thy beadsman, Valentine."

Dr. Nares, in his Glossary, has it thus,—"Beadsman. From bede, a prayer, and from counting the beads the way used by the Romish church in numbering their prayers; a prayer-man.—Commonly one who prays for another." And he refers to

(*a*) Richardson gives the following quotation from "The Thief and the Cordelier," by Prior,—

> "Tell your beads," quoth the priest, "and be fairly truss'd up,
> For you surely to-night shall in Paradise sup."

the same passage in Shakspere He further says: "The office of a beadsman is thus expressed by Herrick,

"Yet in my depth of grief I'd be
One that should drop his beads for thee."

Bailey also defines "Beads men," "Persons devoted to prayer, who, in a chantry or religious house (in **[417]** popish times) said a certain sett of prayers for patrons, having an allowance for performing the said office:" and he gives the passage from Spencer above cited. The circumstance of the office having in modern times become a sinecure, makes no difference. Dr. Johnson describes a sinecure to be "an office which has revenue without employment." [Cockburn, C. J. A man may be devoted to prayer, and yet not hold an office.] The term beadsman is, as appears from the authorities cited, a recognized term to express one who is devoted under a vow to prayer. "Office" is a word of the largest signification possible. [Cockburn, C. J. Would you say that a monk is an officer?] Officers are of infinitely various descriptions: and the question is, whether this is not an office within the fair and reasonable construction of the statute. Dr. Johnson defines an office to be "a public charge or employment," or a "particular employment." In Com. Dig. Franchises, it is "a right to exercise a public or private employment, and to take the fees and emoluments belonging to it." In Cruise's Digest, vol. iii., p. 92, it is said, "an office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it." A similar definition is given in 2 Bl. Comm. 36. The word office is manifestly comprehensive enough to embrace an employment of this sort. It is not necessary that it should be a thing falling within the statutes of 5 & 6 Ed. 6, c. 16, and 49 G. 3, c. 126 (*a*). An endowed schoolmaster (*b*), a curate (*c*), a dissenting-minister (*d*), and a Roman Catholic priest (*e*), though they do not hold "offices" in the strict legal sense, are yet entitled to **[418]** vote in respect of lands held by them as such. Amongst offices may be mentioned the antient one of "Tubman" in the Exchequer, the origin of which seems to be involved in impenetrable mystery.

Field, for the respondents, was not called upon.

COCKBURN, C. J. I entertain no doubt whatever that the decision of the revising-barrister was right, and that the six persons whose names are mentioned in the case are not entitled to be upon the register. The question turns upon the 18th section of the Reform Act, 2 W. 4, c. 45, which abolishes the right of voting in respect of freeholds for life, except in certain specified cases, one of which is, where the lands or tenements in respect of which the right to vote is claimed shall have come to the party claiming by promotion to an office. The individuals in question are called "the Beadsmen of Daventry," and as such are entitled to receive a yearly sum out of the rents of certain lands. They are appointed by the bailiff and burgesses of Daventry, who are trustees under the wills of Edward Sawbride and Mary Walford, to whom certain moneys had some time prior to the year 1776 been bequeathed upon trust to purchase lands and to apply the rents to various charitable purposes, amongst others, a portion thereof to and amongst the six beadsmen of Daventry. It appears that the whole of these six persons have been appointed since the passing of the Reform Act, and that, neither under the trusts above referred to, nor in their character as beadsmen, are they liable to be called upon to perform duties or services of any kind, nor have they ever been so called upon. The whole question is, whether their appointment as beadsmen is a "promotion to an office" within the meaning of the statute. I am clearly of opinion that there is nothing **[419]** in the facts stated to us by the revising barrister to warrant us in holding that they fill such an office as to entitle them to vote. I am far from saying, that, under some circumstances, beadsmen may not be persons holding an office, for instance, if the appointment involved the performance of duties of a public character. But all that appears here is, that these persons are appointed, and that they are the recipients of a yearly stipend or allowance. Beadsmen, according to the definitions given by the authors to whom we have

(*a*) See *Hopkins* v. *Prescott*, 4 C. B. 578; *Sherry* v. *Clifton*, 9 C. B. 110.
(*b*) See Elliott, 23; Heywood's Co. El. 127; Rogers, 122.
(*c*) See Rogers, 122; Elliott, 25.
(*d*) Heywood's Co. El. 130; Elliott, 25; Rogers, 125.
(*e*) Elliott, 31.

been referred,—some of which are not often quoted in courts of law,—seem to have been in antient times persons who devoted themselves to prayer, —not merely on their own account, but for the benefit also of others. There is nothing on the face of this case to shew, and we cannot assume, that there are any duties attached to the appointment which would constitute it an office. I am not sure, that, in construing this act, we ought not to look at the state of things which existed at the time of its passing. And, assuming that persons of this description in former times had duties to perform, all such duties had ceased long since, and at the time of the passing of the act these persons were merely the recipients of charity. It is not necessary, therefore, in this case to lay down precisely what is and what is not an "office" within the meaning of the statute. It is enough to say that nothing has been brought before us on this occasion to satisfy us that these persons stand in the position of persons possessed of an "office" in respect of which the act of parliament intended that they should be entitled to vote.

WILLIAMS, J. I am entirely of the same opinion. Assuming the benefit which the beadsmen were entitled to under the trusts of the donors' wills to constitute an estate sufficient in point of description and value, if **[420]** within one of the exceptions, the question is, whether they came to that estate by promotion to an "office" within the meaning of the 18th section of the Reform Act. I am of opinion that there is nothing on the face of the case to shew that they did. I quite agree with my Lord in thinking that it would be wrong to say that there may not be beadsmen who are appointed to an office which might bring them within the act,—men who might have duties to perform which would constitute in law an office. But here there is nothing to shew that they owe any duty to anybody. There are twelve beadsmen attached to Westminster Abbey (*a*); though what their duties at this day may be, I do not know: nor do I know whether they have ever claimed a right to vote or not.

CROWDER, J. I also am of opinion that the decision of the revising-barrister was right. The simple question is whether there was evidence before him that the persons claiming to be retained on the register were persons possessed of an estate by promotion to an office within the meaning of the exception in the 18th section of the Reform Act. There is no evidence beyond the argument mentioned in the case, that the term beadsman necessarily imported the holding a "benefice, office, or employment." It is possible that, in former **[421]** times, some duties may have attached to the office of beadsman: but nothing is stated to justify the conclusion that that is so here. And I must beg to express my strenuous dissent from the assumption of my Brother Hayes that it was the intention of the framers of the Reform Act to confer the franchise in a case of this sort. I think that, if the attention of parliament had been drawn to the subject, the probability is that they would most particularly have excluded these beadsmen, as well as all other recipients of charity.

WILLES, J. I am entirely of the same opinion. However the matter may be stated to raise an inference that these persons may in some former time have been appointed to some office in an antient hospital, the only conclusion one can possibly arrive at upon the statement of this case is, that they exist now solely for the purpose of receiving their yearly stipend under the trusts of the wills referred to. They are not persons promoted to an office, or to anything like an office. The appeal must be dismissed.

Field, for the respondents, asked for costs.

Hayes, Serjt., submitted that there was reasonable ground for the appeal, these votes never having been objected to before.

WILLES, J. The rule has always been, to dismiss the appeal with costs, where the respondent has not been called upon.

Appeal dismissed, with costs.

(*a*) Probably attached to the Hospital founded by Henry VII., which is thus alluded to in Dart's Westmonasterium, vol. i., p. 32,—"He founded an Hospital for thirteen poor people, one of which to be a priest, and allowed the priest 6d. per week and the others 2½d. per week, &c. All which, by agreement, the Abbot Islip obliged himself to perform, as did after him his successor Benson, who on Monday the 12th day of May, in the 20th year of the reign of King Henry VIII., came before the then Lord Chancellor Audley into Westminster Hall, between nine and ten in the morning, and entered into obligations for that purpose."

[422] County of Durham.—Northern Division.

Washbourne West and Another, *Appellants*, John Stephenson Robson, *Respondent*. June 12th, 1858.

[S. C. 27 L. J. C. P. 262; 4 Jur. N. S. 666; 6 W. R. 659.]

Lord Crewe, by his will, in 1720, devised lands in Hunstonworth, in the county of Durham, of the net yearly value of 735l., and also lands in Northumberland, of the net yearly value of 5600l., to five trustees in fee, upon trust out of the rents, &c. thereof to pay certain yearly sums to certain persons, amongst others, "the yearly sum of 10l. a piece to each of the fellows of Lincoln College, Oxford,"—the aggregate of such yearly sums being 740l.; and he directed that all the annual payments to be so made should be made to the bursar of the college for the time being, to be by him paid for the uses aforesaid:—Held, that the fellows were not owners of a rent-charge, there being no power of distress; nor of a rent of any sort of the value of 10l. a year issuing out of lands in Durham.—Held also, that their interest was not an estate coming to them by devise within the meaning of the 18th section of the Reform Act, 2 W. 4, c. 45,—or by promotion to a benefice or office within that section.—Whether they could be considered as cestuis que trust in actual occupation of any part of the lands, so as to be entitled to freeholds at all,—quære? But, held, that, at all events, they were not possessed of freeholds of the value of 40s. a year in Durham, inasmuch as the net proceeds of the lands in the two counties must be rateably apportioned for the payment of all the sums charged thereon under the will, and, so apportioning them, the value in Durham was not sufficient to give each of the donees 40s. per annum.

At a court held for the revision of the lists of voters for the Northern Division of the county of Durham, Octavius Ogle and Washbourne West respectively claimed in writing, pursuant to the statute in that behalf, to be entitled to vote in the election of knights of the shire for the Northern Division of the said county, and to have their names respectively inserted in the list of voters for the said division, in the township and parish of Hunstonworth, in the said division; and John Stephenson Robson, being a person on the register of voters for the said division, duly objected to the said several claims of the said Octavius Ogle and Washbourne West.

The nature and local description of the qualification of Ogle and West, as stated in the claim, were as follows, viz. the nature of the qualification in the third column was "rent-charge," and the local description in the fourth column was, "William Nicholas Darnell, clerk, and the four other acting trustees under Lord Crewe's will, owners," the property situate "in the parish of Hunstonworth."

The facts of the case, as proved, were as follows:—**[423]** Lord Crewe being seised in fee of certain lands, tenements, and hereditaments, in the township and parish of Hunstonworth, in the county of Durham, and also of other lands, tenements, and hereditaments in the county of Northumberland, by his will, dated the 25th of June, 1720, and properly executed (and attested) to pass real estates, devised all the said lands, tenements, and hereditaments to five trustees named in the said will, their heirs and assigns for ever, upon the following trusts, viz. upon trust that they the said trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should, out of the rents, issues, and profits of the said lands, tenements, and hereditaments in the said counties of Durham and Northumberland, for ever thereafter pay or cause to be paid the yearly sum of 20l. to each and every of twelve exhibitioners of Lincoln College in the University of Oxford, which he had then already named and appointed, or which he should thereafter nominate and appoint, and to each and every of twelve exhibitioners to be elected and chosen after his decease, as thereinafter mentioned, as should be undergraduate commoners in Lincoln College aforesaid, and who were or should be natives of the diocese of Durham, and, for want of such natives, of Northallertonshire, Howdenshire, in the county of York, or of Leicestershire, and particularly of the parish of Newbold Verdon, or of the diocese of Oxford, whereof he was formerly bishop, or of the county of Northampton, in which county he was born (with certain directions and limitations for electing fresh exhibitioners in case of vacancies, and as to the time and conditions

of the holdings of the said exhibitions, not material in the judgment of the revising-barrister to the present cases); upon the further trust, that the said trustees, their heirs and assigns, should, out of the rents, issues, and profits of the said lands, **[424]** tenements, and hereditaments in the said counties of Durham and Northumberland devised to them as aforesaid, for ever thereafter pay the annual sums thereinafter mentioned, that is to say, unto the minister of the parish church of Bamborough, in the county of Northumberland, and his successors, the yearly sum of 40*l.* per annum, and to the minister of St. Andrew's, Auckland, in the county of Durham, and his successors, the yearly sum of 30*l.*, and the yearly sum of 10*l.* a piece for the augmentation of twelve poor rectories, vicarages, small livings, or curacies in the diocese of Durham, such as he should by any writing or writings, codicil or codicils, under his hand and seal, to be attested by three or more credible witnesses, from time to time direct and appoint, and, in default thereof, to and for the augmentation of twelve such poor rectories, vicarages, small livings, or curacies within the diocese of Durham aforesaid, as the same trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should direct and appoint; and unto the ministers, lecturers, or curates of the parishes of All Saints and St. Michael's, in Oxford, of Twyford, in the county of Bucks, and of Comb, in the county of Oxford, which belonged to Lincoln College aforesaid, and to their several successors for the time being, the several yearly sums of 10*l.* a piece, for catechising youth within the same respective parishes; and unto the poor scholars of Trap and Marshall in Lincoln College aforesaid (being eight in number) such annual sums as would make up and increase their respective scholarships to the yearly sums of 10*l.* a piece (including what they then already respectively received on account of their several scholarships), to the intent that their respective scholarships might be all alike in their respective yearly values; and to the bible clerk of Lincoln College aforesaid such annual sum as would make up and in-**[425]**-crease his salary to the yearly sum of 10*l.* (including what he then already received on account of his clerkship); and also the yearly sum of 20*l.* to the rector of the said college, and the yearly sum of 10*l* a piece to each of the said fellows of the said college, which benefactions he gave to the said rector and fellows of Lincoln College aforesaid, and to the college aforesaid, being the place where he had had his education, and of which college he was first fellow, and afterwards rector; and to each of the almsmen and almswomen in each of the hospitals in Durham and Bishop Auckland of the foundation of Bishop Cozens, and to each of the six almswomen in the hospital of Brackley, in the county of Northampton, of the foundation of his grandfather, Sir Thomas Crewe, and to each of the two almswomen in the hospital at Hinton, in the said county of Northampton, of the foundation of Elisha Hele, Esq., the several yearly sums of 40*s.* a piece; and to such school-master of Newbold Vernon aforesaid for the time being, the yearly sum of 20*l.*; and to the trustees for the time being of the hundred of Spackenhoe, in the county of Leicester, for the relief of the widows, orphans, and children of poor clergymen deceased, and to their successors, the yearly sum of 10*l.*, to be by the said trustees and their successors distributed for the relief of widows, orphans, and children of poor clergymen deceased, within the said hundred, in such proportions as the said trustees and their successors should think fit; and unto the minister and churchwardens of the parish of Daventry, in the county of Northampton, and to their successors, the yearly sum of 6*l.*, to be by them paid and applied for and towards the support and maintenance of a charity-school to teach poor children of the said parish of Daventry to read English and write; All which said payments he willed and desired should be for ever thereafter paid in manner following, that is to say, **[426]** unto the said almsmen and almswomen, by quarterly equal payments, on the feasts of St. Michael the Archangel, St. Thomas the Apostle, the Annunciation of the Blessed Virgin Mary, and St. John the Baptist,—the first payment to begin and be made at such of the said feasts which should first or next happen after his decease; and all other the annual payments by half-yearly equal payments, at the feast of St. Michael the Archangel and Annunciation of the Blessed Virgin Mary,—the first payment thereof to begin and be made at such of the same two last-mentioned feasts which should first and next happen after his decease: And the testator by his said will did will, order, and direct that all the said annual payments by him directed to be paid to the said rector, fellows, exhibitioners, poor scholars of Lincoln College aforesaid, and to the said ministers, lecturers, or curates of All Saints, St. Michael's Tywford, and Comb aforesaid, and to the bible

clerk, should be from time to time received by the bursar of the said college for the time being, as other rents of the said college were by him received, to be by him paid for the uses aforesaid, and for no other use or uses whatsoever, whom the testator thereby required to give security to pay the money coming to his hands by virtue of that his will to the uses aforesaid, to the satisfaction of the rector and fellows of the college aforesaid: And his will was, and he did thereby direct, that all the said annual payments for ever thereafter should be made without any deduction or abatement whatsoever for taxes, charges, or assessments for or by reason of any act or acts of parliament then already made or thereafter to be made, or by reason or means of any other payments, matter, or thing whatsoever, and to begin to be made in manner as he had thereinbefore directed.

Then followed directions as to the application of the [427] surplus rents "after the said annual payments should be made, and not before," which the revising-barrister did not think material to be set forth.

The will contained a clause for the election and appointment of new trustees from time to time, on the death of any one or more of the trustees appointed by the will, so as the trustees should never exceed five in number, and providing that the rector of Lincoln College for the time being should be one of the trustees: and the will contained a further clause, directing that the trustees for the time being should be satisfied and paid their charges and expenses which they or any of them should be put unto, lay out, or expend in or about the execution of all, every, or any of the trusts aforesaid, or by reason of any matter or thing whatsoever anyways relating to or concerning that his will, or the trusts therein contained.

The trustees are and have been for several years past, James Thompson, rector of Lincoln College, Charles Thorp, William Nicholas Darnell, Henry George Liddell, and John Dixon.

Hunstonworth is a parish; and the parish and township are co-extensive.

Lincoln College is a corporation aggregate, styled "The Warden or Rector and Scholars of the Blessed Virgin Mary and All Saints, Lincoln, commonly called Lincoln College;" and the rector and fellows are respectively members of the body corporate. The said Octavius Ogle and Washbourne West are, and have been for several years, respectively, fellows of the said college.

The aggregate amount of the said several annual sums so by the said will primarily made payable out of the rents, issues, and profits of the said devised lands, tenements, and hereditaments in Durham and Northumberland is, 740l. 6s. 8d.; and they are and always [428] have been paid out of a joint fund derived from the rent, issues, and profits of the whole of the said devised lands, tenements, and hereditaments in Durham and Northumberland, without distinction.

All the annual payments directed by the said will to be paid to the rector, fellows, exhibitioners, and poor scholars of Lincoln College, and to the ministers, lecturers, or curates of All Saints, St. Michael Twyford, and Comb aforesaid, and to the bible clerk, are and have always been paid by the said trustees to and received by the bursar of Lincoln College for the time being, to be by him paid to and for the uses aforesaid, pursuant to the direction of the said will; and the moneys so received by the bursar have never been nor are carried to the corporate funds of the college, but have always been and are by him distributed amongst and paid to the individuals entitled to receive the same, as directed by the said will. The rest of the said annual sums are paid by the trustees directly to the parties entitled to receive the same.

The gross annual rental of the said devised estates in Hunstonworth amounts to 800l. a year.

The ordinary management of those estates, including the collection of rents, costs the trustees from 25l. to 30l. a year; and the repairs incident to the same estate have on an average for the last twenty years cost the trustees from 40l. to 50l. a year.

The amount of the net annual rental of the Hunstonworth estates is less than the aggregate amount of the annual sums charged on those estates and the said estates in Northumberland.

Of the said devised estates in Northumberland, parts are situate in the Northern Division of the county, and the rest in the Southern Division thereof. The amount of the gross annual rental of those parts which are situate in the Northern Division of Northumberland [429] is 6500l.; and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property, amount to

1500l. The gross annual rental of those parts which are situate in the Southern Division of Northumberland amounts to 1500l.; and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property, amount to 400l.

The qualification of the appellant was thus stated in the list of voters:—

HUNSTONWORTH.

Name.	Place of abode.	Nature of qualification.	If the qualification consists of rent-charges, the names of the owners of the property out of which the rent is issuing; and the situation of such property.
West, Washbourne.	Oxford.	Rent-charge.	William Nicholas Darnell, clerk, and the four other acting trustees under Lord Crewe's will, owners of the property situate in the parish of Hunstonworth.

It was objected on the part of the said John Stephenson Robson,—

First, that the statement of the nature and description of the qualifications of the said Octavius Ogle and Washbourne West in the register, as apparent on the face thereof, was imperfect and defective:

Secondly, that the qualifications of the said Octavius Ogle and Washbourne West, as described in the register, were not supported in fact; and that neither of them had a sufficient rent-charge or estate in Hunstonworth to qualify him to vote in the election of knights of the shire for the said Northern Division of Durham, because the said rent-charges issued out of lands in Northumberland as well as those in Hunstonworth, jointly:

Thirdly, that, if the said rent-charges ought to be **[430]** rateably and proportionably distributed over each division in each county, in proportion to the whole property in each division, and if such rateable and proportionable apportionment of the said rent-charges were made, or if any other apportionment which could be legally made were made, then and in any such case neither the said Octavius Ogle nor the said Washbourne West would have a rent-charge out of the lands in the parish of Hunstonworth of sufficient amount to qualify him to vote.

Fourthly, that the interest of the said Octavius Ogle and Washbourne West respectively in their said respective annuities was equitable merely; and that they could not elect to take their annuities out of the rents of the lands in Hunstonworth.

Fifthly, that the said Octavius Ogle and Washbourne West, being respectively members of the corporation aggregate of Lincoln College aforesaid, had not individually such an estate or interest in their said annuities as to qualify them, or either of them, to be on the said register of voters.

The revising-barrister overruled the first, fourth, and last objections, and held the second and third objections to be valid, and rejected the said claims, and expunged from the list of claimants and the register of voters the several names of the said Octavius Ogle and Washbourne West; whereupon the parties objected to gave notice of appeal, and their appeals were allowed, and consolidated.

Montague Smith, Q. C. (with whom was Manisty, Q. C.) for the appellants. The decision of the revising-barrister disallowing the votes of the appellants is clearly wrong. The statute is satisfied if each is shewn to possess a freehold interest of the value of 40s. a year; for, it is an estate which comes to them by devise within **[431]** the exception in s. 18 of the Reform Act. They take, under the devise in Lord Crewe's will, an interest sufficient within the 6 H. 8, c. 7, 10 H. 6, c. 2, and 18 G. 2, c. 18, s. 5, to entitle them to vote,—an equitable rent-charge. [Cockburn, C. J. Is it an interest of the value of 40s. a year issuing out of lands in Durham?] It is. A rent-charge issues out of every part of the land, and therefore the whole is charged upon the lands in Durham. And the interposition of trustees makes no difference. [Cockburn, C. J. The money is to be paid to the bursar of Lincoln College.] His is merely the hand

to receive it: the bequest is to the individuals. By the 5th section of the 18 G. 2, c. 18, which was the principal statute which regulated the right of voting at the time of the passing of the Reform Act, it was enacted "that no person should vote without having a freehold estate in the county for which he votes, of the clear yearly value of 40s. over and above all rents and charges payable out of or in respect of the same, or without having been in the actual possession or in receipt of the rents and profits thereof for his own use above twelve calendar months, unless the same came to him within that time by descent, marriage, marriage-settlement, devise, or promotion to a benefice in a church, or by promotion to an office." And the Reform Act has not interfered with that right. [Crowder, J. You contend that these parties had a right to vote for both counties?] It may be so. At all events, they have a clear right to vote for Durham. If an apportionment took place, there would still be enough to give more than 40s. a year in each county.

Hindmarch (with whom was J. R. Davison), for the respondent. The revising-barrister has stated five objections to the right of the appellants to vote: and, if any one of those objections be well founded, the appeal [432] cannot prevail; for it is the entire decision that is brought before this court for review. [Cockburn, C. J. The appellants do not appeal against that part of the decision which is in their favour.] The only object of putting all the points in the case is, that the judgment of the court may be given upon them. [M. Smith. In *Ashmore, App., Lees, Resp.*, 2 C. B. 31, 39, where a similar point arose, Maule, J., says, "The first and third objections having been disallowed by the revising-barrister, and there being no appeal against his decision thereon, those points are not now open to discussion: we are only authorised by the 6 & 7 Vict. c. 18, s. 42, to enter into such questions of law as are reserved by the barrister for our opinion."] That was a mere dictum, and not the decision of the court. [Williams, J. It seems to have been acquiesced in by the counsel, and acted upon by the court.] The 42nd section enacts "that it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising-barrister on any point of law material to the result of such case, either himself or by some person on his behalf, to give to the revising-barrister in court, before the rising of the said court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the said barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which according to his judgment shall have been established by the evidence in the case, [433] and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made as nearly as conveniently may be in like manner as is now usual in stating any special case for the opinion of the court of Queen's Bench upon any decision of any court of Quarter Sessions," &c. That surely must mean the whole decision. [Cockburn, C. J. How can you bring before us by way of appeal a point upon which the revising-barrister in allowing the appeal has not exercised his discretion? Crowder, J. The party appealing only appeals against that part of the decision which is against him. Suppose the revising-barrister is called upon to state a case, and he merely states "A variety of objections were urged before me; and I overruled them all, and decided so and so," would it be competent to the court to entertain all the objections?] There is no reason why they should not. The point is one of great importance. [Cockburn, C. J. Is there any instance of a respondent being allowed to convert himself into an appellant in this way? If your argument be well founded, how is the 43rd section, "that, in the matter of every appeal, the party in whose favour the decision appealed against shall have been given shall be the respondent," to be carried out? Willes, J. If no reasons were given for the decision of the revising-barrister, probably the whole would be open to you: and it may be a question whether you ought to be in a worse position because he has given bad reasons. Cockburn, C. J. What is the decision that is appealed against?] That the parties have not the right to vote which they affirm that they have. [Cockburn, C. J. The appeal is against a decision founded upon a particular point of law.] The 42nd section expressly says

that the barrister is to state his decision upon the **[434]** whole case. [Williams, J. I incline to think with my Brother Willes, that the whole ought to be open.]

Cockburn, C. J. The point raised is of sufficient importance to require consideration. The argument had better be confined for the present to the points appealed against; and, should it become necessary, we will determine hereafter whether the respondent is entitled to go into the others (*a*).

Hindmarch, continuing. The thing described here is not a rent-charge at all. A rent-charge is a rent issuing out of land upon which the person entitled to the rent has a power of distress: Co. Litt. 143 b., 144 a. If the power to distrain does not exist, the rent is not a rent-charge, but a rent-seck. The evidence does not support the right to vote, as it appears upon the register. [Williams, J. The revising-barrister does not treat it as a variance: he speaks of this as "an objection." There is much technical matter which might have been avoided.] When this matter was in agitation last year, the qualification was described as consisting of "annuity out of freehold lands,"—see *Robson*, *App.*, *Brown*, *Resp.*, ante, vol. i., p. 34. This is not an interest in land. By the will of Lord Crewe, the whole property is devised to the trustees. They deal with it as they like. The trust attaches not on the land, but on the surplus money. It is not like the ordinary case of land devised to A. in trust for B., which would give the cestui que trust the right to vote. In *Bligh* v. *Brent*, 2 Y. & C. 268,—where the question was, whether shares in the Chelsea Waterworks Company were personal pro-**[435]**-perty, so as to pass by a will not executed according to the provisions of the statute of frauds,—Alderson, B., says: "It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted, the powers that body has over it, and the purposes for which these powers are given. The property is money,—the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time: and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments,) whereby the joint-stock of money is made to produce profit." The barrister's decision in truth amounts to a finding that West and Ogle had not sufficient out of lands in Hunstonworth to entitle them to a vote. If there could be an apportionment,—which, it is submitted, is at least extremely doubtful,—it must be according to the proportionate value of the land in Northumberland and in Durham. Comparing their relative values, it would be found that each of these parties would have less than 40s. a year out of the lands in Hunstonworth. Then, can this rent or yearly sum be said to come to the parties by devise? The natural meaning of that expression in the act is, a disposition by will to a party directly: it cannot fairly include every person who at any time hereafter may be a fellow of Lincoln College. [Cockburn, C. J. The devise is to trustees, in trust for the benefit of certain persons who may for the time being happen to fill a certain position.] It comes to the par-**[436]**-ties, not by devise, but by virtue of their appointment to the fellowship. [Crowder, J. Does the party get it by promotion to a benefice or office?] A fellowship clearly is not a "benefice:" and the revising-barrister has not found that it is an "office." The nature and duration of the tenure do not appear,—whether for life or for years, or determinable in any other way: and, if so, an interest of the value of 40s. a year would not confer the right of voting; the parties must have 10l. a year at the least. [Cockburn, C. J. Much may turn on the nature of the tenure of these followships: generally, those who are elected to them are under an engagement to enter into holy orders within a limited period.] A further difficulty arises as to the expenses of collection and management and repairs, which are necessarily of uncertain amount, and might in some years reduce the value considerably below the sum required to constitute a qualification.

Montague Smith, in reply. This case is clearly within the exception in s. 27: these parties have an interest arising out of lands of the clear yearly value of more

(*a*) It is to be observed that there is no such provision in this act as there is in the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 41, that "the court of appeal shall give such judgment as ought to have been given in the court below."

than 40s., —whether coming to them by promotion to a "benefice" or to an "office," is immaterial. And it does not the less come to them by devise, by reason of the intervention of trustees: nor is the claim to vote the less valid because the recipients of this rent-charge have not a power of distress,—an equitable interest being equally available to confer the franchise: *Baxter, App., Brown (or Newman), Resp.*, 7 M. & G. 198, 8 Scott, N. R. 1019; 6 & 7 Vict. c. 18, s. 74. The charge is upon the whole and every part of the lands, *Rees* v. *Watson*, 5 M. & W. 255: and the court is not called upon to make the apportionment as suggested.

Cur. adv. vult.

[437] COCKBURN, C. J., now delivered the judgment of the court: (*a*)

It appears from the case, as stated, that Lord Crewe, by his will, in 1720, devised certain lands and tenements in the township and parish of Hunstonworth, in the county of Durham, and also other lands and tenements in the county of Northumberland, to five trustees, in fee, upon trust, out of the rents, issues, and profits thereof, to pay certain specified annual sums to twelve exhibitioners of Lincoln College, Oxford, to the ministers of certain parishes, to certain scholars, to the bible clerk, and to the rector of Lincoln College; "and the yearly sum of 10l. a piece to each of the said fellows of the said college." And the testator directed that all the annual payments to be made should be received by the bursar for the time being, and paid over by him.

The two claimants whose votes were rejected by the revising-barrister were fellows of Lincoln College, claiming to vote for the county of Durham as recipients of 10l. per annum under Lord Crewe's will.

The question as to their right to vote arises under the 18th section of the Reform Act, 2 W. 4, c. 45, which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such **[438]** person by marriage, marriage-settlement, devise, or promotion to any benefice or to any office, or except the same shall be of the clear yearly value of not less than 10l. above all rents and charges payable out of or in respect of the same; any statute or usage to the contrary notwithstanding: Provided always that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained."

It was contended, first, that the claimants had a right to vote as owners of a rent-charge of 10l. per annum issuing out of the lands in Durham. But it is clearly not a rent charge, there being no power of distress. Moreover, it appears upon the case that the annual sums payable under the will amount to 740l., and the whole net proceeds of the lands in Durham are less than that sum; so that they would be insufficient to pay the whole of such annual sums: and, consequently, the claimants must receive less than 10l. per annum.

Next, it was contended that the claimants had a right to vote as for an estate which came to them "by devise." They were elected to their fellowships, and then became entitled to the annual payments under Lord Crewe's will. We are clearly of opinion that this is not an estate coming to them "by devise," within the meaning of the 18th section.

It was further contended that the followship was "an **[439]** office" within the meaning of that section. We are clearly of opinion that it is not.

The only remaining question under that section, —and which was principally argued before us, —was, whether the claimants were seised for life of any freehold lands, of the value of 40s. per annum in the county of Durham, of which they were in the

(*a*) The case was argued before Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

actual and bonâ fide occupation. It was contended, for the appellants, that they were seised for life of lands in Durham to that amount, as cestui que trusts in the actual receipt of the rents and profits thereof, and that this would enable them to vote, within the provisions of the 74th section of the 6 Vict. c. 18. Although 10l. per annum could not be realized from the lands in Durham if all the annual payments were made out of lands in that county; yet it was clear that much more than 40s. could be so realized.

But it was answered by the respondents, that the annual sums payable out of the lands in both counties must be rateably apportioned to the amounts respectively received from the lands in each county: and, if so, as it appears from the case that the net proceeds of the lands in Durham are at most 735l. per annum, and the net proceeds of the lands in Northumberland 5600l., the proportion of those two sums being as one to between seven and eight, it follows that a much less sum than 40s. per annum would be apportioned from the lands in Durham to the payment of the appellants' 10l. per annum.

It was much discussed before us whether the appellants could be considered as cestui que trusts in the actual occupation of any part of the lands, so as to be entitled as freeholders at all. But we think it unnecessary to decide that point; because we are of opinion, that, assuming them to be such freeholders, the lands **[440]** in the two counties must be deemed to be rateably apportioned for the payment of the annual sums under the will, and that, consequently, the appellants would not hold freeholds of the value of 40s. per annum in the county of Durham.

We think, therefore, the revising-barrister was right in disallowing the votes; and we give judgment for the respondents, but without costs.

Decision affirmed, without costs.

End of Michaelmas Term.

[441] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN MICHAELMAS VACATION, IN THE TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA.

MEMORANDA.

In the course of this Vacation, the Hon. Sir Cresswell Cresswell, Knight, resigned the office of Judge of the Court of Common Pleas, and was appointed Judge of the Court of Probate and Judge Ordinary of the Court for Divorce and Matrimonial Causes. He was afterwards sworn a member of Her Majesty's Privy Council.

John Barnard Byles, one of Her Majesty's Serjeants-at-Law, was appointed a Judge of the Court of Common Pleas, in the room of Sir Cresswell Cresswell. He took his seat on the first day of the ensuing Term, and shortly afterwards received the honor of knighthood.

[442] In this vacation also, the following gentlemen were appointed Her Majesty's Counsel learned in the Law:—

Evelyn Bazalgette, Esq., of Lincoln's Inn; John Shapter, Esq., of Lincoln's Inn; Samuel Bush Toller, Esq., of Lincoln's Inn; Thomas Webb Greene, Esq., of the Middle Temple; Francis Henry Goldsmid, Esq., of Lincoln's Inn; Richard Paul Amphlett, Esq., of Lincoln's Inn; James Fleming, Esq., of the Middle Temple.

LAWS AND ANOTHER *v.* RAND. Dec. 6th, 1857.

[S. C. 27 L. J. C. P. 76; 4 Jur. N. S. 74; 6 W. R. 127. Adopted, *Heywood* v. *Pickering*, 1874, L. R. 9 Q. B. 432.]

As between the drawer and the holder of a cheque, the former is not discharged by any delay in its presentment short of six years, unless some loss or injury is occasioned to him by such delay.—Presumption that an instrument is drawn at the time of its date.

This was an action by the holder against one of the alleged drawers of a banker's cheque.

The declaration stated that the defendant, by the name and style of Bedford & Rand, on the 30th of May, 1856, made his draft or order in writing for the payment of money, called a banker's cheque, and directed the same to a certain banking-company called the Union Bank of London, and thereby required the said banking-company to pay to R. Bedford or order 100*l*., and then delivered the same to the said R. Bedford, who delivered the same to the plaintiffs, who still were the bearers thereof; and the said banking-company did not pay the said cheque, although the same was presented to them for payment, whereof the defendant had due notice, but did not pay the same; and the said cheque was still unpaid.

The defendant pleaded, amongst others, a plea traversing the making of the cheque, and (fourthly) that the cheque was not presented to the said banking-company within a reasonable time. Issue thereon.

[443] The cause was tried before Williams, J., at the second sitting in London in Easter Term last, when the following facts appeared in evidence: Messrs. Bedford & Rand entered into business in partnership together as saddlers, in Oxford Street, in January 1856, and so continued until the 30th of January, 1857, when the partnership was dissolved, and notice of dissolution duly published in the *London Gazette*. The firm had an account with the Union Bank of London, which was closed on the dissolution of the partnership. The mode of drawing cheques, according to the provisions of the deed of partnership, was, upon the separate signature of each of the partners: and a clerk of the bank, who was called, stated that cheques drawn otherwise would not have been paid by the bank, even when they had funds belonging to the firm in their hands. The cheque in question, which was written on plain paper, was dated the 21st of May, 1856, and was signed by Bedford in the name of the firm, and payable to himself, but was not presented at the bank for payment until the 11th of March, 1857: and it was not handed over to the plaintiff in satisfaction of any liability of the firm. There was no evidence as to when the plaintiff became the holder of the cheque; nor was there any evidence as to when it was drawn.

On the part of the defendant, the only objection urged was, that the presentment was not made within a reasonable time.

On the other hand, it was submitted that a presentment at any time within six years would, in the absence of evidence to shew that the defendant had been prejudiced by the delay, as by the failure of the bank, or the like, be a presentment within a reasonable time, as between the drawer and the holder.

The learned judge was of opinion that the reasonableness of the time of presentment was a question of law: **[444]** but that, assuming it was a question of fact, there was nothing for the jury, the presentment unquestionably not having been made within a reasonable time.

A verdict was thereupon entered for the defendant upon the fourth issue, and for the plaintiff on all the others,—the point on the fourth plea being reserved, and the court to be in the position of a jury thereon.

Honyman, in Easter Term, moved for a rule nisi to enter a verdict for the plaintiff on the fourth issue, pursuant to leave reserved, "on the ground of misdirection of the judge in ruling that the cheque was not presented within reasonable time." He cited *Robinson* v. *Hawksford*, 9 Q. B. 52, where, to an action by the holder against the drawer of a cheque, it was held to be no answer that the cheque was not presented in reasonable time, unless, during the delay, the fund has been lost, as by failure of the banker. [Cresswell, J. Was there any proof of the time of the drawing of the cheque?] The date would be primâ facie evidence. [Cresswell, J. I doubt that, under the circumstances. Bedford had no authority to draw cheques in the name of the firm after the dissolution of the partnership.] The cheque must be assumed to have been drawn whilst the partnership was subsisting. It is laid down in Byles on Bills, 7th edit. p. 64, that the date expressed in the instrument is primâ facie evidence of the time when the instrument was made.

A rule nisi having been granted,

C. W. Wood, at the sittings after Trinity Term last, shewed cause. The question in all these cases is, whether, under the circumstances, the cheque has been presented within a reasonable time: the stoppage of the bank in the interim being only one of the circumstances. In *Serle* v. *Norton*, 2 M. & Rob. 401, where **[445]** a cheque drawn on a country banker, dated the 19th of March, was not presented until the 6th of April,

and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the cheque. The judgment of Lord Denman in *Robinson* v. *Hawksford*, 9 Q. B. 52, is rather in the defendant's favour. He says: "Where a loss has occurred by the cheque not being presented, it is necessary to inquire if there was any unreasonable delay: and the loss itself would be some evidence of that fact." [Cockburn, C. J. There are some very pertinent remarks on the subject in the note to *Serle* v. *Norton*, 2 M. & Rob. 404, where it is said: "It is difficult to see how a solvent drawer, on a solvent banker, can be prejudiced by delay in the presentment of a cheque. By drawing such a cheque, he appropriates a sum of money then in his banker's hands to the payment thereof, and cannot honestly reduce his account below that amount: *Boehm* v. *Stirling*, 7 T. R. 429: and, as between him and the payee of the cheque, the question of reasonable time for presentment can scarcely arise, unless some damage has arisen in consequence of the non presentment."] That note was referred to by Lord Denman in *Robinson* v. *Hawksford*. In the present case, the circumstances clearly shew that the presentment was made at an unreasonably late period The cheque was drawn in express contravention of the terms of the partnership deed. It was drawn by Bedford without the authority of Rand. The date, no doubt, is primâ facie evidence of the time of the drawing: *Anderson* v. *Weston*, 8 Scott, 583, 6 N. C. 296. But the delay in the presentment was some evidence to justify the jury in presuming that it was not drawn at the time it bore date. It was incumbent on the plaintiff, the cheque being tainted with fraud, to shew when he received it, and that it was given in satisfaction of a claim on the partnership.

[446] Honyman, in support of his rule. The authorities are clear, that cheques differ in this respect from bills of exchange and promissory notes,—that the holder is not bound to present them within any limited period short of six years, unless circumstances have intervened to alter the position of the drawer, so as to prejudice him. In *Alexander* v. *Burchfield*, 3 Scott, N. R. 555, 563, 7 M. & G. 1061, Tindal, C. J., says: "In the case of a cheque, the holder does not lose his remedy against the drawer by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place in the interval; that is, unless there is actual loss to the drawer." And in *Robinson* v. *Hawksford*, 9 Q. B. 52, Patteson, J., says: "As between the drawer of a cheque and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemed unreasonable: but, if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years." And Williams, J., says: "If the question arises who is to be the loser when the banker becomes unable to pay, the point is properly raised whether the cheque was presented in due time: but, if things remain the same, the cheque is still a cheque, and the money is money applicable to the payment; and I cannot conceive that the rule as to time applies." What is or is not a reasonable time necessarily varies according to circumstances. The authorities cited shew that the plaintiff was entitled to recover, unless the delay in the presentment was shewn to have damnified the defendant, of which there was no evidence whatever. It was clear that, if the presentment had taken place at an earlier period, the cheque would not have been paid: the banker's clerk proved that. [Cresswell, J. If the presentment had taken place before, the amount might **[447]** have been settled and allowed in account.] There was no evidence of any settlement of accounts. The onus lay on the defendant to shew that he was damnified by what took place: no attempt was made to shew that he was. As a general rule, it cannot now be doubted that there is a primâ facie presumption that all documents are made on the day they bear date: *Anderson* v. *Weston*, 6 N. C. 296, 8 Scott, 583; *Smith* v. *Battens*, 1 M. & Rob. 341; *Potez* v. *Glossop*, 2 Exch. 191; Taylor on Evidence, 3rd edit. vol i., p. 153, § 137. The drawing of cheques is incident to modern partnerships. [Cockburn, C. J. It is a mere mode of payment: the power to draw cheques is not vitally essential to a partnership.] Perhaps not essential; but very convenient. In Byles on Bills, 7th edit. 17, it is said: "There is one material difference between the liability of the drawer of a cheque and the drawer of a bill. The drawer of a cheque is not discharged by the holder's failure to present in due time, unless he have sustained from the delay actual prejudice, as, by the failure of the banker. The cheque is an absolute appropriation of a sum of money in the banker's hands to lie till called for; but by delay the holder takes the risk of the bank's failure." The cases of *Grant*

v. *Vaughan*, 3 Burr. 1516, and *Down* v. *Halling*, 4 B. & C. 330, 6 D. & R. 455, occurred at a time when the doctrine, now exploded, of reasonable care prevailed.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court (*a*):—

This was an action on a cheque drawn on a banker, by one Bedford, in the names of Bedford and the de-[448]-fendant, Rand, who were formerly in partnership. Plea, that the cheque was not presented within a reasonable time.

The cause was tried before Williams, J., at the sittings in London in last Easter Term, when it appeared that Bedford and Rand were in partnership, and had an account with a banker, who was instructed not to pay cheques unless signed by both. The cheque in question was made payable to Bedford, and was signed by Bedford in the names of both, but Rand did not sign it. Bedford and Rand dissolved partnership on the 31st of January, 1857, and then closed their account with their banker. The cheque in question bore date the 30th of May, 1856, and was presented on the 11th of March, 1857. The banker's clerk proved, that, if presented before the account was closed, it would not have been paid, not being signed by Rand. No evidence was given as to the time when the plaintiff became the holder: but no objection was made at the trial on that ground.

The learned judge directed a verdict for the defendant, the plaintiff having leave to move to enter a verdict for him, if the court should think that, according to the evidence, the cheque was presented in a reasonable time.

A rule was granted, and cause was shewn against it at the sittings after Trinity Term last. It was then said that evidence should have been given of the time when the cheque was handed over to the plaintiff; but, no such point having been made at the trial, we think it could not with propriety be entertained afterwards; and the sole question to be disposed of is that which was reserved by the learned judge.

We are of opinion that the point was decided by the court of Queen's Bench in *Robinson* v. *Hawksford*, 9 Q. B. 52, where Patteson, J., said that no time less [449] than six years would be unreasonable, unless some loss was occasioned by the delay (there was no evidence of any loss here): and that was in conformity with what was said by Lord Chief Justice Tindal, in giving judgment in the case of *Alexander* v. *Burchfield*, 7 M. & G. 1067, 8 Scott, N. R. 563.

The rule for entering a verdict for the plaintiff must therefore be made absolute.

Rule absolute.

THE REV. WILLIAM KIRKPATRICK RILAND BEDFORD, Clerk, *v.* THE WARDEN AND SOCIETY OF THE ROYAL TOWN OF SUTTON COLDFIELD. SILVESTER *v.* THE REV. WILLIAM KIRKPATRICK RILAND BEDFORD, Clerk. Dec. 6th, 1857.

[S. C. 27 L. J. C. P. 105; 4 Jur. N. S. 133.]

By a local inclosure-act,—reciting that the defendants, amongst others, were owners and proprietors of old inclosed lands within the parish,—it was (by s. 61) provided that the tithes should be extinguished and certain yearly corn-rents substituted, such yearly rents to be "issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid," and to be paid to the rector at the rectory-house on the four usual quarter days. The 62nd section provided that the rector, in addition to all present powers for recovery of tithes and compositions, should have the same powers and remedies for recovering them as by common law or statute were given to landlords for the recovery of rack-rent in arrear. And the 63rd section, having provided for the apportionment of the rent-charge in case of the division of the land, concludes by enacting that such apportioned part of the rent "shall and may be recovered from the lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn rents or sums are hereby made recoverable:"—Held, that the rector could not maintain an action against the owners of the land for the recovery of the rent charge thus created.—Held also, that a distress by the rector for the amount of the rent charge imposed upon lands

(*a*) The case was argued before Cockburn, C. J., Cresswell, J., and Williams, J.

of a proprietor acquired by him before the passing of the act, and also for the amount of the rent-charge imposed upon other lands in the parish acquired by him since the passing of the act, jointly, was illegal.—But held, by Williams, J., Crowder, J., and Willes, J.,—dissentiente Cockburn, C. J.,—that a distress might be levied, in respect of the whole rent-charge imposed on all the lands in the parish belonging to the same owner, upon an occupier of any part thereof.

The first of these actions was brought by the Rev. Mr. Bedford, who is the rector of the parish of Sutton [450] Coldfield, in the county of Warwick, to recover from the defendants, as the owners and proprietors of certain lands in the same parish, a sum of 30l. 10s. 2d. for rent in lieu of tithe, as hereinafter mentioned.

The other action was brought by Silvester against the rector, for distresses made as hereinafter mentioned, to recover certain other sums of rent-charge.

As the facts involved in these actions are undisputed, and both depend upon similar questions of law, by consent of the parties and by order of a judge, according to the Common Law Procedure Act, 1852, the following case has been stated in both actions for the opinion of the court, without pleadings:—

By a private act of parliament passed in 5 G. 4 (c. 14), intituled "An act for inclosing lands within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, in the county of Warwick," it was enacted in the 1st, 61st, 62nd, 63rd, and 64th sections,—which are the only portions of the act material to the present purpose,—as follows:—

Sect. 1. "Whereas there are within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, in the county of Warwick, certain open and common fields and meadows, and also certain commons, commonable and waste lands: and whereas the worshipful the Warden and Society of the Royal town of Sutton Coldfield, in the county of Warwick, claim to be lords of the manor of Sutton Coldfield aforesaid, and as such are or claim to be entitled to the soil of the several commons and waste lands within the said manor: And whereas William Bedford, Esq., is patron of the rectory and parish church of Sutton Coldfield aforesaid, within the Royal town, manor, and lordship of Sutton Coldfield aforesaid, and the Rev. William Riland Bedford, clerk, is the present rector thereof, and as such is entitled to certain glebe lands, [451] and right of common in respect thereof, and claims to be entitled to all the great and small tithes yearly or otherwise arising or renewing within the said parish of Sutton Coldfield, or to certain moduses or compositions in lieu thereof, if any such legally exist: And whereas the said warden and society, Sir E. C. Hartopp, Bart., Sir R. Peel, Bart., F. B. Hacket, Esq., W. H. C. Floyer, Esq., C. Chadwicke, Esq., John Scott, Esq., the Rev. James Scott, J. Whitehead, Esq., the Master and Fellows of Emanuel College, Cambridge, and the said William Bedford, and other persons, are owners and proprietors of certain inclosed lands and estates within the said lordship and parish of Sutton Coldfield, and also of the said open and common fields, meadows, commons, and waste lands, or to certain rights of common or other rights in, over, and upon the same: And whereas an act was passed in the 41st year of the reign of His late Majesty, King George the Third, intituled 'An act for consolidating in one act certain provisions usually inserted in acts of inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such acts:' And whereas another act was passed in the 1st and 2nd years of the reign of His present Majesty, intituled 'An act to amend the laws respecting the inclosing of open fields, pastures, moors, commons, and waste lands in England:' And whereas the properties in the said open and common fields and common meadows lie very much intermixed with each other, and are in their present state incapable of any considerable improvement, and it would be advantageous to the several persons interested therein and in the said commons and waste lands, if the said open and common fields, meadows, commons, commonable and waste lands were divided and inclosed, and specific allotments made thereof to the several persons interested therein, according to their several rights and interests, [452] and if compensation were made for the tithes of all and every the lands and estates aforesaid, in manner hereinafter mentioned; but such division, allotment, inclosure, and compensation for tithes, cannot be effectually made without the aid and authority of parliament: Be it enacted, &c., that John Harris, of, &c., surveyor, shall be and he is hereby appointed the commissioner for valuing, setting out, dividing, allotting, and inclosing all the said open and common fields,

meadows, commons, commonable and waste lands, and for putting this act and the said recited acts into execution, subject to the rules, orders, and directions hereinafter mentioned, and with such powers, directions, and regulations as are contained in the said recited act, except in such cases only as the same are hereby varied or altered."

Section 61. "And whereas it is proposed and agreed that all tithes whatsoever arising out of, for, or in respect of any old inclosed lands, tenements, or hereditaments within the parish of Sutton Coldfield aforesaid, and payable to the rector of the said parish for the time being, shall cease and be for ever extinguished; and that, in lieu thereof, yearly rents or sums of money shall be ascertained and paid to the rector of the said parish for the time being, in manner hereinafter mentioned: be it therefore further enacted that it shall be lawful for the said commissioner, and he is hereby required, to make a just and true valuation according to the average prices of wheat in the corn-market in the city of London for the seven years preceding the passing of this act, of all the tithes, both great and small, issuing or payable out of, for, or in respect of all the old inclosed lands and tenements in the parish of Sutton Coldfield aforesaid, subject to the payment of tithes in kind, or any moduses or other compositions, if any such shall be proved to exist, to the said rector, in **[453]** order to enable him, the said commissioner, to fix and ascertain the total aggregate annual amount which in his judgment is a just, fair, and equal compensation and satisfaction to be made to the said rector and his successors in lieu of all such tithes and moduses or other compositions, if any: and the said commissioner, after ascertaining such aggregate annual amount, shall also ascertain and determine what yearly sums of lawful money of Great Britain, according to such aggregate annual amount, are equivalent to the tithes and moduses or other compositions, if any, of each proprietor's old inclosed lands and tenements within the said parish; which said yearly sums shall be yearly charged upon the old inclosed lands and tenements of the respective proprietors, as yearly rents payable thereout respectively to the said rector and his successors, in lieu of the tithes thereof; and the same rents shall accordingly be and are hereby charged on the said several inclosed lands and tenements of the several proprietors; and, for the purpose of hereafter regulating the amount of such yearly rents according to the price of good marketable wheat, at such times as hereinafter mentioned, the said commissioner shall also ascertain the quantity of good marketable wheat each of the several yearly sums so to be ascertained as aforesaid should in his judgment purchase, and the said commissioner shall set forth the several particulars hereinafter directed to be ascertained in his award; and the several yearly rents or sums to be ascertained and set forth as aforesaid, subject to such variations as is hereinafter provided for, shall be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid; and the same yearly rents shall be payable and paid to the said rector and his successors at the rectory-house of Sutton Coldfield aforesaid, by four equal quarterly payments in every year, on the 25th of March, the 24th **[454]** of June, the 29th of September, and the 25th of December in every year,—the first payment thereof to begin and be made on such of the said quarterly days as the said commissioner shall direct by his said award, or by any notice in writing to be given and published previous to the execution of the said award, in like manner as hereinbefore is mentioned with respect to the meetings of the said commissioner."

Sect. 62 enacts "that the said rector and his successors shall and may, in addition to all present powers for recovery of tithes and compositions, have and exercise such and the same powers and remedies for recovering the said yearly rents or sums of money when in arrear, as by common law or statute are provided and given to landlords for the recovery of rack rent when in arrear: Provided, nevertheless, that, whenever the said rector or his successor shall, by death or otherwise, cease to be entitled to such yearly rent or sum, his executors or administrators shall be entitled to receive a proportionable part of such rent or sum, up to the day of his so dying or ceasing to be entitled."

Sect. 63. "And in order to prevent any difficulty to the said rector and his successors by the division or sale of the hereditaments to be charged with such yearly corn-rent or sum of money, and to facilitate the future regulation of the same, be it enacted that the said commissioner shall and he is hereby required to make or cause to be made two complete schedules or descriptions of the several hereditaments which shall be chargeable with the said yearly corn-rent or sum, and the particular measure

thereof, in acres, roods, and perches, and to declare what proportion thereof shall be charged upon each and every part of such respective hereditaments and the quantity of wheat which is to govern the said future yearly corn-rent or sum, and such other requisites as shall be judged necessary and **[455]** proper by the said commissioner to render every matter respecting the same clear and plain in future; which said schedules or descriptions shall be signed by the said commissioner, and one of them shall be deposited in the bishop's court at Lichfield, and the other annexed to the commissioner's award: and that, upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedules or descriptions, in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn-rent or sum; and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable."

Sect. 64. "Provided always, and be it further enacted, that it shall be lawful for the said rector of the parish of Sutton Coldfield, and his successors for the time being, or for any two or more of the owners or proprietors of lands or tenements hereby made liable to the payment of yearly tithe-rents to the said rector and his successors, at his or their respective proper expense, by writing under his or their respective hands to apply at their first general or quarter sessions of the peace to be holden in or for the said county of Warwick after the expiration of seven years to be computed from the commencement of the said yearly rents, having given thirty days' previous notice of such intended application in the said *Aris's Birmingham Gazette*, or in some other newspaper usually circulated in the said county of Warwick, and on the principal outer door of the parish **[456]** church of Sutton Coldfield aforesaid, to have one proper and disinterested person named or appointed by the justices then and there assembled, for the purpose of ascertaining by the *London Gazette* the average price of a Winchester bushel of good marketable wheat in the corn market in the city of London for seven years then last past: which said person to be appointed as aforesaid for that purpose shall thereupon by his report to be made and delivered to the court of quarter sessions to be held after the feast of the Translation of St. Thomas the Martyr then next ensuing, set forth such average price; and, in case it shall by such report appear that such average price of a bushel of good marketable wheat is more or less than the price of a bushel of such wheat as set forth in the said award, by the value of 3d., the said respective yearly tithe rents and the several proportions thereof shall be increased or diminished accordingly in the same proportions as the said average price shall appear to have increased or diminished, which shall be declared by the said court, and the said several yearly tithe rents so re-ascertained as aforesaid, shall, at and from the quarterly day of payment next after such order, be a charge upon, and be, remain, and continue issuing and payable to the said rector and his successors out of the several old inclosed lands and tenements to be charged by the said award with such respective yearly tithe-rents as aforesaid, for the term of seven years then next ensuing, and until the same shall afterwards upon a like application be again varied according to the average price of wheat during the term of seven years then last past, to be ascertained in manner aforesaid; and such future applications the said rector and his successors, and any two or more of such owners or proprietors, are hereby respectively authorized to make from time to time at the expiration of every term of seven years for ever, in such and the like manner **[457]** and form as hereinbefore are mentioned and directed with respect to the first application; but the costs and charges of every such application to the court of quarter sessions, and of varying and re-ascertaining such several yearly rents or sums as aforesaid, shall be paid and discharged by the person or persons who shall give notice of any such application."

After the passing of this act, Mr. John Harris, the commissioner therein named, duly made his award in accordance with the provisions of the 61st section: and he also made, in accordance with the provisions of the 63rd section, two schedules or descriptions of the hereditaments charged with the said yearly corn-rent or sum, and the particular measure thereof, in acres, roods, and perches, and declared what proportions thereof should be charged upon each and every part of such respective hereditaments and the quantity of wheat which was to govern the said yearly corn-

rent or sum, and such other requisites as he the commissioner judged necessary and proper for the purposes mentioned in that behalf in the said 63rd section.

The Rev. William Kirkpatrick Riland Bedford is now, and has been for some years past, the rector of the said parish of Sutton Coldfield, and as such is entitled to the said yearly rent or sum payable in lieu of tithe to the rector of the said parish for the time being by virtue of the provisions of the said act and the said award and schedules made in pursuance thereof. The said Warden and Society of the Royal town of Sutton Coldfield are a corporation duly established by charter, capable of suing and being sued in their corporate name; and they were at the time of the passing of the said act, and still are, the owners and proprietors of certain lands comprising a considerable portion of the said parish.

A copy of one of the said schedules made by the said [458] commissioner, so far as it relates to the said lands of the said warden and society, was annexed to the case, with all the particulars relating to the said lands which are given in the said schedule.

Description of the schedule. (See next page).—The first column of the said schedule contains the name of the said warden and society as being the proprietors of the said lands; the second column contains the names of the several occupiers of such of the said lands as were not in the actual possession of the said warden and society at the time when the schedule was made; the third column contains the numbers by which each of the different fields or tenements is distinguished upon the plan made under the direction of the commissioner; the fourth column contains the names or description of those fields or tenements; the fifth column describes the quantity of land contained in each field or tenement; the sixth column states the rate per acre at which the said lands are charged with the said rent; the seventh column states the annual amount of rent chargeable at the time the said schedule was made upon each of the said fields or tenements; and the eighth column states the quantity of wheat upon which the said rent is to be calculated in respect of each field or tenement.

It was agreed that an entire copy of the schedule should be in court when the case came on to be heard, and might be referred to if necessary; and that the said copy of the schedule and the said act of parliament of the 5 G. 4, c. 14, should be taken as part of the case.

At the time when the said schedule was made, the said several persons mentioned in it as occupiers of lands under the said warden and society were tenants of the same respectively at rack-rent: and, although some of the said lands are now occupied by other persons than those who were named in the said schedule, [460] those lands have been continuously held since the said schedule was made by tenants at rack-rent.

From the time of the commissioner making his said award and schedule, up to the 29th of September last, a period of thirty years, the rector and his predecessor have received from the occupiers of lands in the parish for the time being so much of the rent-charge as has been paid during that period.

On the 25th of December, 1855, the sum due to the said rector for the said rent in respect of the whole of the said lands within the said parish of which the said warden and society were then the owners and proprietors, was 30*l.* 10*s.* 2*d.*, which is the sum claimed by the said rector in the first of these actions.

On the 25th of March, 1856, a further sum of 19*l.* 9*s.* 1*d.* became due to the said rector for the said rent, in respect of the whole of the said lands within the said parish of which the warden and society were then the owners and proprietors (a portion of which lands they had acquired by purchase since the making of the award); and for this last mentioned sum a distress was levied by the said rector on the 18th of this present month, upon a portion of the said lands, which is, and was on the said 25th of March, 1856, in the occupation of George Silvester, the plaintiff in the second of the above-mentioned actions, one of their said tenants at rack-rent.

On the 24th of June, 1856, a further sum of 8*l.* 14*s.* 8*d.* became due to the said rector for the said rent in respect of that portion of the said lands of which the said warden and society were the owners and proprietors at the time of the passing of the said inclosure act, and have since continually been, and still are, the owners and proprietors: and for the last mentioned sum another distress has been levied by the said rector on the said 18th of this present month, upon the lands of the [461] said

[459] (A Specimen of) the Schedule referred to in the Case.

Proprietors names.	Occupiers names.	No. on the plan.	Names of fields.	Quantity. A.	R.	P.	Tithe rent per acre.	Amount of Tithe-rent. £	s.	d	Quantity of corn payable. Bush	decs.
Warden and Society of Sutton Coldfield.	Careless, William	3	Big Croft	1	1	18	5s.		6	$9\frac{3}{4}$		851
		4	Meadow	2	0	15			10	$5\frac{1}{2}$	1	308
		5	Little Croft		2	6			2	$8\frac{1}{2}$		336
		6	Cottage and garden		1	12			1	$7\frac{1}{2}$		203
				4	1	11		1	1	7	2	698
	Allport, John	7	Further Croft	1	2	24	6s.		9	11	1	238
		7.a.	Cottage and garden		1	26			2	$5\frac{3}{4}$		309
				2	0	10			12	$4\frac{3}{4}$	1	547
	Milner, Joseph	8	Pleck	1	2	10	5s.		7	$9\frac{3}{4}$		977
		8.a.	Cottage and garden		2	6			2	$8\frac{1}{4}$		336
				2	0	16			10	6	1	313
	Rice, John	Pt. 10 Pt. 11	Orchard, &c.		2	17	5s.		3	$0\frac{1}{4}$		378
		Pt. 13 15	Close	1	1	0			6	3		782
		Pt. 14	Upper close		1	5			1	$4\frac{3}{4}$		175
				2	0	22			10	8	1	335

George Silvester as such tenant as aforesaid, being part of the lands in respect of which the said last-mentioned sum became due.

The last of the above-mentioned actions has been brought by the said George Silvester against the said rector for damages for taking the said distresses: and it is agreed, that, if the said rector was wrong in taking the first of the said distresses, the damages recoverable by the said George Silvester shall be 19*l.* 9*s.* 1*d.*: and, if the said rector was wrong in taking the last of the said distresses, the damages shall be 8*l.* 14*s.* 8*d.*

The said rector contends,—first, that he has a right to maintain the said action against the said warden and society for the whole of the said sum of 30*l.* 10*s.* 2*d.*,—secondly, that he had a right to distrain for the whole sum of 19*l.* 9*s.* 1*d.*,—thirdly, that he had a right to distrain for the said sum of 8*l.* 14*s.* 8*d.*

The said warden and society and the said George Silvester contend, —first, that the said rector is not entitled to maintain the first of these actions at all, —secondly, that the said rector was not entitled to make either of the said distresses,—thirdly, that the said rector can only distrain (if at all) upon each tenement numbered in the said schedule, for the rent due in respect of that tenement,—fourthly, that the rector is only entitled to distrain (if at all) upon the lands of each occupier in the said parish for the rent due in respect of such lands, although they may be held by him at rack-rent from several different owners or proprietors.

The questions for the opinion of the court are,—first, whether, under the circumstances stated, the plaintiff in the first of these actions is entitled to recover the said sum of 30*l.* 10*s.* 2*d.*, —secondly, whether the defendant in the said last-mentioned action was entitled to take the said distresses, or either of them.

[462] It was agreed that judgment should be entered in either action, according to the opinion expressed by the court, and that the costs were to be paid in accordance with the terms of the order of the 20th of May, 1857.

Bovill, Q. C. (with whom was Garth), for the plaintiff in the first action. The substantial question is, whether the rector has a right to proceed for the recovery of the rent-charge against the owner, as distinguished from the occupier of the lands. A further question arises in respect of lands acquired since the making of commissioner's award. And again a further question, as to the form of the remedy,—whether by action or by distress, and, if by distress, in what form. The inclosure act passed in 1824. The 1st section recites that there were within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, certain open and common fields and meadows, and certain commons, commonable and waste lands; that the warden and society of the Royal town of Sutton Coldfield were or claimed to be entitled to the soil of the commons and waste lands; that William Bedford, Esq., was the patron, and the Rev. William Riland Bedford, clerk, incumbent of the parish church of Sutton Coldfield, and as such entitled to certain glebe lands and rights of common in respect thereof, and claimed to be entitled to all the great and small tithes within the parish, or to certain moduses or compositions in lieu thereof; that the warden and society and certain other persons were owners and proprietors of certain inclosed lands and estates within the lordship and parish of Sutton Coldfield, and also of the said open and common fields, meadows, commons, and waste lands, or to certain rights of common or other rights in, over, and upon the same; and that it would be advantageous to the several persons interested therein, if the said lands were inclosed **[463]** and allotted: and it then proceeds to appoint a commissioner "for valuing, setting out, dividing, allotting, and inclosing all the said open and common fields, meadows, commons, commonable and waste lands, and for putting that act and the recited acts (41 G. 3, c. 109, and 1 & 2 G. 4, c. 123) into execution, subject to the rules, orders, and directions thereinafter mentioned, and with such powers, directions, and regulations as were contained in the said recited acts, except in such cases only as the same were thereby varied or altered. The 61st section enacts, that the tithes shall cease, and certain yearly rents be paid to the rector in lieu thereof, and that the commissioner shall make a valuation to enable him to fix the total aggregate annual compensation to be paid to the rector, and proportionate amount payable in respect of each proprietor's old inclosed lands, and that "the same rents shall accordingly be and they are thereby charged on the said several inclosed lands and tenements of the several proprietors;" and it then goes on to enact that "the several yearly rents or sums to be ascertained and set forth as aforesaid, subject to such variations

as was thereinafter provided for, should be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid, and the same yearly rents should be payable and paid to the said rector and his successors at the rectory-house at Sutton Coldfield aforesaid, by four equal quarterly payments, &c. Section 62 gives the rector the same remedies for recovering the rents as by law are provided and given to landlords for the recovering of rack rent. And s. 63, after directing a schedule to be made specifying the amount charged on each of the several hereditaments, concludes with enacting, "that, upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth **[464]** be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedules or descriptions, in exoneration of the other hereditaments thereby charged with the payment of the whole of the said yearly corn-rent or sum, and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are thereby made recoverable." Under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, the rent-charge in lieu of tithes is charged upon the land in similar terms: but there is an express enactment (in s. 67) that no person whatever shall be personally liable to the payment of the rent-charge: *Griffinhoofe* v. *Daubuz*, 4 Ellis & B. 230. Here there is no such enactment: and there is good reason for the omission; for, it would operate great hardship if the rector were bound to distrain for the whole sum assessed, upon one occupier: and, on the other hand, it would be equally hard upon the rector if he were compelled to resort to a separate distress for each of the small sums assessed upon the various occupiers,—none much exceeding 3l., and some being as low as 1d. Then, the payment is to be made to the rector at the rectory-house. Who is to make the payment? Clearly not the occupier. [Cockburn, C. J. In the case of a distress, it is the goods of the occupier that are taken. Crowder, J. In the schedule, the only aggregation or lumping is of lands in each person's occupation, not ownership.] The liability to action and distress is in respect of all the lands belonging to the same proprietor. [Cockburn, C. J. Primarily, the tithe is a charge on the land. Your contention is, that the private act throws the burthen upon the owner of the land. Now, the two principal clauses, the 61st and 62nd,— **[465]** are wholly silent upon that great change: and the whole reliance is placed upon the few words incidentally thrown in at the end of the 63rd section.] The whole scope of the act makes it a charge on the owner or proprietor of the land. [Cockburn, C. J. Apart from the words at the end of s. 63, this act does no more than the general tithe act does: and that does not charge the owner.] If the occupier were compelled by distress to pay this rent-charge, he would, in the absence of an agreement to the contrary, be entitled to recover it back from the landlord. [Cockburn, C. J. What authority is there in the act for that?] It results from the fact of the act of parliament making it a charge upon the land. The rent-charge is to be paid by the owner, to the rector, at the rectory-house. There is nothing in the general scope of the act to indicate any intention to impose the charge upon the occupier. It is like any other charge on the land. [Cockburn, C. J., referred to *Cumming* v. *Bedborough*, 15 M. & W. 438.] Assuming that the party charged is the owner, the case of *Willoughby* v. *Willoughby*, 4 Q. B. 687, is a strong authority for the plaintiff. There, by an act (6 & 7 W. 4, c. 16, private) for dividing and allotting commons and wastes in a parish, the rector's tithes, and some detached portions of glebe, were commuted for a rent charge, on the principle of a corn-rent: and an arbitrator was impowered to declare the amount by award. The rent charge was to be charged on the lands of W. situate in the parish, in exoneration of the lands of all other proprietors therein: and the act declared that it should be lawful for the arbitrator, by his award, to divide the rent-charge into so many portions as he should think fit, and to charge each portion on a separate part of W.'s lands, in order that each might be subject only to the portion charged thereon. Provision was made for revising the amount of the rent-charge periodically at the **[466]** end of seven years, at the instance of the rector or of W., his heirs or assigns, owners for the time being of the lands to be charged. The act provided, that, so often as the rent-charge should be three months in arrear, the rector, his executors, &c., should have "such and the

like powers and remedies for recovering the same, together with all expenses incident to the recovery thereof, as by the common law or statute are given to landlords for the recovery of rent when in arrear." The act gave compensation to W., by allotments of lands, for the burthen which his lands would suffer by the rent-charge. It was held that the act did not point out W. as the person by whom the rent charge was to be paid. A doubt was intimated whether the statute gave a remedy by action against any person; but it was held, that, if any such action lay, it could be only against an occupier of the land charged. In giving judgment, Lord Denman says: "No person is mentioned by whom the said rent-charge shall be paid and payable. No remedy is given for the recovery of it until it shall be behind and unpaid by the space of three calendar months; and then the rector 'shall have such and the like powers and remedies for recovering the same,' 'as by the common law or statute are given to landlords for the recovery of rent when in arrear.' No demand is required to be made by the rector or any person prior to his having recourse to such powers and remedies. The rent-charge in this case being perpetual, it is conceded that no action of debt would lie for the recovery of it, according to the case of *Webb* v. *Jiggs*, 4 M. & Selw. 113, unless it be given by the 35th section of the act in question. It cannot be denied that by law an action of debt for rent will lie by a landlord against his tenant. If, therefore, this act had stated by whom the rent was to be paid, we should have had little difficulty in saying that an action of debt would lie for it." 2. **[467]** The second question is, whether the distress was properly made for the 19*l.* 9*s.* 1*d.* due on the 25th of March, 1856, in respect of the whole of the lands in the parish of which the wardens and society were the owners and proprietors, a portion of which lands they had purchased since the making of the award. The affirmative of that proposition is inconsistent with the argument on the first point. That the rector was entitled to distrain for part, is clear. The distress, therefore, could not be unlawful, though it might be excessive. 3. The distress for the 8*l.* 14*s.* 8*d.* which became due on the 24th of June, in respect of that portion of the lands of which the wardens and society were owners and proprietors at the time of the award, raises substantially the same question as that first argued. That distress clearly was justifiable.

Byles, Serjt. (with whom was Huddleston, Q. C.), contrà. There are three states of circumstances before the court in this case,—1. an action brought by the rector to recover 30*l.* 10*s.* 2*d.* in respect of rent-charge in lieu of tithes for the whole of the lands within the parish of which the defendants in that action, the wardens and society of Sutton Coldfield, were owners and proprietors, —2. a distress for 19*l.* 9*s.* 1*d.* levied by the rector for rent due on the 25th of March, 1856, in respect, not only of lands of which the corporation were owners at the time of the award, but also of lands acquired by them by purchase since that time, the person distrained on not being in possession of the whole of the lands upon which the rent is charged, —3. a distress for 8*l.* 14*s.* 8*d.* for rent-charge arising from lands which were in the ownership of the corporation at the time of the award and at the time of the distress, and taken upon land of an occupier who was in possession of the whole of the lands out of which the rent-charge claimed **[468]** is issuing. 1. The first question is, whether the action will lie. Unless there are words in the act of parliament under which this charge is created which expressly or impliedly render the owner of the land liable, the action is not maintainable. That was distinctly decided in *Willoughby* v. *Willoughby*, 1 Q. B. 487. The words of the statute upon which that case turned expressly excluded personal liability on the part of any one. No action lay at common law for tithes: the only remedy for them was an action on the statute, 2 & 3 Edw. 6, c. 13, for not setting out tithes. It is only by express enactment that the liability to tithes or rent charge in lieu of tithes can be removed from the person primarily chargeable, and imposed upon somebody else. The 61st and 62nd sections of the private act clearly do not charge the owner or proprietor: it is only by the language found at the end of s. 63, that he is sought to be made responsible, that, "upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from henceforth be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn rent or sum as shall be specified in such schedules or descriptions, in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn rent or sum, and that such apportioned part thereof shall and may be recovered from the

lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable." *Lister* v. *Lobley*, 7 Ad. & E. 124, shews that "owner" is a word of flexible meaning. By a turnpike-act, the trustees were authorized to enter upon and take certain lands, and to pull down certain houses, buildings, **[469]** &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings," &c., so taken "for any loss or damage they may sustain thereby;" and it was provided that they should not be authorized to take other buildings, &c., without the consent of "the owners or proprietors thereof, or other persons interested therein:" and it was held that compensation was to be made, in the case of premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also to the lessees of the same for terms of years. Lord Denman there says,—"It appeared to me at the trial, and it does so most clearly now, that the plaintiff was an 'owner or proprietor' for the purpose of receiving satisfaction. The words have no definite meaning. They may refer to owners having either the whole or partial interests. These are, properly speaking, owners in each case. It would be inconvenient and unjust if the trustees were required to make satisfaction to the tenant in fee for any loss or damage which another party might sustain. The person having a partial interest can recover in no character except that of owner or proprietor." And Littledale, J., said: "It seems clear to me that the plaintiff comes within the words 'owners or proprietors.' These are not legal terms; but they must be understood from their ordinary use. I do not see that owner necessarily means the tenant in fee-simple. In common sense, one would ask, whose is the land? who has the beneficial rent? If there be a nominal rent, how can the tenant in fee-simple be the owner? Suppose there were a lease for ninety-nine years, with no rent reserved,—in common sense you would call the lessee the owner. The word 'owners' has, therefore, no definite meaning." [Williams, J. If it has any definite meaning here, it must be "the per-**[470]**son entitled to receive the rack-rent (*a*).] The 1st section of the act speaks of "owners and proprietors;" in s. 61, the word "proprietors" only is used, and at the end of s. 63 the word "proprietors" is dropped, and the word "owners" alone used. [Williams, J. If your argument be well founded, I do not see any reason for the exception made in the case of occupiers at rack-rent. If the occupier is liable, what signifies whether he is an occupier at rack-rent or not? Crowder, J. Is the word "owner" in s. 63 to receive a different interpretation from the same word in ss. 61 and 64?] Originally the land only was liable for tithes: there is nothing to make the owner or proprietor liable for the substituted rent-charge, except the introduction of the word "owner" in the concluding part of the 63rd section. It never could have been the intention of the act to impose such a liability in that incidental manner. 2. The right to distrain upon an occupier in one district for rent accruing in respect of lands in that and also in another district, has not been insisted upon. 3. The only remaining question, therefore, is the third,—as to the right to distrain upon one tenant for all the rent-charge arising within the particular district. It is to be observed that the act of parliament gives the tenant distrained on no claim for contribution. It is submitted that the act meant to make each tenement or close bear its own burthen. [Cockburn, C. J. If the local act had not passed, and the parish had come under the general act, there would have been no liability cast upon the owner.] The two acts are in pari materiâ, and should receive the same construction. [Williams, J. Your argument results in this, that there is no difference as to districts whether there is a division by sale **[471]** or by leasing?] As to the last point, that is so. Upon the whole, it is submitted that neither the action nor the distresses can be sustained.

Garth was heard in reply.

Cur. adv. vult.

There being a difference of opinion in the court as to a part of the case, the judgment of the majority was now delivered by

CROWDER, J. This case was argued before my Lord Chief Justice, my Brothers Williams and Willes, and myself, in the course of last term: and I regret to say we have been unable to come to an unanimous opinion upon it. My Lord Chief Justice

(*a*) See the Building Act, 7 & 8 Vict. c. 84, s. 2, and the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 250.

differs from the rest of the court as to a part of the judgment which I am about to deliver. This judgment, therefore, is to be taken as that of my Brothers Williams and Willes and myself.

This was a special case stated for the opinion of the court in two actions of *Bedford* v. *The Warden, &c. of Sutton Coldfield*, and *Silvester* v. *Bedford*, *Clerk*.

The first was an action by the rector of the parish, to recover from the defendants, the owners and proprietors of inclosed lands in his parish, the amount of the rent-charge laid upon the lands in lieu of tithes, under the provisions of the local inclosure act of 5 G. 4, c. 14: and the first question for our opinion is, whether such action can be maintained.

In the preamble of the act, the names of several of the proprietors and owners of inclosed lands within the parish, paying tithes to the rector, are mentioned: and, among them, the names of the defendants. Then, by the 61st, 62nd, and 63rd sections, the tithes are abolished, and a rent-charge imposed in lieu thereof.

It is contended for the plaintiff, that, according to **[472]** the true construction of those sections, an action lies by the rector against the land-owners for non-payment of this rent-charge.

It is clear that the language of those sections does not in terms authorize such an action; and, further, that it does not expressly say that the rent charge shall be paid by the land-owners. But it is argued, that, reading the three sections together, and looking at the general scope and purview of the act, the land-owners are bound to pay the rent-charge to the rector, and that an action lies to compel payment when it is withheld. The main argument in support of this view is founded on the direction in the 61st section, that the rent-charge should be paid at the times mentioned, "at the rectory-house;" and also on that part of the 63rd section, which, referring to the case of a subdivision of the original lands, as set out in the schedule, enacts that "the apportioned part of the rent may be recovered from the lands and hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable." And then it is said that the 62nd section shews that an action may be brought for the whole, and so by implication that it may be brought against the owners of the land. But the case of *Willoughby* v. *Willoughby*, 4 Q. B. 487, cited at the bar, seems to us to conclude this question against the plaintiff. There, although there was a clause in the local act substantially the same as the 62nd section in the present act, the court held that no action lay by the rector against the land-owner; because no such action was given by the act in express terms, and it did not clearly appear that the land-owner was the party bound to pay the rent-charge.

We think the argument founded on the language already referred to, in the 63rd section, and the direc-**[473]**-tion in the 61st section, that the rent-charge shall be paid "at the rectory-house," are not sufficient to distinguish the present case from *Willoughby* v. *Willoughby*. And it seems clear that, at the time of the passing of the 5 G. 4, c. 14, no action lay for the recovery of a rent charge issuing out of freehold lands: *Webb* v. *Jiggs*, 4 M. & Selw. 113. The direction as to paying the money at the rectory-house raises no legitimate inference in favour of the plaintiff: it only shews, that, unless the money is paid at the rectory-house by somebody, a distress may be put in upon the lands for it. And, although the words relied on by the plaintiff's counsel, in the latter part of the 63rd section, refer to some supposed provisions in the act giving an action against the land owners; yet we can find none such either in the 62nd section or in any other part of the act.

As to the first action, therefore, we think the judgment of the court ought to be for the defendants.

The second action mentioned in the case was brought by an occupier against the rector, for two several alleged illegal distresses made upon the lands in his occupation. The first was a distress for the amount of the rent charge imposed upon lands of the Wardens and Society of Sutton Coldfield, of which they were owners when the act passed, as well as the amount imposed upon other lands purchased by them of other owners subsequently. And we think it quite clear that such distress for the joint sum was illegal, and that, consequently, the action against the rector well lies for that distress. Indeed, the rector's counsel, in the course of the argument, gave up this part of the case.

The second distress was made upon the plaintiff, who was the occupier of some of

the lands belonging to the same proprietor, for the whole rent-charge imposed on all the lands of such proprietor, comprising lands not in the same occupation, but of which such **[474]** proprietor is still the owner. And we are of opinion that this distress was legal, and that no action can be maintained against the rector for making it.

The 61st section first requires the commissioner to ascertain the aggregate value of the tithe of all the inclosed lands in the parish belonging to all the proprietors, and to ascertain the aggregate amount of composition for the whole tithes. It then requires him "to ascertain and determine what yearly sums, according to such aggregate annual amount, are an equivalent to the tithes, &c., of each proprietor's old inclosed lands and tenements within the parish; which said yearly sums shall be yearly charged upon the old inclosed lands and tenements of the respective proprietors, as yearly rents payable thereout respectively to the said rector and his successors in lieu of the tithes thereof; and the same rents shall accordingly be, and are hereby, charged on the said several inclosed lands and tenements of the several proprietors:" "And the several yearly rents or sums to be ascertained and set forth as aforesaid, subject to such variations as is hereinafter provided for, shall be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid."

It seems to us that, upon the true construction of this section, one sum is to constitute the rent-charge upon all the lands of the same proprietor. And as, by the 62nd section, the same remedy is given to the rector as a landlord has for his rack-rent in arrear, a distress for the whole sum may be legally made upon any part of the lands out of which the whole sum as a rent charge issues. And this result still more plainly appears on referring to the provisions of the 63rd section, which contemplates the future regulation of the rent-charge, upon the alienation of any part of the lands on which it is imposed. After directing that a schedule **[475]** shall be made shewing the portion of the rent-charge applicable to each smaller portion of land, it enacts that, upon "any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedule, &c., in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn-rent or sum; and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn rents or sums are hereby made recoverable." From which it seems to us clear that it is only in case of a division by sale or otherwise after the passing of the act that the sum to be recovered by distress on the part divided is confined to the amount in the schedule apportioned to the part so divided, —leaving the operation of the 61st section in other respects entirely unaffected.

For these reasons, we are of opinion that the second distress was legal, and that no action lies against the rector for it.

Cockburn, C. J.—I entirely concur with the rest of the court that, in the first of these actions, there must be judgment for the defendants. I regret that I find myself constrained to differ from my learned Brothers in the view they take of the case of *Silvester* v. *Bedford*.

As regards the first of these cases, I entertain no doubt that the action will not lie. The question turns on the effect of the 61st and 62nd (and, as it is contended, of the 63rd) sections of an act of the 5 G. 4, c. 14, for the inclosure of lands in the parish of Sutton **[476]** Coldfield. The 61st section provides for the extinguishment of the tithes, and the substitution of yearly sums to be paid as yearly rents in lieu thereof; which rents are to be charged on the lands; with a further provision that these yearly rents shall be paid to the rector at the rectory-house on the four quarter-days in each year. The 62nd section then provides that the rector, in addition to all present powers for recovery of tithes and compositions, shall have the same powers and remedies for recovering these rents or sums of money as by common law or statute are given to landlords for the recovery of rack-rent in arrear.

I am clearly of opinion that no right of action accrues to the tithe-owner against the owners of land for the recovery of the rent-charge thus created. It is clear that, prior to the act, there was no personal liability in respect of the tithe, beyond the

obligation of the occupier to set it out. The 61st section of the present act does away with this obligation, and substitutes for it a rent charged upon the land, without any provision as to any personal liability in the land-owner. But the mere creation of a rent-charge, without more, will not impose any personal liability which the grantee can enforce by action. It was contended, indeed, in the course of the argument, that the provision that the rent should be payable at the rectory-house distinguished this from the case of an ordinary rent-charge. But there is nothing whatever in this argument. The object of the provision evidently was, to relieve the rector from the necessity of applying upon the various lands for payment. At law, rent is regularly due and payable upon the land from which it issues, if no particular place is mentioned in the reservation: Co. Litt. 201 b. But for this provision, the rector must have gone upon the land to receive the rent: the effect of it is, to relieve him from that necessity, before he pro-[477]-ceeds to enforce his right against the land. The 62nd section carries the case no further. It provides the remedies for enforcing payment of the rent-charge. But it is obvious that the remedies given, however extensive and efficient they may be, can, so far as a personal liability is sought to be enforced, be directed only against those in whom a personal liability exists; unless, indeed, a right of action were given against the land-owner in such express terms as to create a personal liability. Such, however, is not the case here. The object of the clause was, to give a power of distraining for the rent-charge; it being perhaps doubtful how far the 4 G. 2, c. 28, s. 5, would apply to a rent-seek, such as, independently of statutory provisions for distress, such a rent as this would be. In doing this, large and general words have been used, but not such as will suffice to create by implication the personal liability in the land-owner which it is now sought to enforce. Had it been intended to create a new liability of this kind, I cannot but think that the legislature would have had recourse to express enactment, instead of leaving a matter of so much importance to mere implication. At all events, the case of *Willoughby* v. *Willoughby* is a direct authority for saying that no such liability will be created by such an enactment as the present, unless the party by whom the rent is to be paid is expressly pointed out by the act.

The 63rd section is, however, further relied on as shewing the liability of the land-owner. That section, having provided for the apportionment of the rent-charge in case of the division of the land, concludes by saying that the apportioned part shall be recoverable from the lands charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are made recoverable by the act. But I am of opinion, that, if the [478] effect of the preceding sections was not to render the owner personally liable, these words, thus incidentally introduced at the close of a section passed for a different purpose, will not have that operation. Even if this language should lead to the inference that those who framed or passed the 63rd section conceived that they had imposed such a liability by the preceding sections, such a belief will not supply the place of the necessary provisions for that purpose. But the probability is, that these words have been inserted or retained per incuriam.

I quite concur, therefore, in saying that in this case there must be judgment for the defendants.

In the other case, of *Silvester* v. *Bedford*, I am of opinion that the plaintiff is entitled to recover in respect of both distresses.

The question turns upon whether, the corporation of Sutton Coldfield being the owners of numerous properties in the parish, the aggregate of the rent-charge due in respect of all can be levied upon any one. I cannot bring myself to think that this can be so. It is clear, that, before the passing of the act, the tithe was due in respect of each of the lands and tenements immediately; and the declared purpose of this part of the act, as stated in the preamble to the 61st section, was, that the tithes arising out of any lands, tenements, or hereditaments should cease and be extinguished, and that, "in lieu thereof, yearly rents or sums of money should be ascertained and paid to the rector." Accordingly, the commissioner is to fix and ascertain the total aggregate annual amount which will be a just, fair, and equal compensation to the rector; and, having done so, he is "to ascertain, with reference to such aggregate amount, what yearly sums are equivalent to the tithes of each proprietor's lands and tenements," and such yearly sums are to be "charged upon the lands and [479] tenements of the respective proprietors, as yearly rents payable thereout respec-

tively:" and then "the same rents are charged on the several lands and tenements of the several proprietors."

I cannot believe that the legislature here intended to do more than to substitute a rent-charge for tithe, in respect of each tenement previously liable to tithe. I cannot suppose, that, where estates, although belonging to the same proprietor, were different in point of locality and occupation,—such as farms or houses occupied by different tenants,—it was intended to fix the whole with one aggregate charge. Great inconvenience, as it seems to me, would be liable to arise from such an arrangement. Although, as a charge upon the land, the tithe rent-charge falls, as the tithe itself did, ultimately on the owner, yet in general practice the rent-charge is, I believe, paid by the occupier: at all events, he it is who is immediately liable to be distrained on for the payment. I cannot think that the legislature intended to expose the occupier of farm A. to this serious inconvenience, because the occupier of farm B., or even the common owner of both, shall have failed to discharge the liability in respect of B. At least, I should expect such a provision to be expressed in clear and definite language: whereas the language of the 61st section not only, as it seems to me, admits of, but rather leads to, an opposite construction, inasmuch as it speaks of the rents "charged on the several lands of the several proprietors."

The 63rd section does not appear to me to carry the matter further. With a view to the possible division, by sale or otherwise, of the hereditaments which shall have been charged with the substituted rent, the commissioner is directed to make "schedules or descriptions of the several hereditaments chargeable with the said yearly rent or sum, and the particular measure thereof [480] in acres, roods, and perches, and to declare what proportion thereof shall be charged upon each and every part of such respective hereditaments:" and the section then goes on to provide, that, "in case of any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall become, respectively, exclusively and solely liable to the payment of so much of the said rent or sum as shall be specified in such schedule, in exoneration of the other hereditaments hereby charged with the payment of the whole."

It appears to me that there is nothing in this inconsistent with the construction which I think should be put on the 61st section. It is obvious that the provision and language of the 63rd section will apply to the case of a single property or tenement, as well as to that of several. It is impossible to suppose that the provision was not intended to apply to the case of a man who, having a single property, sold a portion of it, and was only intended to reach the case of a man who, having several distinct tenements, sold one of them: and I cannot but think that the purpose of this section was to have the several closes or parcels of which each property consisted, severally assessed, in order to provide for the event of the property becoming afterwards divided.

Be this, however, as it may, it seems that the commissioner has taken the view I have here suggested, and has assessed the properties of each owner, not in the aggregate, but severally: for, though each owner's properties are assessed consecutively with such proprietor's name set forth once only in the first column, yet each property is assessed separately under the name of its particular occupier: and, the several closes and parcels of which the tenement is composed being separately assessed, the aggregate amount of the assessment [481] of the whole tenement is ascertained and fixed: but nowhere is there any aggregation or attempt at aggregation of the sum total of the various amounts of the different tenements.

It is said that this may now be done, and so the sum total be ascertained to which the aggregate of the numerous farms, houses, and other tenements owned by the corporation of Sutton Coldfield in this parish, may be liable. But I do not think that we are at liberty thus to meddle with and alter the apportionment made by the commissioner. As it stands, it is an assessment of each tenement according to its occupation: and the plaintiff, Silvester, was, therefore, in my opinion, only liable to be distrained upon for the amount set against the land in his own occupation. I think, therefore, he is entitled to recover in respect of both the distresses made upon his premises.

Judgment for the defendants in the first action.

Judgment for the plaintiff in the second action, in respect of the first distress.

[482] ROBERTS *v.* EBERHARDT. Dec. 8th, 1857.

[S. C. 28 L. J. C. P. 74; 4 Jur. N. S. 898; 6 W. R. 793.]

A plea of nul tiel agard, to an action upon an award, puts in issue not merely the fact of the making of the award set out in the declaration, but the making of a good and valid award of and concerning the premises referred.—A. and B., who had carried on business as coal and lime masters, agreed to dissolve their partnership upon certain terms. B. having died, leaving his wife his executrix, it was agreed between A. and the executrix that the agreement for dissolution should be carried out, and that the settlement of all disputes thereon should be referred to an arbitrator. A. and B. had also carried on business in partnership as attorneys; and, by another agreement, reciting that disputes had arisen between A. and the executrix about the last-mentioned partnership and the accounts thereof, all matters in dispute relating thereto were referred to the same arbitrator; and it was agreed that the arbitrator so appointed should be receiver of the estate and effects of the law partnership, and should settle and get in as he thought fit all costs due to the estate, and "dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of A. and the executrix," and that "the costs and expenses of the reference and award should be in his discretion." By his award, the arbitrator, amongst other things, stated that he had "received the estate, moneys, and effects belonging to the estate of the said law partnership, and in the said second agreement mentioned to be then remaining unrealized," and had "got in and settled, on such terms as he thought fit, all bills of costs due to the estate of the said law partnership, and had disposed of the estate, moneys, and effects of the said law partnership in such manner as he had thought best for the interests of A. and the executrix;" and he awarded that the sum of 1069*l.* 13*s.* 8*d.* was due from the executrix to A., and ordered her to pay the same to him within one week: he then awarded mutual releases, and he concluded thus, —"I certify that I have deducted and retained to myself the costs [not saying how much] of this my award out of the moneys which have been received by me as such receiver as aforesaid:" Held, by Cockburn, C. J., Cresswell, J., and Willes, J., that the award was void, both because it did not shew how the costs of the award were to be paid, and so was not final, and because the arbitrator had retained, from a fund belonging to the parties which was in his possession as receiver for them, the amount of his costs before he signed and delivered his award.—Held, by Williams, J., that the award was good, notwithstanding these objections, —the arbitrator having authority as receiver to dispose of the moneys he received as he should think best for the interest of the parties, and having exercised his discretion in disposing of some of those moneys in defraying the costs of the award, and therefore not having neglected his duty as arbitrator in omitting to adjudicate as to the costs of the award. The judgment of the majority was reversed by the Exchequer Chamber, on appeal, the majority of that court being of opinion that the award was not void for the reasons assigned.—An arbitrator cannot, unless such power is expressly reserved to him by the submission, award to himself a sum (named or otherwise) for his own costs and expenses.

This was an action upon an award.

The declaration stated, that, by an agreement, dated the 25th of July, 1854, made between the plaintiff of the one part, and the defendant of the other part,—after therein reciting that the plaintiff and one Henry Eberhardt then lately carried on the trades of coal-masters and lime-masters at Tipton Green, Buckpool, and Hayhead, in the county of Stafford, as co partners, under the firm of Roberts & Eberhardt, and that the properties and effects of the said co partnership belonged to the said co partners in equal proportions; and re-**[483]**-citing that the said Henry Eberhardt duly made his will, dated the 16th of December, 1853, and thereby gave and devised to his wife, the defendant, all his real and personal estate, and appointed her executrix thereof, and that the said Henry Eberhardt died on the 16th of April then last, without having revoked or altered his said will, which was duly proved by the defendant in the Prerogative court of Canterbury on the 17th of May, 1854; and further reciting, that, previously to the death of the said Henry Eberhardt, a proposal in writing,

dated the 3rd of February then last, had been made by the plaintiff to the said Henry Eberhardt, to buy the share, estate, and interest of him the said Henry Eberhardt of and in the said colliery, mines, credits, hereditaments, and premises at Tipton Green aforesaid, belonging to the said co-partners, for the sum of 20,000l., to be paid in manner in the said proposal mentioned; and, among other things contained in the said proposal, it was proposed that the said co-partnership in respect of the said Tipton Green works should be considered to have been dissolved on the 31st of December then last; and that the said proposal was signed by the plaintiff, and verbally accepted and agreed to by the said Henry Eberhardt, subject to certain marginal observations which were approved of by the plaintiff, but that it was never signed by the said Henry Eberhardt; and also reciting that the plaintiff also made a verbal offer to buy the entirety of the hereditaments, properties, credits, and effects belonging to the said co-partners in respect of their said trades carried on at Buckpool and Hayhead aforesaid, for the sum of 3500l., and that the said co-partnership in respect of the last-mentioned trades should be considered as dissolved from the 25th of March, 1853, and that such last mentioned verbal offer was verbally accepted by the said Henry Eberhardt; and after reciting that the **[484]** defendant, at the request of the plaintiff, had since the death of the said Henry Eberhardt agreed to accept and carry out the said written and verbal proposals so made and accepted by the said Henry Eberhardt in his lifetime, and, for the purpose of testifying such her acceptance of, and making other arrangements connected with, the execution of the said proposals, she the defendant had consented to sign the agreement thereinafter contained,—It was witnessed that the plaintiff and defendant did thereby mutually agree to carry out the said above-mentioned written and verbal proposals, subject as aforesaid, and that proper deeds of dissolution of partnership containing all necessary provisions, and mutual releases, and all other conveyances, releases, mortgages, and deeds necessary for carrying out and completing the said proposals should be drawn by one John Harward as between the said parties, and his settlement thereof should be binding on both the said parties: And it was thereby further agreed between the said parties, that, inasmuch as the said John Harward was fully acquainted with the negotiations connected with the said proposals, and with the intentions of the parties thereto, all disputes or differences between the said parties (if any) in reference to the said proposals, or either of them, or to the construction, meaning, or effect of any clause therein, or to the arrangements, acts, or deeds connected with the carrying of the same into completion, and all claims and demands whatsoever of the said parties thereto against each other in respect of the said co-partnership, or any of them, or of the said proposals, or of that agreement, should from time to time as the same might arise be referred to the arbitration and award of the said John Harward, and should not be made the subject of litigation, except in default of such arbitration and award within a reasonable time after the submission of the **[485]** said disputes and claims as aforesaid, and that such arbitration and award should be final and conclusive between the parties, and that the said submission to arbitration might at the request of either of the said parties be made a rule of either of Her Majesty's courts of law or equity at Westminster: That, by a certain other agreement, dated the 25th of February, 1856, and made between the plaintiff of the one part, and the defendant of the other part,—after reciting, amongst other things, that the plaintiff and the said Henry Eberhardt had then lately carried on the business or profession of attorneys and solicitors at Stourbridge, as partners, under the firm of Roberts & Eberhardt, and the estate, moneys, and effects of the said partnership, and the profits of the said business or profession, belonged to the said partners in the proportions following, that is to say, five equal eighth parts thereof belonged to the plaintiff, and the remaining three equal eighth parts thereof belonged to the said Henry Eberhardt; and that the said partnership was dissolved shortly before the death of the said Henry Eberhardt, but the partnership estate, moneys, and effects had not at the said date of that agreement been realized, nor the partnership accounts settled, nor any deed of dissolution and mutual release executed; that the plaintiff and the said Henry Eberhardt also carried on the trades of coal-masters and lime-masters in partnership, and that, since the death of the said Henry Eberhardt, the said John Harward had been appointed arbitrator between the plaintiff and the defendant in respect to certain disputes and differences which had arisen between them in respect of the said last-mentioned trade partnerships; and reciting that disputes and differences had arisen between the plaintiff and defendant in respect of the said

law partnership between the plaintiff and the said Henry Eberhardt, and it had been agreed between the parties that such [486] disputes and differences should be referred to the said John Harward in manner thereinafter contained and hereinafter mentioned, the plaintiff and the defendant severally agreed with each other as follows,—That all disputes and differences between them which had already arisen or might thereafter arise before the signing of the final award thereinafter referred to and hereinafter mentioned, in reference to the said law partnership, whether relating to the realization of the said partnership estate, moneys, and effects, or to the settling of the partnership accounts as between the partners or their representatives with each other, or as between the then late law partnership firm with the clients, or to the form of the deed of dissolution and mutual release to be executed by the said parties, or otherwise, and also all other disputes and differences between the said parties not included in the reference to arbitration thereinbefore mentioned as aforesaid, which had arisen or might thereafter arise before the signing of the said final award, in reference to or out of the said law and trade partnerships, should be referred to the arbitration and award of the said John Harward, so as the said award were made under his hand on or before the 24th of June then next: That the said John Harward should be the receiver of the estate, moneys, and effects belonging to the estate of the said law partnership, and which then remained unrealized, and should have power to get in and settle on such terms as he should think fit all bills of costs due to the estate of the said law partnership, and dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of the plaintiff and the defendant: That the said John Harward should have power to investigate and settle all accounts between the plaintiff and the defendant in respect to the said law partnership or otherwise, and to draw and settle all [487] such deeds of dissolution and mutual releases and other deeds which he might think fit in reference to the matters aforesaid, or any of them: That he should be at liberty to make professional charges for business done in connection with the reference thereby made, or with the reference thereinbefore mentioned as aforesaid: That the costs and expenses attending the reference thereby made, and the said reference thereinbefore mentioned, and the award or awards to be made under such several references, should be in his discretion: That the reference thereby made and the said reference thereinbefore mentioned might be regarded as one single reference, and that it should be lawful for the said John Harward to make one single award embracing matters comprised in both references, or several and distinct awards, respecting the several references, or to state and separately adjudicate upon any particular claim, dispute, or difference, claims, disputes, or differences, made by or on behalf of or arising between the plaintiff and the defendant, and to make an award or order in the nature of an award as respected such particular claim, dispute, or difference, which award or order should be binding on the said parties thereto, notwithstanding that the same might not be a final award comprising all the subject-matters of difference: And that any award to be made by the said John Harward in the matters aforesaid, or any of them, should be final and conclusive between the parties: Averment, that the said John Harward,—having taken upon himself the burthen of the said arbitrations, and having heard and duly considered all the allegations and evidence of and concerning all the matters referred as aforesaid; and having drawn and settled all such deeds of dissolution and mutual releases and other deeds as he thought fit in reference to the matters in the said agreements or either of them mentioned; and having ex-[488]-amined and investigated all the disputes and differences, claims, and demands submitted to him by the said agreements respectively; and having investigated and settled all accounts which according to the said agreements or either of them were to be investigated and settled by him; and having received the estate, moneys, and effects belonging to the estate of the said law partnership and in the said secondly mentioned agreement mentioned to be then remaining unrealized; and having got in and settled on such terms as he thought fit all bills of costs due to the estate of the said law partnership; and having disposed of the estate, moneys, and effects of the said law partnership in such manner as had thought best for the interests of the plaintiff and the defendant; and all things having been done necessary to enable and entitle him to make such award as thereinafter mentioned, did, within the time so limited for the making of such award, to wit, on the 23rd of June, 1856, duly make and publish his award in writing under his hand, of and concerning the said matters referred to him, and did thereby (amongst

other things) award and determine that the sum of 1069l. 13s. 8d. was then due from the defendant to the plaintiff, and did thereby order the defendant to pay the same to the plaintiff within one week from the date of the said award: And that the defendant did not pay to the plaintiff the said sum of 1069l. 13s. 8d. within the said period so appointed for payment thereof as aforesaid, and which had elapsed before this suit, and the same still remained and was wholly unpaid.

There was also a count for money paid and for money found due upon accounts stated.

Pleas,—first, that it was not agreed as in the declaration in that behalf firstly alleged,—secondly, that it was not agreed as in the declaration in that behalf secondly alleged,—thirdly, that the said John Harward [489] did not make any such award of and concerning the matters referred to him as in the declaration in that behalf alleged. Issue thereon.

At the trial before Crowder, J., at the second sitting in London in Hilary Term last, the plaintiff proved the due execution of the two agreements and of the award. The award, which bore date the 23rd of June, 1856, after reciting the agreements, proceeded as follows:—

"Now know ye that I the said John Harward, having taken upon myself the burthen of the said arbitration, and having heard and duly considered all the allegations and evidence of and concerning all the matters referred as aforesaid, do make and publish this my award in writing of and concerning the said matters. I have drawn and settled conveyances by the said Mary Eberhardt to the said Charles Roberts of her shares, estates, and interests in the said collieries, mines, credits, hereditaments, and premises at Tipton Green aforesaid, and in the hereditaments, properties, credits, and effects, belonging to the said co-partners in respect of the trades carried on at Buckpool and Hayhead aforesaid, certain parts of the said hereditaments, properties, credits, and effects being comprised in the deed of dissolution and mutual release hereinafter mentioned; and I have also drawn and settled a mortgage from the said Charles Roberts to the said Mary Eberhardt for securing the unpaid instalments of the said purchase-money of 20,000l.; and such conveyances and mortgage, except the conveyance intended to be effected by the said deed of dissolution and mutual release, have been duly executed. The said conveyances bear date respectively on or about the 29th of November, 1854, the 3rd of February, 1855, and the 3rd of February, 1855, and the said mortgage bears date on or about the 30th of November, 1854. Such conveyances and mortgage, with the said deed of dissolution and mutual [490] release afterwards mentioned, are the only necessary deeds for carrying out the said proposals as to such respective premises, or otherwise necessary in reference to the matters mentioned in the said agreements respectively. I have drawn and settled a deed of dissolution and mutual release comprising both the deeds of dissolution and mutual release provided for by the said agreements respectively, such deed containing an assignment to the said Charles Roberts of the personal estate which should be assigned to him in pursuance of the said proposals, and also a conveyance and assignment to the said Charles Roberts of such parts of the said hereditaments, properties, credits, and effects belonging to the said co-partners in respect of the said trades carried on at Buckpool and Hayhead aforesaid as were not comprised in the several herein-beforementioned conveyances which have been executed by the said parties. Two copies of the said deed of dissolution and mutual releases have been ingrossed; and I have signed a memorandum indorsed on each of the ingrossments, stating the same to be the deed of dissolution and mutual release mentioned in this my award; and both such ingrossments are now in my possession ready for execution as afterwards mentioned. I have examined and investigated all the disputes and differences, claims and demands referred to me by the said agreements respectively, and I have investigated and settled all accounts which I have been directed to investigate and settle. I have received the estate, moneys, and effects belonging to the estate of the said law partnership, and in the said second agreement mentioned to be then remaining unrealized; and I have got in and settled, on such terms as I thought fit, all bills of costs due to the estate of the said law partnership, and have disposed of the estate, moneys, and effects of the said law partnership in such manner as I have thought best for the interests of the said Charles Roberts and Mary Eberhardt. I award [491] and determine that the sum of 1069l. 13s. 8d. is now due from the said Mary Eberhardt to the said Charles Roberts, and I order the said Mary Eberhardt

to pay the same to the said Charles Roberts within one week from the date hereof. I award and determine that the said Charles Roberts do forthwith execute one ingrossment of the said deed of dissolution and mutual release, and do thereupon deliver the same to the said Mary Eberhardt. And I award and determine that the said Mary Eberhardt do forthwith execute the other ingrossment of the said deed of dissolution and mutual release, and do thereupon deliver the same to the said Charles Roberts. I find that there is due from the said law partnership the several sums of money mentioned in the schedule hereto in respect of the transactions of the said law partnership, which sums amount together to the sum of 3156l. 19s. 5d.(*a*); and I award and determine, that, as between the said Charles Roberts and Mary Eberhardt, the said sum of 3156l. 19s. 5d. is due from the said Charles Roberts and Mary Eberhardt in the proportions following, that is to say, five equal eighth parts thereof from the said Charles Roberts, and three equal eighth parts thereof from the said Mary **[492]** Eberhardt. And I award and determine that the said Charles Roberts, as the surviving partner, do forthwith pay the said sums mentioned in the said schedule, together with such interest thereon as such sums or any of them may bear; and that the said Mary Eberhardt do pay to the said Charles Roberts three equal eighth parts of the sums so paid by him for principal or interest as last aforesaid. I certify that I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid. I award and determine that each of the parties to the above reference shall bear and pay his and her own costs of the said reference respectively."

A verdict was taken for the plaintiff for the amount claimed, subject to leave to the defendant to move to enter a nonsuit on the ground that the award was bad for defects apparent on the face of it.

Fortescue, in the course of the term, obtained a rule nisi, on the grounds, "that the arbitrator has awarded and retained to himself a portion of the moneys of which he was receiver, for the costs of his award; and also for not having made any award as to the sums received by him, but merely stated that he had laid them out for the benefit of both parties; and for stating merely that he has paid debts with moneys received, not saying what debts, or making any award in respect of the moneys so paid." He referred to the case of *In re Coombs*, 4 Exch. 839.

Hugh Hill, Q. C., and M'Mahon, in Trinity Term last, shewed cause. It is objected that this award is faulty in three respects,—that it is uncertain in two particulars, viz. as to the sums which the arbitrator has laid out, and as to the debts which he says he has paid,—**[493]** and that the arbitrator has improperly retained a sum for his own costs, not saying how much. The power which Mr. Harward had under the two agreements was not that of mere arbitrator: he was also receiver, with power to collect and dispose of the moneys which might come to his hands in that character, in any manner he might think best for the interests of the parties. The objections as to the uncertainty of the award are disposed of by the case of *Perry* v. *Mitchell*, 12 M. & W. 792, where this broad principle is laid down, that, under a general reference of all matters in difference, an award which professes to be made de præmissis, and to dispose generally of all the matters referred, is sufficiently certain and final, in the absence of anything to shew that there were matters in difference before the arbitrator which are left undisposed of. Then, it is said that the arbitrator has been guilty of misconduct in awarding and retaining to himself a portion of the

(*a*) The schedule referred to was as follows:—

"Stourbridge and Kidderminster Banking Company . £1050 10 11
Miss Roberts 1574 0 4
Mr. Frost 135 3 1
Messrs. Toller & Son 247 12 10
Mr. Davis 67 7 4
Mr. Scott 2 1 0
Worcester Journal 1 2 11
Aris's Gazette 1 0 0
Messrs. Fowler & Son 74 19 0
Messrs. Oaks & Perrens 3 2 0

£3156 19 5"

moneys of which he was receiver, for the costs of his award. The objection, in truth, answers itself: for, the fact of Harward's being receiver distinguishes this from the case cited, of *In re Coombs*, 4 Exch. 839. [Williams, J. Does the submission contain any provision for the retainer by the arbitrator of the expenses of the award?] Not expressly; but it impowers the arbitrator "to make professional charges for business done in connection with the reference." The payment of the expenses of the award was part of the duty devolving upon him as receiver. [Cockburn, C. J. He might intend the costs to be paid out of the common fund. But here he not only settles the fund out of which they are to be paid, but he pays himself. In the case of *In re Coombs*, it was urged in argument, that, by the terms of the submission, all the costs were to be in the arbitrator's discretion: but Parke, B., said,—"The amount of his own fee is to be excluded, by na-**[494]**-tural justice; for, it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." It certainly strikes one as quite contrary to reason that the arbitrator should not only settle the amount, but at once put his hands upon it.] Had he done otherwise, he would have left a part of the estate undisposed of. The course he has adopted was rendered necessary by the form of the submission. If he has retained an unreasonable sum, that matter will be dealt with when his accounts as receiver are passed. Further, upon these pleadings, it was not competent to the defendant to impeach the validity of the award. Upon a plea of nul tiel agard, all that the plaintiff was bound to do was, to prove the making of an award such as that set out in the declaration. If the defendant meant to rely upon defects in other parts of the award not set out, he should have alleged in his plea so much as would shew the award bad, and demurred. [Williams, J. Something of the sort is said in *Fisher* v. *Pimbley*, 11 East, 188; but it is clearly a mistake; it could not be done.] It is laid down in the notes to *Veale* v. *Warner*, 1 Wms. Saund. 327 a., that it is not necessary "for the plaintiff to prove any thing else on the issue of nul tiel agard, but execution of the award within the time limited to the arbitrators to make their award; and the defendant on such proof may take advantage of some material variance between the award so produced in evidence and that which is set forth in the replication, but cannot go into objections to the award in point of law:" *Foreland* v. *Marygold*, 1 Salk. 72. Upon that is appended a further note referring to p. 103, note (1), "in which it is laid down that upon this issue of nul tiel agard, the defendant may shew that the award is void in point of law: but the better opinion seems to be, as here stated, that he cannot. If the replication [to a plea of nul tiel agard **[495]** pleaded to debt on bond] set out the whole award, and it be void in law, the defendant should demur: if it set out only a part, omitting that which makes the award void, the defendant should set out the whole in his rejoinder, and demur." [Williams, J. That clearly is a mistake: it should be, the plaintiff should demur to the rejoinder.] In Viner's Abridgment, Arbitrement (D. a.), pl. 14, is the following case, from Br. Pleadings, pl. 88,—"Debt upon an obligation to stand to the arbitrement, &c. The defendant said that the arbitrators did not make any award, and the plaintiff prist that they did, and so to issue, and this is jeofail; for, the plaintiff shall shew certainly what award and where, and that the defendant in such point did not perform it: and the defendant shall say that they made no such award, and the plaintiff shall say then prist that they did, and the defendant shall then say prist that they did not." The same principle is laid down in *Farrer* v. *Gate*, Palmer, 511, and *Skinner* v. *Andrews*, 1 Lev. 245. [Cockburn, C. J. What do you suggest the defendant should have pleaded here, in order to raise the question he seeks to raise?] He should have set out the rest of the award, and taken the opinion of the court upon its validity. Here, it is left as a fact to the jury. The very point is put by Buller, J., in *Prael* v. *The Duchess of Cumberland*, 4 T. R. 585, where there was a plea of no such memorial as the statute requires, to an action of debt on an annuity bond. "We are not," says that learned judge, "to require under the allegation of 'no such memorial,' every thing that is required by the act of parliament: it is merely an issue in fact. So, in the case of an award, if there be an award in fact, the party cannot, on the trial of an issue of no award, go into objections to the award in point of law. It has, however, been said that the plaintiff might have replied that there was no such memorial, &c., in **[496]** order to have let in the objections which arise under the act of parliament; but that word cannot make any difference; it is still but an issue in fact; for, otherwise, it would be sending down an issue in law to be tried by a jury:

and it might be as well contended, that, on the trial of an issue 'nul tiel record,' the parties might at nisi prius shew errors on the record." [Cresswell, J. Why is it necessary for the plaintiff, upon a plea of no award, to set out the award in his replication? If any award would satisfy the issue, why set it out in the replication? I want to get at the distinction between "no award" and "no such award." It may be, that, if issue were taken on no award, supposing a bad award to be equivalent to none, it would be putting matter of law to the jury: and it may be necessary to set out the award, in order to make the matter of law apparent to the court.] In *Fisher* v. *Pimbley*, 11 East, 188, Bayley, J., says: "A submission of matters in difference between A. and B. does not include matters in difference between A. and B. and others jointly: the award, therefore, was bad. Then, a plea of no award means no award according to the submission: that is the plain meaning of it. I do not agree with the argument that the defendant might have defended himself by taking issue upon the award as stated in the replication; for, there was such an award as is there stated; but it was not an award made conformably to the submission, which would have appeared to be the case if the whole had been truly set out in the replication. Then, the rejoinder first setting out the true award, and then demurring to it, is no more in effect than saying that there was no award conformable to the submission, and therefore no award: which maintains the plea." And that is adopted by Alderson, B., in *Gisborne* v. *Hart*, 5 M. & W. 50. [Williams, J. If there is no good award, there is no award at all,—just as that which is ordina-**[497]**-rily called a bad shilling is not a shilling. Cases of debt on bond for the due performance of an award have no application: they are anomalous.] The goodness or badness of an award cannot be referred to a jury, as in the case of a bad shilling. [Cresswell, J. The goodness or badness of the award is not in terms put in issue, but whether it is an award at all. If nul agard means no valid award, nul tiel agard must mean no valid award in that form.] *Fisher* v. *Pimbley* was the first case where no award was held to mean no valid award. In *House* v. *Launder*, 1 Lev. 85, in "debt on obligation to stand to an award, the defendant pleads no award; the plaintiff replies, and shews an award and a breach; the defendant rejoins, that a new cause of action arose after the submission, and before the award, and they (the arbitrators) awarded mutual releases to be made at the time of the award made, and nothing further is awarded on one side but the release, and so the award was void; on which the plaintiff demurred, and it was adjudged for him, for, the rejoinder is a departure; for, when he pleads no award, it shall be intended no award at all; and then to shew and confess an award in fact, but (saying) that it is void in law, is a departure; and they cited *Rugles* v. *Witherly*, Trin. 15 Car. 2, B. R. Rot. 604, as so adjudged, and the like between *Dean and Isham*, the following term, adjudged." So, in *Morgan* v. *Man*, 1 Lev. 127, to "debt on an obligation conditioned to perform an award, the defendant pleads no award; the plaintiff replies, and shews an award, and assigns a breach; the defendant rejoins, and shews another matter in controversy, of which the arbitrators had notice, but made no award thereof; and so the award was void, the submission being with an ita quod. But, by the whole court: The rejoinder is a departure, for, no award is none at all, and is not to be maintained by shewing the award to **[498]** be void: but he ought at first to have pleaded the award, and also that other matter whereby it was void." *Harding* v. *Holmes*, 1 Wils. 122, and *Meriell* v. *Ecclesfield*, 2 Keble, 156, are to the same effect. [Cockburn, C. J. Suppose the plaintiff, in declaring upon the award, sets it out, but omits something which would shew it to be bad, what is the defendant's proper course?] To set out the rest of the award. [Cockburn, C. J. Why not rest upon his denial of the existence of an award, and, on production of the award at the trial, rely upon the variance?] The plaintiff, in declaring upon an award, is only bound to set out so much thereof as he relies on to support his claim: *Perry* v. *Nicholson*, 1 Burr. 278. [Williams, J. It is difficult to distinguish this case from *Dresser* v. *Stansfield*, 14 M. & W. 822. It was there held, that a plea of "no award" means no valid award; and therefore a special plea to debt on an award, which shewed that the arbitrator had not awarded on all the issues in the cause referred to him, was held bad on special demurrer, as being an argumentative denial of its being a valid award. Parke, B., says: "The award is alleged to have been made of and concerning the premises referred, that is, the cause, which means the issues in the cause. It being alleged that there were no matters in difference between the parties except those in the cause, then, in order to make the award good and valid, it must be made

on all the matters in difference, that is, on all the issues in the cause. Therefore, a plea that there was no award, that is, no valid award, sufficiently raises this objection. To make this plea good, it ought, at all events, to have concluded with a traverse, and so that there was no award of and concerning the premises. The case is substantially decided by *Gisborne* v. *Hart*."] In *Adcock* v. *Wood*, 6 Exch. 814, a declaration upon an award, after stating that differences had arisen **[499]** between the plaintiff on the one part, and the defendant and one S. A. on the other, alleged that it was agreed between the plaintiff and the defendant and S. A. mutually and reciprocally to refer the same differences to T. S. and W. J., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150l. 18s. 6d. to T. S., who should immediately pay it to the plaintiff. The defendant pleaded that T. S. and W. J. did not make their award concerning the matters in difference referred to them: and it was held that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. And this was affirmed by the Exchequer Chamber,—*Wood* v. *Adcock*, 7 Exch. 468. Parke, B., in the court below, says: "We think that the plea in this case merely puts in issue the fact of an award 'of and concerning the matters in difference in the manner and form alleged,' and not the validity of that award on the face of it, and that the latter is matter of law on the record. The authorities cited on the argument (*a*) do not shew the contrary. Where there is a plea of 'no award,' not by way of answer to a declaration upon an award, but by way of answer to an action on a bond with a condition to abide by an award, the plea means that there is no good award; and, if the replication sets out the award in part, it is no departure to rejoin that there was an award, setting it out fully, and thereby shewing the award to be bad on the face of it. That is the case of *Fisher* v. *Pimbley*. In that case, Bayley, J., said the defendant could not have taken issue on the allegation of the award in the replication, because there was such an award as there stated. Where the plea of nul tiel agard is pleaded to an action on the award, averring **[500]** the award to be made of and concerning the premises, it puts in issue the fact of the award being made of and concerning the premises, that is, on all the matters submitted: *Dresser* v. *Stansfield*: but, if the award as set out is on the face of it bad, it does not raise that question to be decided by a jury. The objections on the face of the award are for the court, on demurrer, or in arrest of judgment." The only distinction between that case and the present is, that there the award as set out was bad. [Williams, J. The court there recognize *Dresser* v. *Stansfield*. If the plea had stated that the award did not dispose of all the matters referred, it would, under the old system, have been bad, as an argumentative plea of nul tiel agard.] The real ground of the decision in *Dresser* v. *Stansfield* was, that the plea was improperly concluded. *Perry* v. *Mitchell*, 12 M. & W. 792, shews, that, if there is anything that is not disposed of by the award, that must be shewn by plea. The second objection stated in the rule does not vitiate the whole award. The arbitrator will have to shew how he has dealt with the moneys received, when he comes to account as receiver. [Cockburn, C. J. The question for us is, whether the arbitrator has acted in conformity with the submission or not.] If the arbitrator has acted ultra the powers conferred upon him by the submission, the party complaining might have moved to set aside the award. The third objection is perfectly groundless. [This was conceded.]

Fortescue, in support of his rule. Whatever doubts formerly existed as to the proper mode of pleading the absence of a good and valid award, none have existed since the case of *Fisher* v. *Pimbley*, 11 East, 188. From that time to the present, all matters shewing an award not to be good or in pursuance of the submission, if the defect do not appear on the face of the declaration, **[501]** may be taken advantage of on a plea of no award. Bayley, J., there says distinctly,—"A plea of no award means no award according to the submission; that is the plain meaning of it." The award as there stated was good: it only became bad because not in accordance with the terms of the submission. *Gisborne* v. *Hart*, 5 M. & W. 50, is equally strong in the same way. In *Armitage* v. *Coates*, 4 Exch. 641, to a declaration upon an award, the defendant pleaded certain facts to shew that the award was not final, and the plea was held to be bad, as amounting to an argumentative denial that the award stated in the declaration was ever made. [Williams, J. The plea of nul agard puts in issue

(*a*) *Fisher* v. *Pimbley*, *Gisborne* v. *Hart*, and *Dresser* v. *Stansfield*.

whether there has been any award of and concerning the premises.] *Fisher* v. *Pimbley* and *Osborne* v. *Hart* go further. [Williams, J. There is a difference between a declaration upon an award and a declaration upon a bond for the due performance of an award.] The distinction is not very obvious: an action upon an award is nothing more than an action for the breach of an agreement to refer. [Cockburn, C. J. The agreement is, to perform the award, provided a valid award is made.] Here, there has been no award at all in reference to the matters submitted. It does not appear that the arbitrator has settled the accounts so as to bind the parties: it will be necessary to have recourse to equity to carry out the award. [Williams, J. The arbitrator directs the defendant to pay the balance, which is the result of the accounts between the parties.] That is after making a deduction which he was not warranted in making, viz. for his costs. [Willes, J. If the arbitrator had not retained his costs, and his charge had been submitted to taxation, peradventure the difference would have been enough to pay the sum which he has ordered the one party to pay to the other.] Precisely so. The case of *In re Coombs*, 4 **[502]** Exch. 839, shews that an arbitrator cannot retain a sum for his charges. Parke, B., in the course of the argument, there says, "The amount of his own fee is to be excluded, by natural justice; for, it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." And, in giving judgment, he says, "I think that the award is bad, on the ground that the umpire had no jurisdiction to fix his own fee, and to direct the manner in which it was to be paid, under the terms of this submission: and, as that part of the award which is made without jurisdiction, is not separated from that portion of it which is [not] so made, the award cannot be supported." If that be so, this is a difficulty which is not to be got rid of by a reference to the master. In *Robinson* v. *Henderson*, 6 M. & Selw. 276, an award that the sum of 230*l.* was due from the defendants to the plaintiffs, and that, out of the said sum, the defendants should pay to the arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge, trouble, and attendance on the reference and arbitration, and certain costs which they awarded to be paid to the solicitors of the plaintiffs in respect of certain actions mentioned in the agreement of reference, leaving the sum of 130*l.*, which they awarded to be paid to the plaintiffs, was held void for uncertainty, in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object; the court saying "that there would be danger in permitting arbitrators to award a definite sum, of which a part, including an indefinite allowance to themselves, was ordered to be paid to the arbitrators."

For these reasons, it is submitted, the award is clearly bad.

Cur. adv. vult.

[503] CRESSWELL, J., now delivered the judgment of the majority of the court (*a*).

This was a motion to enter a verdict for the defendant, depending upon the validity or invalidity of an award.

The facts are in substance as follows: Charles Roberts and Henry Eberhardt had been partners in trade as coal-masters and lime merchants. An agreement to dissolve the partnership upon certain terms was entered into between them. Henry Eberhardt died, having made a will under which he appointed his widow, Mary Eberhardt, his executrix. Charles Roberts and Mary Eberhardt agreed to fulfil the agreement, and referred the settlement of that and of all disputes concerning it to an arbitrator. Charles Roberts and Henry Eberhardt had also been in partnership as attorneys and solicitors; and, by an agreement reciting that differences and disputes had arisen between Charles Roberts and Mary Eberhardt about the last mentioned co partnership, and the accounts relating thereto, all matters then in dispute, and all differences that might arise before the making of a final award, were referred to the same arbitrator; and it was agreed that he should also be the receiver of the estate, moneys, and effects of the law partnership, and should get in and settle on such terms as he thought fit all bills of costs due to the estate of the law partnership, "and dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of the said Charles Roberts and Mary Eberhardt;" and that the

(*a*) The case was argued before Cockburn, C. J., Cresswell, J., Williams, J., and Willes, J. The judgment was that of Cockburn, C. J., Cresswell, J., and Willes, J.

costs and expenses of the reference and award should be in the discretion of the arbitrator.

[504] The arbitrator made an elaborate award, the particulars of which it is unnecessary to notice. It concludes in these words: "I certify that I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid."

Two objections were taken to this part of the award, viz. that the arbitrator had fixed the amount of his own costs, and had not said by whom they were to be paid. To this it was answered that the real effect of the award was, that there were to be no costs paid to the arbitrator, they having been already paid by him in his character of receiver.

We regret that all the expense and trouble of this arbitration should be thrown away, but feel bound to say that the award is bad. The duty and authority of receiver vested in the arbitrator, was ancillary to his duty of arbitrator, and must have been fully discharged by him before he could be in a condition to make a final award. He does not profess to have paid the costs of the award by anticipation; nor could he do so. If, then, when he made the award, money which he had received as receiver remained in his hands, he was bound to make an award with reference to it; for, his functions as receiver were then at an end, and he cannot say that he applied it as receiver. Nor could he, by professing to act as receiver, obtain authority to fix the amount of his own charges. That could not be done till the award was made. He was, as receiver, functus officio. I agree, that, for misconduct as receiver, he would be responsible in equity; but, in this matter, he was acting as arbitrator, not as receiver, and acted erroneously in the two respects mentioned,—he fixed the amount of his own charges, and did not decide who was to pay them. The rule, must, therefore, be made absolute.

[505] The question whether it was open to the defendant to impugn the validity of the award upon the plea of nul tiel agard, was disposed of on the argument.

WILLIAMS, J. I cannot agree that the award is bad on the ground that the arbitrator has omitted to say by whom the costs are to be paid.

By the terms of the deed, I think his office of receiver is made quite distinct from his office of arbitrator. In his character of receiver, he has power to dispose of the moneys he has received as he thinks best for the interest of the parties. And he says, generally, that he has done so. And he also says, particularly, that he thought it best to dispose of some of them by applying them to defraying the costs of the award. This may have been an abuse of his trust as receiver, and he may have been guilty of other breaches of his duty as receiver, in disposing of the rest of the money he has received. But, if this be so, he must, I conceive, be made to account for it, as trustee, in a court of equity. But it is not, I conceive, part of his duty to state on the face of his award how he has disposed of the fund, nor because he does so incidentally, and discloses what we consider a breach of trust, have we power to set aside the award on that ground.

We can only look at what he has done as arbitrator; and in that character, I think, he has neglected no duty in omitting to adjudicate as to the costs of the award; because he has already thought fit, in his character of receiver, to reduce them to nothing at all, by defraying them out of the money he had in his hands as receiver. It is just the same as if some third party had already defrayed them, or as if the arbitrator had declared in his award that he would act gratuitously, and that therefore there was nothing to pay.

For these reasons, I am of opinion that the rule to **[506]** enter a nonsuit should be discharged: but, as the majority of the court have come to a different conclusion, the rule will be absolute.

Rule absolute.

May 10th, 1858.—The plaintiff appealed against this decision; and the questions stated for the opinion of the court of appeal were,—first, whether the award was bad on the grounds stated in the rule, or any of them,—secondly, whether the objection was open and available to the defendant under the issue on the third plea.

If the court of appeal should be of opinion in the negative on either question, then the verdict for the plaintiff on the said issue was to stand, and the nonsuit to be set aside, and judgment to be entered for him for the amount assessed by the jury, with

costs of suit. If the court should be of opinion in the affirmative on both questions, the rule for entering a nonsuit was to be confirmed, with judgment for the defendant accordingly.

Hugh Hill (with whom was M'Mahon), for the appellant (*a*)[1]. He repeated the arguments urged in the court below, citing *Baspole's case*, 8 Co. Rep. 98 a., *Perry* v. *Mitchell*, 12 M. & W. 792, and *Wilkinson* v. *Page*, 1 Hare, 276, and observing upon *In re Coombs*, 4 Exch. 839. And he submitted, that, inasmuch as the agreement of reference expressly enabled the arbitrator [507] to make one or more awards, if the objection were that the award left some of the matters in difference undisposed of, that might be cured by an award made now; and that there was no complaint of Harward in his capacity of receiver. [Crompton, J., observed that the arbitrator was bound to make an award that should be certain as to amount; whereas, here, the arbitrator merely states that he has "deducted and retained to himself the costs of that his award, out of the moneys which had been received by him as receiver," without saying how much.]

Bovill, Q. C. (with whom was C. Pollock), for the respondent (*a*)[2], relied upon *Robinson* v. *Henderson*, 6 M. & Selw. 276, and *In re Coombs*, 4 Exch. 839. [Watson, B., referred to *Wood* v. *Wilson*, 2 C. M. & R. 241.]

Hugh Hill, Q. C., was heard in reply.

Cur. adv. vult.

There being a difference of opinion amongst the learned judges, they now delivered their judgments seriatim, as follows:—

[508] Watson, B. This was an appeal from a judgment of the court of Common Pleas, given for the defendant in an action upon an award.

The submission was extremely special. [The learned judge read it.] The arbitrator was also receiver as regards one partnership, to which the parties were entitled in certain proportions. The costs of the reference and award were to be in the discretion of the arbitrator: and the arbitrator had the power of making one or more awards.

The award was duly made, as stated in the declaration, with the addition of this paragraph:—"I hereby certify that I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid."

It was contended in argument, on the part of the defendant, that this statement in the award vitiated the award; that the arbitrator could not determine the amount of his own fee; that he could not retain any part of this money out of the funds which came to his hands as receiver; and that this part of the award was uncertain, and not final.

I am of opinion that the award is good, notwithstanding these objections. It is true that an arbitrator cannot conclusively determine the amount of his own fee. But the invariable rule or practice of the profession,—and, I believe, of lay arbitrators also,—is, that the arbitrator fixes in the first instance the amount of his own fee, and retains the award until such fee is paid. The exorbitancy of the fee demanded by the arbitrator does not form any ground for setting aside the award. As between the parties (*Miller* v. *Robe*, 3 Taunt. 461; *Fitzgerald* v. *Graves*, 5 Taunt. 342), the amount of the fee may be referred for taxation by the master. In *M'Arthur* v. *Campbell*,

(*a*)[1] The points marked for argument on the part of the appellant were,—"First, that the award was not bad on any of the grounds alleged by the defendant,—Secondly, that the objections alleged by the defendant to the validity of the award were not open or available to her under the issue on the third plea."

(*a*)[2] The points marked for argument on the part of the respondent were,—

"That the award declared upon is bad upon the following grounds:

"That the arbitrator has awarded to himself and retained for the costs of his award a portion of the moneys of which he was receiver:

"That the arbitrator has determined the amount of his own costs, without having directed who was to pay them:

"That the arbitrator has not made any award regarding certain sums of money received by him, but has only stated in a general way that he has expended them for the benefit of the parties concerned:

"And that the above objections are open to the defendant under the issue taken on the third plea."

5 B. & Ad. 518, Lord Denman, in delivering the judgment of the court, intimates that, [509] if necessary, as against the arbitrator, the amount of the charge might be referred; and this course was pursued in *Musselbrok* v. *Duncan*, 9 Bingh. 605, 2 Moore & Scott, 740. It is clear that any excess over a reasonable fee received by an arbitrator, may be recovered back by action: *Fernley* v. *Branson*, 20 Law J., Q. B. 178; *Barnes* v. *Braithwaite*, 2 Hurlst. & N. 569.

In this case, on passing the receiver's accounts, any excess in the amount charged for the arbitrator's fee might be deducted. It is no valid objection to the award, that the arbitrator has taken his fee out of a fund which came to his hands as receiver. He was to incur expenses as arbitrator: and he had a lien upon this fund for those expenses. If there had been no such provision in the award, the parties could not, either at law or in equity, have got that fund without paying his expenses in and about the receivership and the reference, considering they are so much mixed up together. The claim may be objected to as against him as trustee and receiver, but not as arbitrator.

The fee, then, being capable of reduction to a smaller sum, and not being mentioned in the award, and it being merely stated as a fact that the arbitrator had taken it or received the amount from a fund which he held as receiver, I am of opinion that there is no objection to the award on that ground.

It was argued that the award is not certain or final, inasmuch as it is not shewn how much of the costs of the reference each party is to pay. It appears to me that this is sufficiently ascertained. The amount is deducted from the gross fund in the hands of the arbitrator in his character of receiver. If this sum was improperly retained by the arbitrator, and was recoverable by the parties from him as receiver, it would belong to them in the proportion of five eighths to the plaintiff, and three eighths to the defendant; and I [510] come to the conclusion that the costs of the reference and award are to be paid in those proportions; and, consequently, in this respect the award is certain.

The strongest mode of dealing with this part of the award is, that it should be struck out altogether, as being no award upon the subject of costs. The real objection is, not a want of certainty, but of finality; as, in this view, there is no award as to the party to pay those costs. But, as the arbitrator may still make an award of costs, and the objection is merely a want of finality, that objection is not open to the parties on one award, in a case like this, as the defect might be remedied by a supplemental award.

For these reasons, I am of opinion that the judgment of the court of Common Pleas ought to be reversed.

Bramwell, B. I also am of opinion that the judgment of the court of Common Pleas should be reversed. The plaintiff is entitled to recover, unless the defendant can shew that the award is void. He alleges that it is,—that the arbitrator had no power to award his own costs, whether he fixed the amount, or left it unfixed. I think he has not awarded himself anything Assuming he has, I agree that he has no such power, on the simple ground that it is not expressly given him, and that it is not to be intended that he is to be a judge in his own cause. This is supported by authority: see *In re Coombs*, 4 Exch. 839. That case, however, does not shew that the assumption of this power avoids the award; on the contrary, Parke, B., says,—"As that part of the award which is made without jurisdiction is not separated from that portion of it which is so made, the award cannot be supported." This shews, that, where separable, an award by an arbitrator of his costs is only an excess of authority, and that the award is bad only pro tanto.

[511] But it was urged, that, even then, there was no award who was to pay the costs of the reference; and, as the sum applied to that purpose might be excessive, and so might belong to the plaintiff, or defendant, or to both in unascertained shares, there was possibly a sum not adjudicated on, and so the award was not final. I am of opinion that this objection cannot be supported. Harward, the arbitrator, filled two characters: he was arbitrator, and he was receiver. In which character did he apply money to the costs of the award? I say, in his character of receiver. He is arbitrator to settle disputes and differences. As a mere arbitrator, he has no power to receive. The agreement of the parties, after appointing him arbitrator, appoints him receiver, and declares that he shall have power to get in (that must mean, as receiver,) the estate, and to dispose of it as he thinks best for the interest of the

parties: that also must mean, as receiver. In his award, he recites that he has got in; and he certifies (not "awards") that he has deducted and retained to himself "the costs of this my award out of the moneys which have been received by me as such receiver." What does this leave unsettled? As receiver, he must render his accounts. If, as he says, he has deducted from the partnership assets his costs, he has in effect charged five eighths to the plaintiff and three eighths to the defendant. It is said that he may have fixed all the costs on one party, or half on each, or in some other proportion. But he says otherwise; and it is not averred by plea that that is untrue. But, in whatever way he has apportioned the costs, it must appear in his accounts as receiver. The sum awarded to the plaintiff is 1069*l.* 13*s.* 8*d.* That must be because the defendant is indebted to the partnership more than the plaintiff is, in a sum of which 1069*l.* 13*s.* 8*d.*, is five eighths. But how does Harward ascertain that? Why, by debiting and crediting each [512] with the appropriate items. So that, if he in his mind settled that Roberts was to pay the whole costs, he has debited him with the whole; and so in any other proportion. Then, when his accounts as receiver appear, this must appear also. It cannot be said that he has no authority to do this as receiver. He has, if it is honestly done for the benefit of both parties. If he has allowed any unjust sum, or if he has, in breach of trust, and improperly, made one party bear too large an amount, no doubt it may be questioned: but the ownership of what is recovered is certain. The case would be made clear if the two offices had been filled by two persons instead of one. Suppose J. S. had been receiver: suppose he had thought it, for the benefit of both parties, good to apply a sum to the payment of the arbitrator's costs, charging to one or both in any proportions,—would it have been necessary for the arbitrator to have done more than say he charged nothing, he was satisfied? That is the case here. The appropriation of a sum to the costs of the award, is the act of the receiver; and the rights of the parties to that sum, or any part, must inevitably be ascertained on production of the receiver's accounts. This is the ground on which the judgment of Mr. Justice Williams in the court below proceeded. It is said his duty as receiver was ancillary, and must have been fully discharged before he could make a final award. With great respect, that is not so; for, he might have awarded, that, taking into account only what had been realized, so much was due to the plaintiff, and then have made a schedule of uncollected assets, declaring their ownership to be five eighths in the plaintiff, and three eighths in the defendant. Nor can I see, with all submission, why, if as receiver he thought he could get the award better made by paying for it in advance, he should not do so. I think he might well do it, when it is borne in [513] mind that the arbitrator might consult counsel, and otherwise be at a large outlay; and he does profess to have done so. In my judgment, he was not functus officio when he paid himself his costs. It is vain to say this reasoning is a refinement. The objection is a refinement; so is the reasoning in support of it. I put my judgment on this plain ground, that, as arbitrator, he could not by his award fix his costs, either by a named sum or otherwise: that his award would be pro tanto void; that, if the liability to the costs remained undetermined at the time of his award, that award is not final; but that it did not and could not then remain undetermined nor the amount he had paid himself, as his accounts as receiver must shew what he had allowed, and whom he had charged with it, if he did not deduct it from the assets; that, as arbitrator, it was enough for him to say he made no charge, for any or no reason; and that, as receiver, his conduct is not before us. But, further, the objection, if any, is, that the award is not final. Then, why cannot the arbitrator make a supplemental award? The argument for the defendant is, that there is a partnership asset not properly allotted, and that there is no award as to who is to pay the costs of the reference. He may "state and separately adjudicate on any particular, and make a separate award on it." Until he has decided all matters, he may well postpone the question of costs. Why, then, can he not make a final award now? Nay, how does a want of finality properly arise on a plea of no award, where the award proved need not be final? But I prefer deciding on the other ground.

Erle, J. In this case, the court below decided that the award between the parties was void, both because it did not shew how the costs of the award were to be paid, and so was not final, and because the arbitrator [514] had retained, from a fund belonging to the parties which was in his possession as receiver for them, the amount

of his costs before he signed and delivered his award, and so was guilty of such misconduct as made the award void.

I am of opinion that the award is valid, and that neither objection ought to prevail.

With respect to these objections, it is worth while to consider what are the rights and duties of an arbitrator in relation to the costs of his award, as between him and the parties to the submission, contradistinguished from the rights and duties of the parties between themselves in relation thereto.

Where the submission expresses that the arbitrator is to be paid, he might probably recover his fees in an action for work and labour: per Parke, B., in *Ex parte Coombs*, 4 Exch. 839. But, in practice, he usually obtains his fee from the successful party, by keeping his award until he is paid; and, in his award, he gives to the party who has paid a right to recover the whole or a proportion from the opponent.

The arbitrator cannot judicially decide the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. If he pursues the usual course above suggested, the party made liable by the award may have the amount taxed, and then is liable to his opponent only according to the allocatur. The opponent who has paid the excess must, then, have a right to recover it back from the arbitrator by action: *Fitzgerald* v. *Graves*, 5 Taunt. 342.

If the arbitrator makes an excessive charge to the party finally liable, the court cannot rule him to submit to taxation: *Dossett* v *Gingell*, 3 Scott N. R. 179, 2 M. & G. 874; but the question of excess must be raised in an action brought by the party who was in a manner compelled to pay it.

[515] Whether the amount is stated in the award, or demanded orally when the award is delivered out, the decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favour. This amount, which is a matter in difference between him on the one side and the parties on the other, is entirely distinct from the matters in difference between the parties which he is bound to decide finally by his award.

If his award is silent as to his own costs, and he has demanded nothing before he has delivered his award, he has no remedy for his costs; but the award is not the less valid between the parties.

If the award names too much, or the arbitrator has demanded too much orally, and has obtained the amount from the party who is to pay, the question of the excess is to be settled between that party alone and the arbitrator, the opponent having no concern with it. If it is obtained from one party, to be repaid by the other under the award, it is still a distinct subject from the matters in difference between the parties: the amount paid must be proved by evidence extrinsic to the award, and the alleged excess must also be so proved; and, unless there is excess, there is no ground of objection for any one; and, if there is excess, it is only an objection for the party affected thereby.

If the arbitrator, having written his award upon all the matters in difference between the parties, had them both before him, and informed them of the amount of his fee, and claimed half from each, and they paid it, and he then added to the writing of his award, a certificate that he had been paid for his award by the parties at the time of delivering out his award, and then signed and delivered it out, the award would be valid between the parties though each party might sue the arbitrator for the excess, if he proved these facts, and **[516]** that the demand was excessive: nor would it make any difference as to the validity of the award between the parties, whether they attended in person before the arbitrator, and paid in moieties, or attended by separate attorneys or agents, or by one agent representing each, or whether they paid in moieties or in any other proportion, or one paid all.

I now proceed to examine the deed containing the submission here in question, in order to apply these observations.

The deed recites, first, a trade partnership between the plaintiff and the deceased husband of the defendant, dissolved in 1853, upon terms in which Mr. Harward was to act as attorney and prepare some deeds between the parties, and, secondly, a law partnership, and the decease of one partner, and that partnership debts were to be collected and paid, and that matters in difference were to be settled. The deed then authorizes Mr. Harward to act as attorney in completing the dissolution of the trade partnership, and as receiver in respect of the law partnership, with full discretion to

receive assets and settle liabilities, and as arbitrator in deciding all matters in difference relating to the law partnership which should be brought before him. These three capacities were distinct from each other, the deeds to be drawn by the attorney, the accounts to be rendered by the receiver, and the award to be made by the arbitrator, being separate functions.

Having thus considered the rules relating to the costs of the award under such a submission, and the effect of the deed containing this submission, it appears to me that Mr. Harward, as arbitrator, had before him Mr. Harward as receiver and agent duly authorized by each of the parties to apply any part of the fund received for them in payment of the costs of the award, and declared orally what his charge was, and how apportioned, [517] and received from the agent of each his proper portion to be duly brought into the account between that agent and his principal.

In the court below, it was assumed that the functions of receiver were ancillary only to those of arbitrator, and that Mr. Harward could not make an award till he had closed his accounts as receiver. But, as I have above shewn, the two offices were distinct. If Harward demanded too much as arbitrator, there might be an action for the excess. If he paid it out of the fund received by the receiver, the question would be precisely the same, only the extrinsic evidence of payment of the excess would be adduced from the receiver's account, and not from oral evidence of the fact. If the receiver misappropriated funds, and rendered wrong accounts, the remedy against the receiver would not affect the functions of arbitrator. If Mr. Harward's charges as attorney for the deeds and instruments he was authorised to draw, were excessive, the taxation of these charges between the attorney and his clients would not affect the functions either of receiver or arbitrator: still, the proof of the excess might be obtained, as to this also, only from the receiver's accounts. This judgment is in accordance with the decided cases, and conflicts with none. In *Robinson* v. *Henderson*, 6 M. & Selw. 276, the costs of the cause, the reference, and the award, were in the discretion of the arbitrator; and he awarded that the defendant should pay to the plaintiff 230*l.* 8*s.*, being 136*l.* 15*s.* due between them, and 93*l.* 13*s.* for the costs of the reference and award: this was held bad, on affidavits, because the arbitrator awarded one sum for costs of reference and of award, and he had no authority to fix a sum for the plaintiff's costs of reference, but ought only to have said how they should be paid; and because he had blended the costs of the reference, which was a matter in difference between the [518] parties, with a sum to himself for the award, which he had no right to fix, so that they could not be separated. So, in *Ex parte Coombs*, 4 Exch. 839, under a similar submission, the arbitrator awarded one sum to be paid by the losing party to his opponent for costs of reference and award, and, though on affidavit the amounts were severed, yet the court was inclined to hold the award bad for uniting the two in one sum, so that the costs of the reference could not be distinguished from the award, by the award itself: but, by consent of the arbitrator and parties, the whole question of costs was severed from the award, and referred for taxation to the master. This case suggests the proper remedy for this defendant. If she has been aggrieved by the amount charged to her account by the receiver, she should by extrinsic evidence of the receiver's accounts shew that the grievance exists, and so seek redress from the arbitrator. But, unless she shews by extrinsic evidence that she is aggrieved, the presumption ought to be that all has been rightly done; and no intendment ought to be made, by conjecture, that perhaps the receiver has charged to her three eighths of the assets, a large sum for the costs of the award, which, if credited to her account against the plaintiff, might have reduced the balance given to him by the award.

In both the cases just referred to, the complaint is shewn by affidavit; and there is no precedent for holding an award a nullity, upon a plea of no award, thereby exempting a defendant from paying a debt to the plaintiff, and depriving an arbitrator of his compensation, and unsettling much that has been settled, because perhaps the defendant may have paid to the arbitrator too much for the award.

My Brother Channel desires me to say that he concurs in the judgment I have just delivered.

[519] WIGHTMAN, J. This was an action to recover 1069*l.* 13*s.* 8*d.* awarded to be paid by the defendant to the plaintiff, by an arbitrator acting under two agreements of reference between the plaintiff and the defendant. It appeared that the plaintiff and Henry Eberhardt (the husband of the defendant) carried on business in partnership as

coal-masters and lime-merchants, and that they were also partners in the profession of attorneys and solicitors, and that, upon the death of Henry Eberhardt, the defendant, his widow and executrix, agreed with the plaintiff to refer all differences respecting the trades of coal-masters and lime-merchants to one John Harward; and that subsequently they agreed to refer all disputes respecting the law-partnership to the same arbitrator, and that he should be the receiver of the estate and effects of the law-partnership; that he should settle on such terms as he should think fit all bills of costs, and dispose of the estate, moneys, and effects of the law-partnership in such manner as he should think best for the interest of the plaintiff and the defendant; that the costs and expenses attending the references under both the agreements, and the award or awards to be made under them, should be in his discretion; that the two references should be considered one; and that the arbitrator might make one award in respect of both references.

The arbitrator in his award states that he had investigated and settled the accounts in the matters referred under both agreements, and received the estate, moneys, and effects belonging to the law-partnership, and that he had disposed of the same in such manner as he thought best for the interest of the plaintiff and of the defendant; and he then awards that 1069*l.* 13*s.* 8*d.* is due from the defendant to the plaintiff, and orders her to pay it. He then awards mutual releases, and concludes by certifying that he had deducted and retained [520] to himself the costs of his award out of the moneys which had been received by him as such receiver; and he directs that each party should bear his and her own costs of the reference. The award is a final award; for, it appears to be an award of all the matters referred, and awards mutual releases.

The question is, whether the effect of this clause in the award by which the arbitrator says that he has paid himself the costs of his award out of the money in his hands, and without saying which of the parties was to bear that charge, is to vitiate the whole award. A majority of the judges in the court below held that the award was bad on that ground; and I am of opinion that the judgment of that majority was correct.

The arbitrator was receiver of the estate of the law-partnership, with power to dispose of it as he thought best for the interest of the law-partnership: but he was bound to make an award with respect to all money remaining in his hands undisposed of at the time of making his award. He says in his award that he has deducted and retained to himself the costs of his award out of the moneys received by him as such receiver as aforesaid. The offices of receiver and arbitrator were united in his person; and, as receiver, he would not be warranted in paying for the award until it was made; and, as arbitrator, he could not award himself a sum for his costs of the award out of the moneys remaining in his hands, and otherwise undisposed of, whilst he executed the functions of a receiver, which were determined when he made his award. If the offices of arbitrator and receiver had been in different hands, and the arbitrator bound, as in this case, to award in respect of all moneys remaining undisposed of in the hands of the receiver, the arbitrator would not have been warranted in making it part of his award, that, out of the money in the hands of the re-[521]-ceiver, he had received and retained the costs of his award.

The effect is, that, out of a fund which he was to apportion by his award, he has awarded himself a sum for his costs, which, as the fund was under his control, he has paid to himself, without specifying either the amount or the party upon whom the charge is to fall.

Since the case of *In re Coombs*, 4 Exch. 839, it may be considered as settled that an arbitrator has no power to award himself a sum for costs, but his doing so would only vitiate the award for the part respecting the costs to himself, unless that part is so connected with the rest of the award as to render it uncertain or not final.

By the terms of the submission to reference, the costs of the award are to be in the discretion of the arbitrator; but he has given no direction as to which of the parties is to pay them. No sum is mentioned as having been retained by the arbitrator for the costs of the award; but it may be that the precise sum is ascertainable: in that case, it may be taxed: but, suppose that upon taxation the amount should be reduced, to whom is the overplus to be paid? This renders the award uncertain and not final; and, though it is greatly to be regretted that the time, trouble, and expense attending the arbitration and award should have been thrown away, it appears to me that the objection is insurmountable, and that the judgment of the court below ought to be affirmed.

CROMPTON, J. I agree with my Brother Wightman in thinking that the decision of the court below was correct. The arbitrator appears to me to have made no award as to a portion of the fund, of unknown amount, as to which he was bound to make an award and a distribution. He has withdrawn that sum from [522] the operation of his award, and has not decided to which party it belonged: he has not shewn from which party's share it was taken, nor which party was to bear that loss in the shape of costs; and it is left quite uncertain which party is to have the right of recovering any amount which may turn out to be exorbitant. His award cannot be binding as to the amount which he has chosen to take for his award; and the party or parties from whose share he has taken it, have a clear right to question the fairness of the amount.

By not awarding on whom the costs of the award were to fall, and taking to himself an unknown amount, he seems to me to have left undecided the question as to whom that part of the fund belonged, which may be important, and which he was bound to decide.

It has been said that an award in the nature of a supplemental award might still be made. It seems to me, however, that the award in question is clearly intended as the final award: and the time for making the award seems to have expired: and we are now considering how far the present award is final, and not whether a defect on that ground might be cured, so as to be the foundation of a future action.

I think, therefore, that the decision of the court below was correct, and ought to be affirmed.

The majority of the court being of opinion that the judgment of the court below was erroneous, that judgment was accordingly

Reversed (*a*).

[523] IN THE EXCHEQUER CHAMBER.

HICKMAN *v.* COX AND WHEATCROFT. Nov. 25th, 1857.

[S. C. 27 L. J. C. P. 129: in House of Lords, 9 C. B. N. S. 47; 8 H. L. C. 268; 11 E. R. 431 (with note).]

A. and B., who had carried on business as iron-masters, being unable to meet their engagements, assigned all their plant and effects to five trustees, upon trust, amongst other things, to carry on the business under the name of "The Stanton Iron Company," and, out of the profits, to pay interest on certain mortgages, &c., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts," with an ultimate trust for A. and B.—The court of Common Pleas having held that the creditors who executed this deed, and thus assented to the business being carried on for their benefit, thereby became liable as partners for the amount of a bill of exchange accepted in the name of the Stanton Iron Company, in respect of a debt contracted by the trustees in carrying on the trade under it, the judges of the Exchequer Chamber, on appeal, were equally divided in opinion: Coleridge, J., Erle, J., and Crompton, J., agreeing with the court below that the deed made the creditors partners: Martin, B., Bramwell, B., and Watson B., holding that it did not.—And it was held, after consideration, that, notwithstanding this equality, there was a sufficient affirmance of the judgment of the court below to justify an appeal under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, to the House of Lords.

This was an action brought by the plaintiff as drawer against the defendants as acceptors of three several bills of exchange in the following form:—

(*a*) The result, upon the whole case, is, that five judges, viz. Cockburn, C. J., Cresswell, J., Wightman, J., Crompton, J., and Willes, J., held the award to be bad, and other five, viz. Erle, J., Williams, J., Bramwell, B., Watson, B., and Channell, B., held it to be good; and that the last named five by accident formed the "majority." The decision of the Exchequer Chamber was acquiesced in by the defendant.

"Grafton Iron Ore Works,
"£300. 0. 0 "Blisworth, 10th March, 1855.

"Four months after date, pay to my order in London three hundred pounds value received. "JOHN HICKMAN."

"Grafton Iron Ore Works,
"£490. 0. 0 "Blisworth, 10th April, 1855.

"Four months after date, pay to my order in London four hundred and ninety pounds value received. "JOHN HICKMAN."

"£616. 11. 0 "Blisworth, June 10th, 1855.

"Three months after date, pay to my order in London six hundred and sixteen pounds eleven shillings, value received. "JOHN HICKMAN."

Each of these bills was accepted in the following form:—"At Smith, Payne, & Smith's, Bankers, London. Per pro. the Stanton Iron Co., James Haywood."

[524] The defendants severally pleaded, denying that they had accepted the bills, and issues were joined on those pleas.

The cause came on to be tried before Jervis, C. J., at Westminster, at the sittings after Hilary Term, 1856, when a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him. A motion was accordingly made, and a rule to shew cause was granted in Easter Term, on the ground that, upon the construction of the deed of the 13th of November, 1849 (*a*), and the evidence given at the trial, the defendants were liable to the plaintiff for the debt sought to be recovered in this action. The rule came on to be argued in Trinity Term, and was made absolute. The facts were as follows:—

The plaintiff is an iron-ore master, carrying on business in Northamptonshire; the defendants reside in Derbyshire.

In and previous to the year 1849, Benjamin Smith and Josiah Timmis Smith carried on business in co-partnership as iron-masters and iron-merchants at the Stanton Iron Works, in Derbyshire, under the firm of B. Smith & Son, and, becoming involved in their affairs, and being indebted, amongst other persons, to the defendants Cox and Wheatcroft, executed a deed, dated the 13th of November, 1849. This deed was executed by more than six sevenths in number and value of the joint creditors of the said Benjamin Smith and Josiah Timmis Smith whose debts respectively amounted to 10l. and upwards. It was made between the Messrs. Smith of the first part, and Francis Sanders, John Thompson, James Haywood, the defendant Wheatcroft, and the defendant Cox of the second part, and the said **[525]** Thompson, Haywood, Wheatcroft, Cox, and the other persons whose names were set forth in the schedule, and who should execute the deed, of the third part. After various recitals, it is witnessed that the Messrs. Smith conveyed and assigned all their estate and effects to the parties of the second part, upon the trusts and subject to the powers contained in the deed.

The deed was executed by the defendants Cox and Wheatcroft as parties of the second part; and their names were also set forth in the schedule, and they executed the deed as creditors for the sums set opposite their names and parties of the third part.

The defendant Cox never acted as a trustee; the defendant Wheatcroft only acted for a few weeks; and, on the 27th of December, 1849, a letter was written by his solicitor, by his authority, to Mr. Huish, the solicitor of the trustees, to the following effect:—"Mr. Wheatcroft finds that his own various engagements will prevent his taking any active part in the duties which his office of trustee imposes upon him; and his total ignorance of the details of the various departments connected with the manufacture and sale of iron equally disqualifies him, even if he had time to attend to them. He therefore wishes you to communicate to his co-trustees his intention to resign the trust from the present time,—an intention he has already made known to them; and they can at once exercise their power of electing one in his stead. As far as I recollect of the deed, it gives the trustees full liberty to retire, and the continuing trustees to

(*a*) See the material provisions of the deed set out in the report in 18 C. B. 617.

elect another: but on this point you will please to send me a copy of the particular clause, and Mr. Wheatcroft shall execute any disclaimer which may be necessary."

This letter was read at a meeting of the trustees held on the 15th of January, 1850, and the following resolution was then passed, —"16thly. That Mr. Wheat-**[526]**-croft's resignation be accepted, and that he be informed the vacancy will be filled up at the first meeting of creditors:" and Mr. Huish, the solicitor, on the 15th of the same month, wrote to the defendant Wheatcroft the following letter, "At a meeting of trustees this day held, your resignation of your trusteeship was accepted; and I am directed to inform you, that, as soon as possible, a trustee will be appointed in your place, when it will be necessary for you to assign to him your estate under the deed."

The creditors were made acquainted with the resignation, but no trustee was ever appointed in the place of Wheatcroft. He afterwards attended meetings of the creditors under the deed,—one in the year 1850, another in 1852, and another in 1853. After the 29th of December, 1849, the defendant Wheatcroft never acted in any manner as a trustee.

After the execution of the deed, the business of the Stanton Iron Works was carried on for the purposes aforesaid, in the name of the Stanton Iron Company, the said Francis Sanders, John Thompson, and James Haywood, trustees named in the deed, being the acting persons therein until the death of Francis Sanders in December, 1854; from which time until the month of May, 1855, the business was carried on in like manner, the said John Thompson and James Haywood being the acting persons therein. On the 19th of May, 1855, the said James Haywood entered into possession of the works on his own account as mortgagee, when the works were stopped, and the business then ceased to be carried on for the purposes of the said deed, except that the bill of the 10th of June was accepted for iron-ore delivered previously to the 19th of May. The bills of exchange on which the action was brought were accepted by the said James Haywood in the form appearing on the bills, on or about the days on which they **[527]** respectively bear date, for iron-ore previously delivered to the said company by the plaintiff in the year 1853, and thence to 1855; it being the usual practice to give similar bills for ores supplied by the plaintiff. The said James Haywood was financial manager of the business as well as trustee. He was called as a witness on the part of the plaintiff, and stated that it was necessary to accept bills in carrying on the business: he was not cross-examined on this on the part of either of the defendants; nor was there any oral evidence given in contradiction of this statement, nor any written, save if any as herein appears.

At the time the bills were drawn and accepted, the plaintiff, if he had ever heard that the defendant Wheatcroft had been a trustee, had also heard that he had retired from the trust.

The rule having been made absolute to enter the verdict for the plaintiff for 1406*l* 11*s.* and interest, the defendants appealed against that decision, and the appeal came on for argument in the Exchequer Chamber on the 4th and 5th of February, 1857,—the judges present being Coleridge, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., and Watson, B.

Byles, Serjt. (with whom was Milward), for Wheatcroft (*a*). The substantial question is, whether creditors who have executed the deed of the 13th of November, 1849, are liable to be sued as partners in the concern **[528]** called the Stanton Iron Company, by reason of the provision in that deed enabling the trustees to carry on the business, and to pay the debts of the parties of the third part rateably out of profits. The bills are drawn upon, and accepted for, "The Stanton Iron Company." [Martin, B. I must confess I do not see how the creditors can be said to be the Stanton Iron Company. The argument on the part of the plaintiff in the court below would have been irresistible, if this had been an action for goods sold and delivered. Hugh Hill, Q. C. The action was commenced under the Bills of Exchange Act, 18 & 19

(*a*) The points marked for argument on the part of the defendant Wheatcroft were,—

"That he was not liable to the plaintiff; that he was not responsible in the character of a trustee, having, to the knowledge of the plaintiff, ceased to be such long before the giving of the bills; that he was not liable in the character of one of the creditors of Smith & Son, or in any other way; and that the acceptances of the bills in question did not bind him."

Vict. c. 67. Martin, B. A count may be added for goods sold and delivered when the plaintiff comes to declare. That is universally allowed.] The cases bearing upon the question are only two,—*Owen* v. *Body*, 5 Ad. & E. 28, 6 N. & M. 448, and *Janes* v. *Whitbread*, 11 C. B. 406, which professes to be founded upon it. Now, in *Owen* v. *Body*, the court of Queen's Bench did not decide that the deed constituted a partnership: all the court say is, that "the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit;" and that therefore the assignment was invalid. [Martin, B. I never could understand that case. Crompton, J. I, like my Brother Martin, have always felt very much puzzled by *Owen* v. *Body*.] The case is very well explained by the remarks which fell from Jervis, C. J., and Maule, J., in *Janes* v. *Whitbread*, 11 C. B. 416, 417. And the case of *Owen* v. *Body* is still further qualified by *Coates* v. *Williams*, 7 Exch. 205. The deed now in question has undergone discussion before the Master of the Rolls in a case of *In re The Stanton Iron Company*, 21 Beavan, 164, where this company was held not to be within the provisions of the winding-up acts. His Honor says: "The question really is, whether the deed **[529]** of the 13th of November, 1849, constituted a partnership between the parties thereto, so as to bring it within the provisions of the winding-up acts. I have two things to consider,—the relation in which the parties to the deed stand to each other, and their relation to third parties. There can be no doubt that persons may be partners towards the world, and yet not be partners as between themselves. This is a very common case; and everybody is familiar with *Waugh* v. *Carver*, 2 H. Bl. 235, a leading case on this subject. But, on the other hand, persons who are partners between themselves are necessarily partners as respects the public. Now, it appears that this deed does not constitute a partnership between the parties who have executed this deed, but it is a deed for the benefit of the Messrs. Smiths, rather than for that of the creditors. The surplus profits and the residue of the trust estate are treated as the property of the Messrs. Smiths; the persons executing the deed of the third part are not held out to the world as partners, or as having anything to do with the business or [of] the partnership, and I see no ground for supposing that they could, under any circumstances, be held personally liable to the creditors in respect to the management of the business. What you have to consider in a case of partnership is, what is the proportion of capital and labour which is introduced or contributed by each of the partners, and what is the proportion in which the profits or dividends are to be divided amongst them. I will assume that the argument of the petitioner is right, viz. that the proportion of stock or capital contributed is represented by the amount of the debt of each party: but I will suppose (which I think is a proper way of testing it,) that this was a business newly established, and, instead of debts forming the capital or stock, that the creditors who were parties of the third part had advanced the **[530]** respective sums of money which now stand opposite their respective names in this deed, that is, about 50,000*l*. Suppose they advanced these sums of money to certain other persons, five in number, to establish and carry on a business on this condition,—that out of the profits they shall be repaid the sums which they have advanced simply, and that then the business and the whole surplus profits shall be transferred and belong to certain third parties. Could it be said that this was anything more than a mere loan for the purpose of establishing a partnership? If I were to hold that persons were partners under such circumstances, it would hardly be possible for any one to advance money to a partnership, to be repaid out of the profits, without making themselves partners: but such a case is not a partnership, and possesses none of the properties of a partnership, of which, indeed, the ordinary test and criterion are wanting." Then, how stands the case upon principle? Assuming that the true criterion of partnership is that given by Tindal, C. J., in *Pott* v. *Eyton*, 3 C. B. 32, 39, as deduced from *Grace* v. *Smith*, 2 W. Bla. 998, and *Waugh* v. *Carver*, 2 H. Bla. 235,—"Traders become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern: for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them,"—how does that apply here? In ordinary cases, where a man participates in profits, those profits are an acquisition to him: he gets something which he had not before. Do the creditors here get anything? Suppose one of them is paid in full, he gets nothing more than

he is entitled to set against his debt. Again, in the ordinary case, the situ-[531]ation of the creditors en masse is prejudiced by the withdrawal of profits; but here it is not so: the general fund, as compared with the demands of the general body of creditors, remains as it was. The principle that participation in profits creates liability is, that it takes away the means of paying the debts of the concern. But this arrangement, so far from taking away the means of paying debts, actually pays them. [Martin, B. You are confounding the two sets of creditors. The Smiths are indebted to several persons, amongst others, to the defendants. They assign all their property and effects to certain trustees, upon trust, with the assent of the creditors, to carry on the trade as the Stanton Iron Company, and, out of the profits, to pay the creditors their several debts; with an ultimate trust for the Smiths. The partnership thus created is a new partnership. The person suing is a creditor of the new firm, between whom and the creditors of the old firm there is no relation. There is a marked distinction between the two classes of creditors. Coleridge, J. The question is, whether the trustees are not carrying on the business for the old creditors, so as to make them partners as to all the rest of the world.] This is not a question of holding themselves out to the world as partners: the simple question is, what is the interest they have in the concern? do they contract to receive a share of profits quâ profits? Is it anything more than a trader inducing his old creditors to forbear to sue him, upon his undertaking to pay them 20s. in the pound out of the profits of his future trading (*a*)? [Coleridge, J. Suppose the creditors had consisted of three persons only, instead of seventy or eighty, would you have contended that the deed did not [532] constitute them partners?] Certainly. This is not a case where the payments to the old creditors exhaust the assets. The old creditors, it is true, are to receive payment out of the profits of the trade; but the deed gives priority to the new creditors. [Crompton, J. Your argument assumes that the trustees are the agents of the Messrs. Smith. Is not that begging the question? The creditors executing the deed assent that the trustees shall carry on the trade for their benefit. Do they not constitute them their agents for that purpose?] There is nothing in the arrangement contemplated by the deed which can in any degree affect the ability of the trustees to meet any engagements they may have entered into: nor is it unusual for deeds of this sort to contain provisions for the carrying on of the trade. [Coleridge, J. As ancillary to the winding up of the concern.] The principle laid down in *Grace* v. *Smith*, 2 W. Bl. 998, and *Waugh* v. *Carver*, 2 H. Bl. 235, and upon which the whole doctrine of partnership reposes, is, that "he who takes a moiety [or other share] of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." The present case, it is submitted, does not fall within that definition: the old creditors here do not take a share of the profits indefinitely; all they do is to agree that, if there be anything to spare after paying the expenses of the concern and meeting its new engagements, it shall go rateably among them in satisfaction of their respective debts.

Welsby (with whom was Bovill, Q. C.), for the defendant Cox. One who is charged as the acceptor of a bill of exchange can only be so charged by reason of his [533] having actually accepted it himself, or of its having been accepted by some person by procuration for him. Here, the bills purported to be accepted by the Stanton Iron Company. Now, in order to see who are the Stanton Iron Company, we must have recourse to the deed; and there we find that it is the trustees and not the creditors who are to carry on the concern: and, though it may be that any one who is shewn to be a dormant partner might be liable to be sued for goods sold and delivered, none but those who are parties to the instrument can be sued upon a bill of exchange. The deed is a good and valid deed within the authority of *James* v. *Whitbread*, 11 C. B. 406, and *Coates* v. *Williams*, 7 Exch. 205, the main object of it being, so far as the creditors are concerned, the winding up of the partnership, and the rest being merely ancillary: the recitals shew that. And it is expressly provided that all the debts incurred by the trustees shall be paid before any division of profits amongst the old creditors shall take place. [Erle, J. The trustees would have been guilty of a breach of trust if they had paid any portion of the debts of the old creditors before all the claims of the new creditors were satisfied.] Neither upon any decided case,

(*a*) An undertaking into which every discharged insolvent debtor impliedly enters.

nor upon any principle of law, can the creditors who executed this deed be held thereby to have bound themselves as partners in the Stanton Iron Company. According to all the cases, in order to constitute a partnership, there must be a community of profits. What is a community of profits? Clearly not that the party looks to the profits for payment of his demand. If that were so, every retiring partner, and every person who lends money to a firm, would thereby become a partner. Dr. Story, in his work on Partnership, § 66, says: "It may be generally stated that a person who lends money to a firm, and is to receive therefor a fixed interest (whether usurious or otherwise, **[534]** is not material), or an annuity certain as to amount and duration, will not thereby become, as to third persons, a partner in the firm; for, in such a case, there is no mutuality of profit with the firm, and no general participation in the casual and indefinite profits which, as we have seen, constitutes one of the ingredients of partnership. Cases of this kind often occur upon the retirement of a partner leaving money or funds in the hands of the firm, and upon the decease of a partner who bequeaths an annuity to his widow out of the profits; and in neither case will the retiring partner or the widow be held a partner as to third persons, as he or she certainly is not as to the partners themselves. It is true that it may be said that the retiring partner or widow has, in a certain sense, an interest in the profits. But the same suggestion may be made as to creditors of the firm. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits. He relies on them for re-payment. And there is no difference whether money be lent de novo, or be left behind in the trade by a retiring partner; or whether the terms of the loan be kind or harsh." By mutuality of profits, the learned author means the interest which all the partners have in the profits made by each and every of them: in this sense, mutuality and community of interest are convertible terms. [Crompton, J. Is there not community of interest here?] It is submitted that there is not. There is no agreement here for a community or mutual participation of profits. [Crompton, J. To the extent of the sums due to the several creditors, surely.] The whole sum the creditors can receive is 20s. in the pound upon their respective debts. [Coleridge, J. Suppose a man invests 10,000*l.* in a concern, with an agreement that he shall be repaid the principal **[535]** and interest out of the profits as they arise,—is he not a partner?] Clearly not, though that case differs widely from the present. Story in § 67 says: "The true criterion by which we are to distinguish cases of this kind from cases in which there is a partnership as to third persons is, to ascertain whether the retiring partner, or lender, or annuitant, is to receive a share of the profits as profits, or whether the profits are relied on only as a fund of payment; or, in other words, whether the profit or premium, or annuity, is certain and defined, or is casual, indefinite, and depending on the accidents of trade. In the former case, it is a loan: in the latter, a partnership. The hazard of profit or loss is not equal and reciprocal, if the retiring partner, or lender, or annuitant, can receive a limited sum only for the profits of the loan or other fund; and therefore the law will not deem him or her a partner, since there is an utter want of mutuality of right and interest in the profit." The true criterion seems to be this, that, where the amount to be realized out of the profits is undefined and varying by the expansion or contraction of the business, the recipient is a partner. [Erle, J. Then, according to your definition, a foreman or manager whose salary varies as the profits of the trade vary, would be a partner.] That would be a mere mode of payment for services, which, like the customary contract on a Greenland voyage, would not create a partnership,—*Wilkinson* v. *Frasier*, 4 Esp. N. P. C. 182. The servant, under such a contract, foregoes all remuneration for his labour, unless the business is productive of profit. The creditors here forego nothing but the right to receive present payment of their debts,—consenting to take them by instalments varying in amount as the profits may vary. [Bramwell, B. I have always considered it as a question of agency. Crompton, J. The cases assume that agency is to be presumed from **[536]** perception of profits. In *Cheap* v. *Cramond*, 4 B. & Ald. 663, a merchant in London recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: and it was held that this was a participation in profit, and constituted a partnership between the parties quoad hoc.] The principle established in *Grace* v. *Smith*, 2 W Bl. 998, and recognized and adopted by so many subsequent cases, and,

amongst others, by *Waugh* v. *Carver*, 2 H. Bl. 235, *Pott* v. *Eyton*, 3 C. B. 39, *Barry* v. *Nesham*, 3 C. B. 641, and *Heyhoe* v. *Burge*, 9 C. B. 431, —that he who takes part of the profit takes a part of that fund on which the creditor of the trader relies for his payment, and thereby renders himself liable as a partner,—is totally beside the present case. Here, the parties to the deed of the third part are absolutely and in terms precluded from taking out of the fund any part of that which ought to go towards payment of the debts of the new creditors. [Crompton, J. According to the terms of the deed, when a certain amount of profit is realized, a dividend is to be made. Is not the new creditor prejudiced by that arrangement? The next time a balance is struck there may be a loss.] The distribution is to be made, subject to all the existing liabilities of the concern. [Bramwell, B. Suppose the arrangement had been that the old creditors should take nothing until the concern was finally wound up,—would that constitute a partnership?] Clearly not: and that in substance is this case. Speaking of *Bloxam* v. *Pell*, cited 2 W. Bl. 999 (which was relied on for the plaintiff in the court below), Dr. Story says,—Story on Partnership, note to § 68,—"This case seems to stand upon the utmost verge of the law, even if it be at all maintainable. It differs from *Grace* v. *Smith* principally **[537]** in the circumstance that the annuity was determinable upon the contingency of the death of the partner, and there was a right to inspect the books. But, as the interest was fixed, and the annuity for a determinate term, although liable to be defeated by the happening of the contingency of the death of the party, it does not seem easy to see how either the interest or the annuity can be properly treated as a payment to be made exclusively out of the profits. The right to inspect the books may seem more strongly to indicate a partnership: but ought it to be decisive? See Gow on Partnership, ch. 1, pp. 21, 22 (3rd edit.); Cary on Partnership, pp. 3, 14, 171. Certainly, an annuity of a fixed sum, determinable on the death of the annuitant, or of the partner, cannot per se be treated as creating a partnership as to third persons, when payable in lieu of the profits of the trade; for, there is no mutuality in the profits, and no sharing of profit and loss, as it is not made payable out of the profits exclusively" (*a*).[1] In *Ex parte Wilson, in re Colbeck*, Buck's B. C. 48, the retiring partner reserved to himself an interest in the profits of the trade: "for," as Lord Eldon says, "the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement as the profits might fluctuate." The case of *Ex parte Wheeler, in re Mallam*, Buck's B. C. 25, proceeded upon the same principle. With regard to *Owen* v. *Body*, 5 Ad. & E. 28, 6 N. & M. 448, the first observation which suggests itself is, that, if the court meant to decide that the deed created a partnership, the case is not law. **[538]** But it is obvious, when the course of the argument on the part of the defendants is looked at, that the court decided no such thing: the only question presented for decision was, whether or not the deed was a valid deed under the statute 13 Eliz. c. 5. All the court say is, that "the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit." [Erle, J. *Owen* v. *Body* is a perfectly sound case, if properly understood: the question was whether the deed enured as a bonâ fide assignment within the authority of *Pickstock* v. *Lyster*, 3 M. & Selw. 371.] In the present case, the creditors who execute the deed do not contemplate the acquisition of any interest in the land or the chattels. Neither on principle nor upon authority can such a deed be held to create a partnership.

Hugh Hill, Q. C., for the plaintiff below (*a*).[2] Where a number of individuals agree together that a trade shall be carried on, whatever stipulations they may make as

(*a*)[1] See *Ex parte Chuck*, 8 Bingh. 469, 1 M. & Scott, 615; *Young* v. *Axtell*, cited 2 H. Bl. 242; *Holyland* v. *De Mendez*, 3 Meriv. 184; Watson on Partnership, 2nd edit. ch. 1, pp. 11, 12.

(*a*)[2] The points marked for argument on the part of the plaintiff were, -

"That the defendants are liable to the plaintiff's demand, as being members of the Stanton Iron Company, and parties to the deed, and as creditors by whom and for whose benefit the business of the Stanton Iron Company was carried on; and that the defendants were also liable by reason of their having executed the deed as parties of the second part."

between themselves for the protection of any among them from liability to losses,—if they contract for a participation in profits (whether gross or net), that agreement constitutes them partners quoad persons who deal with and trust the firm. In the present case, there has been an arrangement between the defendants and others to carry on business under the name of the [539] Stanton Iron Company, part of the arrangement being that the defendants are to participate in the profits which are to result from the business so to be carried on. What are profits? Gross profits are, the apparent gains which result from the business, without taking into consideration the expenses incurred in carrying it on. Net profits are, those which remain after allowing for all expenses. The trusts of this deed are as large and comprehensive as can be conceived. The whole of the property and effects of the Messrs. Smith are vested in the trustees, who are to collect the debts, and to carry on the business, and to divide the net income of the business remaining after payment of the interest on mortgages and the new debts and expenses of the trade, amongst the creditors in rateable proportions according to the amount of their respective debts. The deed then goes on to impower a majority in value of the creditors present at a meeting to alter the trusts and the mode of carrying on the business, and to order its discontinuance, &c. The trust for sale only takes effect in the event of the business being thus ordered by the creditors to be discontinued. Can it be said that this was not an agreement between the parties to carry on the business and to participate in the net profits thereof? Who but the creditors at large had the means of carrying on the trade, or an interest in the profits? Each of the creditors agrees to exonerate the Messrs Smith from their respective debts, and that the business shall, unless otherwise ordered at a general meeting, continue to be carried on until the net profits shall have discharged all their debts. In Story on Partnership, § 23, it is said: "It may be laid down as a general rule of the common law, that, in order to constitute a partnership, it is not essential that the partners should equally share the profits and losses. It is sufficient if they are to share in the profits of the business, after a deduction [540] of the losses; or, in other words, that they should share in the net profits according to their respective proportions. It is, therefore, competent for the partners by their stipulations to agree that the profits shall be divided, and, if there be no profits, but a loss, that the loss shall be borne by one or more of the partners exclusively, and that the others shall, inter se, be exempted therefrom." Suppose a son takes a business and plant by devise from his father, and, having no capital of his own, borrows a sum of money, subject to an arrangement that the property shall be vested in an agent, to revert to the devisee as soon as the money advanced and interest should have been re-paid out of the net profits of the trade,—would not the persons who advanced the money under that arrangement be liable as partners for goods supplied for carrying on the business, or for bills accepted in the ordinary course of it? And, can it make any difference, whether the person intrusted to carry on the business be called an agent or a trustee? [Bramwell, B. Suppose there had been an absolute covenant by the trustees here to pay and divide 10,000l. a year amongst the creditors, all the other provisions of the deed remaining the same,—would you say that a partnership was thereby created? If you answer in the affirmative, how do you get over this difficulty,—that a man taking a mortgage, with a clause enabling him to wind up the business, would thereby render himself liable as a partner? And, if you answer in the negative, I would ask whether that arrangement would not be more detrimental to the estate than an arrangement whereby only net profits are abstracted from it? and why that which is less detrimental to the new creditors should be held to constitute a partnership, whilst that which is confessedly more so should not?] The real question is,—who are the parties carrying on the trade? Not the Messrs. Smith cer [541]-tainly: for, they have parted with everything, and have no right to interfere: the only interest they have is in that which may remain after all the debts are paid. Mr. Justice Maule's exposition (in *Jones* v. *Whitbread*, 11 C. B. 416) of *Owen* v. *Body* puts that case upon a plain and intelligible footing. He says,—"All deeds of this sort are within the letter of the 13 Eliz. c. 5, s. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed, shall be void,—that is, all deeds made to or for any of the intents or purposes mentioned in s. 1, viz. 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, and debts,' &c. In *Pickstock* v. *Lyster*, 3 M. & Selw. 371, however, it was decided, that, if a man assigns all his property to a trustee simply with

the purpose of having it fairly distributed among all his creditors, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the spirit of the act, and therefore is not void,—because it does not deprive any of the creditors of his fair share of the debtor's property, if he chooses to become a party to the deed. The deed in *Owen* v. *Body* differed from ordinary deeds of this sort, on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees carrying on the trade as they pleased, until interrupted by the major part of the creditors. The observation of Lord Denman, —that 'the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit,'—means no more than this, that the deed before him was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property, **[542]** to accede to; just as an offer of payment accompanied by a requisition of a receipt in full of all demands, is not such a tender as the creditor is bound to accept,—that is, his position is not deteriorated by his rejection of it. In that case, there were large provisions for the carrying on the trade, and the creditors were to look to the future profits." And, in giving judgment, the same learned judge says: "The main object of the deed in that case (*Owen* v. *Body*), was the carrying on an extensive business for the purpose of making money to pay the creditors who became parties to the deed. Here, the object is, merely to wind up the concern. That is a plain, clear, and intelligible distinction." Can any one doubt that the main object of this deed was, the carrying on the business for the purpose of making money to pay the creditors who became parties to it? [Bramwell, B. I take it to be indisputable law, that, if ten persons agree that three of them shall ostensibly carry on trade, buying and selling for the benefit of the whole ten, one who deals with them may, so soon as he discovers the secret stipulation, insist that he dealt with the whole ten. What is the effect of this deed? Is it that the trade and effects of the Messrs. Smith substantially and beneficially vested in the creditors, so that, when the plaintiff sold his ore to the Stanton Iron Company, he sold it to the whole body of the creditors?] That, it is submitted, is the effect of the transaction. [Bramwell, B. If you satisfy me of that, you succeed in removing a great deal of my difficulty.] What was there to prevent the creditors from exercising their power of winding up the concern and selling the effects the very day after the plaintiff's ore had been delivered at the works of the company? All the authorities bearing upon this subject were referred to in the argument in the court below. There is not a case from the time of *Grace* v. *Smith* to the present that does **[543]** not recognize the rule that an agreement for a participation in profits constitutes a partnership quoad third persons. It is urged on the part of the defendants, that that applies only where the party stipulates to receive something to which he was not before entitled, and not, as here, where he merely stipulates to receive payment of a debt. That, however, is a mere play upon words: if a man takes under any pretence a share of the profits of a concern, he takes a portion of that fund upon which the creditors have a right to rely for payment of their debts. Then, it is said that the fund is not diminished by the payment of debts. But, the fallacy of that argument is, that it supposes that the parties receiving payment are creditors of the Stanton Iron Company; whereas, in truth, they themselves are the Stanton Iron Company.

Field, on the same side (*a*). That agency is not the ground upon which the liability as a partner rests, but participation in profits, is clear from the case of *Waugh* v. *Carver*, 2 H. Bl. 235. In that case, there was a complete negation of agency, and yet it was held, that, quoad third persons, a partnership was created. The same doctrine is laid down in *Grace* v. *Smith*, 2 W. Bl. 998. In the notes to *Waugh* v. *Carver*, in 1 Smith's Leading Cases, 4th edit. 740, after adverting to the definition of partnership given by Tindal, C. J., in *Green* v. *Beesley*, 2 N. C. 108, 112, 2 Scott, 164,—"a mutual participation in profit and loss,"—the learned editors say: "but, with respect to third persons, an actual partnership is **[544]** considered by the law to subsist wherever there is a

(*a*) Welsby (who had himself been improperly heard, with Byles, Serjt., in support of the appeal) objected to Field being heard contrà in addition to Hill: but, after a slight discussion, the objection was withdrawn, and Field was allowed to proceed,—upon the principle, doubtless, that the one impropriety cured the other.

participation in the profits, even though the participant may have most expressly stipulated against the usual incidents of that relation: see *Bond* v. *Pittard*, 3 M. & W. 357. Such stipulations will, indeed, hold good between himself and his companions, but will in no wise diminish his liability to third persons. And this is founded on a principle of justice to the community; for, to use the language of the Lord Chief Justice in the principal case, by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." "On the above principles it is that a dormant partner, i.e. a partner whose name does not appear to the world as part of the firm, is held responsible for its engagements, even to those who, when they contracted with the firm, were ignorant of his existence." And again, at p. 742,—"It has been said that a participation in the profits constitutes a partnership. But the participation must be that of a person having a right to a share of the profits, and to an account, in order to ascertain his share, not that a mere servant or agent receiving, in respect of his wages, a sum proportioned to a share of the profits, or which may be partly furnished out of the profits." Can there be a doubt that the creditors here had a right to an account of profits? [Bramwell, B. My impression is, that the "rule," as it is called, is sheer nonsense. Where there is a right to participate in the profits, there is a joint interest in the goods. But, whether there is such joint interest must depend upon the circumstances.] Lord Eldon, in *Ex parte Hamper*, 17 Ves. 403, 412, says: "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that **[545]** will not make him a partner; but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and, in a question with third persons, no stipulation can protect him from loss." In an earlier stage of the same case, p. 404, his Lordship says: "The cases have gone to this nicety,—upon a distinction so thin that I cannot state it as established upon due consideration,—that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner: but, if he has a specific interest in the profits, as profits, he is a partner." In *Heyhoe* v. *Burge*, 9 C. B. 431, 458, Cresswell, J., delivering the judgment of the court, says: "It has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction, constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken." The distinction between a loan to a trader and a charge on or participation in the profits of the trade, is well stated in the very lucid judgment of Tindal, C. J., in *Pott* v. *Eyton*, 3 C. B. 32, 39. "Traders," he says, "become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them: *Grace* v. *Smith*, 2 W. Bla. 998; *Waugh* v. *Carver*, 2 H. Bla. 235. But, in the former of those cases, Lord Chief Justice De Grey, after laying down the rule of law in the terms which I have mentioned, proceeds: **[546]** 'If any one advances or lends money to a trader, it is lent on his general personal security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits; he relies on them for re-payment.' Afterwards he says, 'I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment,—a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits.' So, in the present case, the jury have said there was no agreement to share the profits. This distinction has been recognized in many cases; of which it may suffice to mention *Dry* v. *Boswell*, 1 Campb. 329, and *Benjamin* v. *Porteus*, 2 H. Bla. 590. And, although in *Ex parte Hamper*, 17 Ves. 404, Lord Eldon said the distinction was so thin that he could not state it as established upon due consideration, yet he acted upon it in that case, and again in *Ex parte Watson*, 19 Ves. 459, where he said,—'One who receives a salary, not charged upon profits, according to a well-known though nice distinction, is not by that a partner.' Nor does it appear to make any difference whether the money

is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." Here, the debts due to the old creditors constitute a specific charge upon the profits of the trade, which brings the case precisely within the rule thus laid down. And it makes no difference that the charge is limited by the amount of the debts: for, there was a similar limitation in *Barry* v. *Nesham*, 3 C. B. 641. *Ex parte Wilson*, Buck's B. C. 48, is an authority for the plaintiff upon this point: the party was held to continue a partner because "the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the [547] then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement as the profits might fluctuate." The opinion expressed upon this deed by the Master of the Rolls in the case of *In re The Stanton Iron Company*, 21 Beavan, 164, is not consistent with the authorities at common law. Besides,—as was observed by Willes, J., in the course of the argument in the court below,—the provisions of the winding-up acts apply only to the parties inter se, and have no application to a question like the present. And the Master of the Rolls, in *Ex parte the Warkworth Dock Company*, 18 Beavan, 629, speaking of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 36, and the Winding-up Act, 11 & 12 Vict. c. 45, says: "The functions of the two acts are distinct and separate. The objection of the Winding-up Act was, to obtain a proper contribution between the members of the partnership, and to have their rights and liabilities ascertained inter se. The creditors have nothing to do with this; and they may have execution against the company in any way they may think fit. I assisted in framing that act of parliament, and I certainly know that it was not the object to delay the creditors until the rights of the parties had been ascertained. The object of the Winding-up Act was only to settle equities between the parties, in order that, when the partnership was wound up, they might obtain contribution from each other." [Bramwell, B. The question is, whether these defendants have not by becoming parties to this deed, constituted themselves partners as to third persons. I should very much like to be informed what that means. Martin, B. Would an acceptance of a bill in the name of the Stanton Iron Company, by any one of the creditors, parties to the deed, have bound the company?] It is submitted that it would, if accepted for the purposes of their trade. [Martin, B. How is a [548] bonâ fide holder for value to know the purpose for which the bill is accepted?] Seeing that the bill purports to be accepted per procuration, he would be bound to inquire into the authority: *Attwood* v. *Munnings*, 7 B. & C. 278, 1 M. & R. 66; *Alexander* v. *Mackenzie*, 6 C. B. 766. The acceptance is the acceptance of the firm: *The South Carolina Bank* v. *Case*, 8 B. & C. 427, 2 M. & R. 459; *Vere* v. *Ashby*, 10 B. & C. 288.

Welsby, in reply. In the case of *The South Carolina Bank* v. *Case*, the ground of the decision was, that the holders of the bills were not bound by the secret instructions under which the parties were carrying on their business. In one sense, every creditor has an interest in the profits of his debtor's trade: but that is not such a community or mutuality of interest as will invest them with the character of partners. Here, the trustees, and not the creditors, are interested in the stock. [Erle, J. No doubt, at law, the trustees, and not the general body of creditors, would be the owners of the goods. Martin, B. The case of *Sparling* v. *Parker*, 9 Beavan, 450, has a tendency to shew what is the nature of an interest in final results.] All the liabilities of partnership, like those resulting from the relation of husband and wife, arise from agency: but the law, in the former case, implies agency from participation in profits. In none of the cases relied upon on the other side was the right to participate in profits limited to a fixed sum. The decision of the court below proceeds entirely upon *Owen* v. *Body*, 5 Ad. & E. 26, 6 N. & M. 448, as that case is supposed to be recognized by Maule, J., in *James* v. *Whitbread*, 11 C. B. 406. But that recognition of it is only inasmuch as it relates to the statute of Elizabeth. And the reasons given in the judgment of the Lord Chief Justice are clearly inconclusive and inaccurate. [Wightman, J. Who would [549] take by survivorship here, the survivor of the trustees, or of all the creditors?] The survivor of the trustees, unquestionably. [Watson, B., referred to *Wightman* v. *Townroe*, 1 M. & Selw. 412.] There, the executors of a deceased partner continued his share of the partnership property in the trade for the benefit of his infant daughter: and it was held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided

the profit and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. [Martin, B. I observe by the schedule, that, amongst the creditors, there are several widows. Bramwell, B. Suppose some of the executing creditors had been trading corporations,—would all their members have been partners in this concern?] That suggests an additional difficulty.

Cur. adv. vult.

The court were unable to agree in their judgment, and an attempt was made to obtain a second argument, for which purpose Lord Campbell and Lord Chief Baron Pollock attended: but, the counsel having received no intimation of the wish of the court upon the subject, the proposed re-argument did not take place; and now the judges who heard the case proceeded to deliver their opinions, seriatim, as follows:—

Watson, B. This was an action on two bills of exchange drawn upon and accepted by the Stanton Iron Company. The acceptance was in this form,—"For the Stanton Iron Company, per proc. James Heywood."

It appears that Messrs. Smith, of Derby, executed a **[550]** trust-deed for the benefit of their creditors, on the 13th of November, 1849. This deed was made between the Smiths, of the first part, Francis Sandars, John Thompson, James Haywood, David Wheatcroft, and Samuel Walter Cox, of the second part, and the creditors who executed the deed, of the third part. The deed recited that the Smiths were unable to pay their debts, and had agreed to assign all their estate and effects, subject to the powers and provisions contained in the deed, whereby the Smiths conveyed to the trustees (being the parties of the second part) all their estate real and personal, upon the trusts therein mentioned, viz. to stand possessed of the property, to collect in debts, to carry on the business under the name and style of the Stanton Iron Company, and to sell as they should think fit, to take fresh leases, and to sell iron, to pay interest on mortgages, to call meetings of creditors, the majority in value of the creditors at such meetings to have power to make, alter, add to, or diminish the trusts, or direct that the works should be discontinued, with power to the trustees to compromise debts and to pay creditors, and to pay the residue to Messrs. Smith, and power to appoint new trustees. The deed was to operate as a release of the debts of parties executing.

The defendants executed the deed as creditors. The defendant Cox never acted as trustee. The defendant Wheatcroft for a short time acted as trustee, and then resigned, which resignation was accepted within the provisions of the deed, and thenceforth he ceased to be a trustee.

The question is, whether the defendants, by executing the deed as creditors, and by taking the benefit of the trusts of the deed, became liable as partners on these bills. I am of opinion that they did not, and that the judgment of the Common Pleas should be reversed. There is no decision which has gone the length of determining this point: nor am I aware of any case be-**[551]**-fore the present in which it has been held, where business is carried on by trustees under an arrangement deed for the benefit of creditors, that the creditors executing such deed have been held to be liable as partners. Giving full effect to the case of *Waugh* v. *Carver*, 2 H. Bla. 235, and the cases which have followed that decision, I do not think that they govern the present case; for, the creditors are not absolutely entitled to a proportion of the net profits,—for, if the value of this species of property had arisen, the creditors might be paid really out of the stock and existing assets, and the profits might go to the Smiths. And, again, if the trustees were, by direction of the majority of the creditors to discharge or compound certain debts, such creditors would cease to be partners. The creditors have no certain share of the profits, but only an equitable right to have their debts paid out of the existing assets or the fruits of them, and with no power to deal with or to exercise any dominion over the corpus of the property. It is in fact a trust more for the benefit of the Smiths, to enable them better to realize the assets, to pay the creditors in full, and to obtain a surplus for themselves. Would the Smiths be liable as partners? I think not.

The case of *Owen* v. *Body*, 5 Ad. & E. 28, did not determine this point; and certainly the opinion expressed by the court in that case has not been entirely assented to: per Parke, B., *Coates* v. *Wilson*, 7 Exch. 205. I am inclined to assent to the judgment of the Master of the Rolls on this deed, as reported in 25 Law Journ. Ch. 142. But I do not consider it necessary to decide the point; for, my judgment proceeds upon a much narrower point. The action is on bills drawn and accepted in the name of the Stanton Iron Company. What persons constitute and carry on business as the Stanton

Iron Company? The deed is express upon that point,—**[552]** that the trustees are the Stanton Iron Company; and, as neither of the defendants were trustees at the time the bills were drawn and accepted, I am of opinion the defendants are not liable.

I am glad to be able to arrive at this conclusion, as a contrary decision would put a stop to deeds of this kind, which are highly beneficial to persons in trade; for, creditors to a small amount would never concur in such deeds, when they might be responsible for the whole debts of the concern.

I am therefore of opinion that the judgment should be reversed.

BRAMWELL, B. In this case, the defendants are sued as acceptors of three bills of exchange directed to "The Stanton Iron Company," and accepted "p.p. the Stanton Iron Company, James Haywood;" and the question is, whether they are bound by that acceptance.

Now, I cannot help beginning the consideration of this question by the somewhat trite proposition, that a man charged as acceptor can only properly be so charged in one or more of three ways, viz. that the acceptance, in terms or by reference binding him, is his very act, or that it was done by his authority, or that he has so conducted himself as to induce persons reasonably to act on one or other of the above assumptions.

In this case, it is not suggested that the acceptance is the very act of the defendants, and, consequently, to my mind, if liable, it must be on one or both the other grounds I have mentioned. But all that the defendants have done, all the authority they can be suggested to have given, any conduct of theirs relied on, or holding out by them, is, by or in reference to and dependent on the deed of arrangement. They have given no other authority than is there contained; they have conducted themselves in no way to give rise to a reasonable belief of such authority, unless in reference to that deed.

[553] The case against Wheatcroft is, merely that he signed the deed and attended meetings as any other creditor; and it is conceded that he is no more liable than any other creditor.

Now, it is said that that deed made all the creditors partners, and therefore every creditor signing it is liable as acceptor of these bills. Whether the deed did or did not constitute a partnership, I think it needless to determine, as I am of opinion that the alleged consequence does not follow. Partners are not liable for the acts of each other on any arbitrary ground independent of principle, as a matter of positive law; but they are liable for a reason; and I know of no reason or principle of law or good sense to make them liable, which does not come under one of the heads I have named. "The law in ordinary partnerships, so far as relates to the power of one partner to bind the other, is a branch of the law of principal and agent:" per Lord Wensleydale, in *Ernest, App., Nicholls, Resp.*, 6 House of Lords Cases, 401, 417. If a trading partnership is formed, and express authority given to each partner to bind the other, or, even where the ordinary mode of carrying on such trades is, for one partner to bind the other, and there is nothing to the contrary in the agreement between the partners, there authority is given. And, even where there is a prohibition of pledging each other's credit, a man may be bound by the acts of his partner pledging his credit; as, where A. and B. are partners, or appear by their conduct or statements to be so, and A., contrary to the agreement with B., pledges his credit, B. is bound. Why? Because he is not permitted to hold out A. as possessed of an authority, and then deny it to those who have acted on its assumption,—as a shopkeeper would not be permitted to deny that his shopman had the ordinary authority of a shopman in the particular trade. Again, there is **[554]** another way in which a partner may be bound contrary to his agreement or intended agreement with his partners. If A. and B. are partners, and agree that A. shall not pledge B.'s credit, but that he may buy goods for the partnership the property in which on the purchase shall vest in the partnership, and A. does buy goods in his own name; I conceive that the seller may recover the price from A. and B., unless by the bargain he excluded B.'s liability, because in truth the contract of sale was with A. and B., by it the property vests in A. and B., and the proviso that B. shall not be liable is repugnant: and this I conceive to be the way in which may be justified the expression that a participation in profits constitutes a partnership and so a liability. See per Cresswell, J., in *Heather* v. *Burge*, 9 C. B. 458,—"It has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, that," &c. Upon that principle,

or on the authorities, independent of principle, it may be these creditors would be liable for goods sold and delivered, to be used in carrying on the business. But how, or on what principle, are they liable on the bills accepted in this way? The arrangement deed does not in terms contemplate a partnership consisting of all the creditors, to be carried on as an ordinary trading partnership, under the style of the Stanton Iron Company. The defendant Wheatcroft has never in any way held himself out as a partner in the concern carried on under the name of the Stanton Iron Company. If, contrary to his intention, he is a partner with the other creditors, by reason of his interest in the profits, he is a partner in a firm consisting of them all, and properly so described, and not properly described as the Stanton Iron Company.

My meaning will be made plain thus,—the Stanton [555] Iron Company meant the trustees, that is, in the events which have occurred, Thompson and Haywood, and perhaps Cox. Suppose the deed had not stated what should be the style of the firm, and suppose a bill had been directed "To Messrs. Thompson, Haywood, and Cox," and Haywood had accepted it,—would any ordinary creditor have been liable as acceptor? If so, why? It may be said that the creditors have authorized the use of the style and firm of the Stanton Iron Company: but I say they have not, as representing the whole body of creditors: if they gave any authority for the use of the style (and I do not think they do, it seeming to me that the name is merely referred to to shew in what name it will be carried on), it is for its use by the trustees, to designate the trustees. In short, then, if by reason of sharing in the profits the creditors are partners, and as such have given an authority in spite of their intention to the contrary, it is at all events not an authority to bind them by the name and style of the Stanton Iron Company. It is clear, that, to bind a partner, the partnership style must be used: *Kirk* v. *Blurton*, 9 M. & W. 284. This point was not taken in the court below. In the judgment, it is said,—"The question is, whether the creditors, by signing this instrument, have made themselves partners." Now, I think this is a question, but not the question, for the reason I have above given. They then say,—"They (i.e. the creditors) agree to carry on the business under the superintendence or agency of a manager." This is not how I read the deed. If the trustees were agents or managers, indisputably the creditors are principals. But I am of opinion they were not so, but were themselves principals, subject to a trust.

I say nothing as to whether the defendants would be liable for goods sold and delivered, or on a bill directed to all the creditors by name, or otherwise, and accepted [556] accordingly: but, on the ground, as to Wheatcroft, at least, that the acceptance is not his act, and that he neither expressly nor impliedly nor by necessary implication, or otherwise, authorized it as binding him, and has never conducted himself as though he had, I am of opinion he is not liable, and that the judgment should be reversed.

Martin, B. The facts of this case are very short and simple. In the year 1849, two gentlemen named Smith, who were partners as iron-merchants at the Stanton Iron Works, in Derbyshire, became insolvent. A deed of composition was executed between them and their creditors. By this deed, they conveyed to five trustees all their property, upon trust, as to the joint-estate, to possess themselves of it, &c.; "and upon further trust that they the said trustees or trustee, and their or his assigns, did and should continue and carry on, under the name and style of the Stanton Iron Company, the business theretofore carried on by the Messrs. Smith in co-partnership as aforesaid." The deed then conferred upon the trustees the most extensive powers, and provided, that, out of the gross income of the business, they should pay the rent reserved in a lease under which the Messrs. Smith held the trade premises, and the interest upon certain mortgages, the cost of the composition-deed, and the expenses and losses incurred in carrying on the business, and proceeds thus:—"And should pay and divide the net income of the said business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of the said Messrs. Smith, and each of them, in rateable proportions according to the amount of their respective debts." The deed then contained provisions for calling meetings of the creditors, that the majority in value of the creditors at a meeting should have power to alter the trusts, and [557] make rules as to the management of the business and the discontinuance of it: and, if they ordered the discontinuance, the trustees were to wind it up, and, after paying all expenses and liabilities, divide the clear residue amongst the creditors rateably, to the amount of their respective debts. The deed

then proceeded to make other provisions usual in such instruments, and that, upon the debts being all paid, the residue should belong to the Messrs. Smith. It also provided for the death of one or more of the trustees, and that, in case one or more of them should desire to be discharged from the trust, the continuing trustees or trustee should have power to act: and the deed was to operate as a release to Messrs. Smith by the creditors who executed it.

The two defendants were originally named trustees; but Mr. Wheatcroft resigned within a few weeks of the execution of the deed, and his resignation was duly accepted. He and a considerable number of the creditors signed the deed.

The business was carried on by the acting trustees down to the year 1855, under the name of "The Stanton Iron Company." Towards the end of that year, the plaintiff supplied the company with iron, to the extent of 1400l. and upwards, for which he drew three bills, addressed "To the Stanton Iron Company," which were accepted by one of the trustees, thus,—"Per proc. the Stanton Iron Co., James Haywood."

A question which has been argued before us upon these facts is, whether Wheatcroft be liable upon the acceptances; and, except he be by reason of his execution of the deed, he is not. He had ceased to be a trustee many years before the plaintiff's debt was contracted; and, beyond the execution of the deed, there is no evidence that he has done anything to create a liability. If he be liable, all the other creditors who executed the deed are also liable. The question is, [558] therefore, of great importance. The direct authorities upon it, so far as I am aware, are, a case before the Master of the Rolls,—*In re Stanton Iron Company*, 21 Beavan, 164,—and the case in the Common Pleas which is now appealed against. In the case before the Master of the Rolls, a question arose upon this deed: and in his judgment he is reported to have thus expressed himself,—"It is impossible to hold that the parties to this deed of the third part (the creditors) are partners liable to contribute to the losses which have been sustained by the persons who have been carrying on the business. No such decision has ever yet been made." The judgment of the court of Common Pleas is reported in 18 C. B. 638, and is very short. The Chief Justice (Jervis) said that the case was expressly bound by *Owen* v. *Body*, 5 Ad. & E. 28, 6 N. & M. 448, and *Janes* v. *Whitbread*, 11 C. B. 406. I cannot think that this is so. *Owen* v. *Body* was a motion arising out of the trial of an interpleader issue. A trader had assigned his property for the benefit of his creditors, and the deed contained a provision that the trustee might carry on the business and pay the expenses, and, as to the surplus, that he should pay it rateably amongst the creditors who should execute the deed, when there was money in hand to the extent of 2s. in the pound upon their debts. An execution-creditor disputed the validity of this deed; and the second ground of objection to the deed, upon the argument,—and which seems to me to have been suggested by counsel, rather than argued, was, that the creditors who should execute this deed would become partners in the business carried on by the trustee. The judgment of the court, as reported, is this,—"Upon consideration, we think that, upon the second ground of objection, the assignment was not good. The deed imposed such terms as might have constituted a partnership among the parties executing [559] it; and these were terms to which the creditors were not bound to submit. The assignment was therefore invalid." It is plain that the court did not decide that the creditors, by executing the deed, would become partners, but merely that there was a risk that they might become so, and therefore could not reasonably be required to come in under the deed: and this is the view taken of it by Chief Justice Jervis and Mr. Justice Maule in *Janes* v. *Whitbread*. The former says, "The meaning of *Owen* v. *Body* is, that the deed was one which no creditor could in reason be expected to execute." And Mr. Justice Maule says: "The judgment meant no more than that the deed was not such a one as it was reasonable to expect a creditor willing to take his fair share of the property to accede to." In *Janes* v. *Whitbread*, there was a provision in the deed that the insolvent trader might be employed by the trustee in carrying on the trade, if thought expedient; and the judgment was, that this provision did not bring the deed within the view taken by the court of Queen's Bench in *Owen* v. *Body*, and did not vitiate it. It seems to me, therefore, that, if these be the only authorities, the Master of the Rolls was well warranted in saying that no decision had ever yet been made, that creditors executing a composition deed which contained a provision that the trustees should carry on the business, were partners.

As I have already observed, the deed alone creates the liability, if there be one: and the most material question seems to me to be, who are "The Stanton Iron Company?" The bills are drawn upon the Stanton Iron Company, and accepted on behalf of the Stanton Iron Company. In my opinion, the trustees, and they alone, are this company. The provision in the deed is, that "The trustees or trustee, or their or his assigns, should continue and carry on the business under the [560] name or style of the Stanton Iron Company." The whole of the then existing property of the Messrs. Smith was conveyed to them, and any goods or merchandize purchased by the Stanton Iron Company would in my opinion belong to them: otherwise, this strange anomaly would exist, that the property originally assigned would be theirs, but the subsequently acquired property not. I therefore think the iron-stone bought from the plaintiff, for the price of which the bills were given, was their property, and that the defendant Wheatcroft, or any other individual creditor who meddled with it, might have been treated by them as a trespasser. The creditors had no individual powers whatever. Their collective power could only be exercised at a public meeting, and, except called by the trustees themselves, one could only be called at the request in writing of two or more creditors whose debts amounted to 3000*l*. There was, therefore, no authority in any individual creditor to control the business of the company, and, so far as concerned the iron ore sold by the plaintiff, which was the consideration for the bills, the only interest the creditors had in it was, that, after it had been manufactured and the price of it brought into the general account, and after the plaintiff had been paid the price of it, if there was a net profit upon the whole business, they were to have it distributed amongst them rateably according to their debts.

But, as I have already observed, I think the question depends upon who are the Stanton Iron Company: and, in my judgment, they are the trustees, and the trustees alone: and, if so, none other is liable upon these acceptances. The acceptance of a bill by a firm must be in the name of the firm, and bind the firm only: *Faith* v. *Richmond*, 11 Ad. & E. 333; *Kirk* v. *Blurton*, 2 M. & W. 284.

The effect and operation of the acceptance of a bill, and the execution of a deed under seal, are very analo-[561]-gous. It seems to me, that, by the very words of the deed, the trustees, and not the creditors, are the Stanton Iron Company. The trustees were not necessarily creditors; and, if they had happened not to have been, and the contention on the part of the plaintiff be right, the trustees would not be liable upon the acceptances at all, for, under such circumstances, there could be no partnership nor joint interest between them and the creditors: and I apprehend it is clear that two separate and distinct parties in interest cannot be liable upon one and the same acceptance to a bill.

This may be said to be a narrow and technical view of the question: but I go further; I concur with the Master of the Rolls in thinking that the creditors are not partners in the sense attributed to them in the judgment of the court of Common Pleas. To hold them to be so, would in my opinion be contrary to the whole spirit and object and intention of the deed. No one can suppose that a creditor,—say, to the amount of 20*l*., and it might be for a lesser sum,—by executing this deed, and agreeing to receive payment of his debt out of the net profits, intended to render himself liable to an unlimited extent by acceptances of the trustees, which might possibly lead to his utter ruin. I am aware it has been said that the Master of the Rolls was only dealing with the rights of the parties to this deed, inter se: but it seems plain to me that he meant to express himself to the effect that there was no partnership amongst the creditors at all: and in this opinion I concur. As against third parties, a partner can withdraw from a partnership at his pleasure. It is difficult to see how a creditor could withdraw from his liability (if there be one) under this deed. I am not at all unconscious of the difficulty arising from the circumstance that judges of great eminence have frequently expressed themselves to the effect that a joint interest in profit [562] constitutes a partnership. As to the decisions in the cases in which these expressions occur, they seem to me to be correct. I do not feel inclined to differ or dissent from any of them: but, to the general abstract proposition that a man is liable as a partner because it can be made out that he has some remote and perhaps infinitesimally small interest in the profits of a business or a transaction, wholly independent of all other circumstances and considerations, I am not prepared to assert. It has been decided that a person who shares in the gross profit of a trade, is not a partner: *Pott* v. *Eyton*, 3 C. B. 32. Baron Parke also is reported to have

stated this to be the law, in summing up the case of *Heyhoe* v. *Burge*, 9 C. B. 440. For my own part, I am unable to comprehend why a man is a partner if he share in the net profits, but is not a partner if he shares in the gross. In the same case, the learned Baron is reported to have said "that a person who shares net profits is primâ facie to be considered a partner." My impression is, that this is the correct rule of law upon the subject. In the case of *Heyhoe* v. *Burge*, the jury found that the defendant had entered into a contract whereby he became entitled to one fourth of the clear or net profits of a transaction: but Baron Parke did not state the law to be, that this, without anything more, made him a partner; and I collect that the court of Common Pleas entertained the same view; for, the following passage occurs in the judgment in banc, —"The argument turned so much on the question whether the instrument alone (viz. that giving to the defendant one fourth of the net profits) was sufficient to constitute a partnership, that we thought there must be some misapprehension as to the meaning of the learned Baron's report. We have, therefore, referred to him, and find that he intended to report that which he apparently did report, viz. that he had left the question to the jury [563] on the whole of the evidence,—not leaving it that that instrument constituted a partnership: on the contrary, he said it would not." And it seems to me that that is a distinct authority of Baron Parke and the court of Common Pleas, that merely taking a share of the net profits does not constitute a partnership. A statement of opinion or dictum of Lord Chief Justice De Grey, in *Grace* v. *Smith*, 2 Sir W. Bla. 998, is one of the earliest usually cited upon this subject. He says, "If one takes part of the profit, he takes a part of the fund on which the creditor of the trader relies for his payment." In *Waugh* v. *Carver*, 2 H. Bla. 235, Lord Chief Justice Eyre says: "Upon the authority of *Grace* v. *Smith*, he who takes a moiety of all the profits indefinitely, shall by operation of law be liable for the losses, —upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." The same reason for the rule is given by Lord Chief Justice Tindal, in *Pott* v. *Eyton*, 3 C. B. 32.

It is to be observed that this reason is quite inapplicable to, and has no bearing upon, the present case; for, the creditors of Messrs. Smith were not entitled under the composition deed to one farthing until all the creditors of the Stanton Iron Company, including the plaintiff, were paid their demands.

With my view of the true legal ground for the present decision, it would be out of place here to pursue the subject further. I would merely observe that the well-established non-liability of the master and seamen of whaling ships, who are paid according to the profits, seems inconsistent with the abstract rule which I have mentioned. I think it is no answer to say that it is a mode of remunerating services. In very many partnerships, all that a partner brings into the concern is, his intellect, his knowledge, his experience, and his [564] energy and industry, a contribution to the common interest, it may be, more valuable than any money capital, however large.

For these reasons, I think the plaintiff has failed to establish the liability of the defendant Wheateroft; and, the contract alleged being a joint one, that the judgment below for the plaintiff ought to be reversed.

Coleridge, J. My brothers Erle and Crompton concur in the opinion I am about to read.

This was an appeal from a judgment of the court of Common Pleas on a rule to enter the verdict for the plaintiff: and I am of opinion, upon consideration, that their decision ought to be affirmed, —speaking, however, with unfeigned distrust of my judgment, in the divided state of the court.

The facts of the case are stated very fully in the Common Bench Reports, vol. 18, p. 617, and need not be now repeated here. Two questions were raised upon them in the argument before us, —the first, whether, under the deed, by which two persons of the name of Smith conveyed all their property to trustees for the benefit of creditors executing the deed, the defendants, who were among such creditors, were partners in the concern carried on by the trustees under the provisions of the deed, — and, secondly, if they were so, whether they were liable as acceptors of the bills of exchange on which the present action is brought, the acceptances being by "The Stanton Iron Company," and that being the name under which, in compliance with the stipulations of the deed, the trustees carried on the concern, and had accepted the bills in payment of goods supplied to it.

According to the provisions of the deed, the trustees are not simply to wind up the concern, but to carry it on indefinitely, under the name of "The Stanton Iron [565] Company:" and all necessary powers for this purpose are conferred on them. They may procure new leases of the premises,—erect new works,—purchase new machinery, implements, live and dead stock,—employ managers, &c. They are to divide the net income arising from the business so carried on rateably among the creditors: and, after the satisfaction of all these, there is an ultimate trust for the Messrs. Smith, their executors and assigns.

It appears to me, that, although the primary object of the trust is undoubtedly the payment of the creditors, yet the deed is very distinguishable from an ordinary winding-up deed. In such a deed, powers to trade temporarily, and carry on the business, might properly be given as ancillary to the main objects,—the collecting in of debts, disposing of the stock, and winding up the concern. But, under this deed, a trading concern is created, from the profits of which the debts are to be paid: and it is quite consistent with the provisions of it, that the concern may never be wound up, but, when the profits have paid off the creditors, the whole may be restored again in full activity to the Messrs. Smith, for whom meantime the trustees are substituted in the management. But, further, in the discharge of their duty, the deed places the trustees under the control of the general body of creditors, who may alter the trusts and provisions of the deed at their pleasure.

This being the nature of the deed, it seems to me perfectly clear that the trustees, if they stood alone, would form a trading partnership: and, as they do not stand alone, but are representatives and agents of the creditors generally, and as these last are intended to share in the net profits of the concern, up to the extent of their several claims on the Messrs. Smith, it is equally clear, and stands on the most undoubted law, as it seems to me, that these last are partners as against third per-[566]-sons, and liable as such to those who supply the money or the goods by means of which the trade is carried on and the profits earned.

This principle of law was applied by the court of Queen's Bench, in *Owen* v. *Body*, 5 Ad. & E. 28, 6 N. & M. 448, to a deed not so strong as the present, and recognized by the court of Common Pleas, in *Janes* v. *Whitbread*, 11 C. B. 406: nor was the principle itself disputed in the argument before us; but it was said not to be applicable to a case where the net income was shared only for the purpose of liquidating old debts. This seems to me, as regards third parties, an immaterial distinction: if creditors take into their own hands the concern of their debtor, and carry it on with a view to profit, they are as much receiving the profits of that concern when they apply them to wipe off their outstanding claims, as if, no such existing, they had purchased the concern from a solvent trader: and they ought to be equally responsible to the parties from whom they procure goods, or whom they employ for the purpose of making those profits. Nor can it be said that the trustees in this case are the trustees of the Smiths only, that they carry on the business for them only, and that the creditors are in the light only of persons who have advanced money to the concern for the purpose of carrying it on, and who are to be re-paid from the concern, but have no interest in the rising or falling of the returns.

This was the view taken of this deed, certainly, by the Master of the Rolls, *In re Stanton Iron Company*, 25 Law Journ. Ch. 142: but, with all the respect which I entertain for that learned judge, I am unable to agree with it. The trustees seem to me manifestly the representatives of the creditors: they act for them, and under their control; and the trust for the Messrs. Smith is not concurrent with or over-riding that for the creditors, but arises only when the trusts for the creditors [567] are entirely satisfied,—at which time the control also of the creditors will cease, and a new state of things begin.

If the body of creditors had been small, so that they could have carried on the concern themselves without the intervention of any trustees, and they had done so, the case would have been substantially the same as now,—but, could any one of them then have denied, in respect of a person with whom the Stanton Iron Company dealt, that he was a partner in the concern, because he was only getting back his debt, and because the Messrs. Smith were to come in again when the whole debt was recouped?

The second question seems to me involved in the first. The question is, who are the Stanton Iron Company? If the trustees do but represent the creditors, that is, manage the concern for them, and hand over to them the profits, then, as against

those with whom they deal, the creditors are the company. It does not follow, that, inter se, and for all purposes, they are so, or that the trustees can bind them by the use of the name for purposes foreign to those for which they are authorized to act; but this is a limitation common to all partnerships, and incident to the principle of agency and authority, on which all partnership liability depends.

The conclusion to which I come will not produce any of the inconvenient consequences dwelt on in the argument; for, the clauses in the deed on which I rely are by no means necessary to the formation of a perfect deed of assignment for the purpose for which deeds of this kind are usually framed; and, if it were, that is to say, if all assignments of trading concerns for the benefit of creditors necessarily involved an indefinite carrying on of them, it would be still more inconvenient, because more unjust, that the new creditors [568] should not be able to have recourse for satisfaction of their debts to those whom they supply with goods, and who reap profit from the use of the goods so supplied.

For these reasons, I think the judgment ought to be affirmed.

The court of appeal being thus equally divided in opinion, the appeal failed, and the judgment of the court of Common Pleas so far remained undisturbed.

Bovill, Q. C., inquired whether the court would give any direction as to the costs.

COLERIDGE, J. We certainly should not think of giving costs.

Some discussion then ensued with reference to a case of *Blackwell* v. *Wheatcroft*, which was an action for goods sold and delivered to the Stanton Iron Company, and in which the court of Queen's Bench had decided in accordance with the view taken by the court of Common Pleas, and the case had stood over to await the decision in *Hickman* v. *Cox*: whereupon Martin, B., observed,—"Before you agree to be bound in that case by the decision of this, you had better consider whether an entirely different question is not raised there. I considered the matter a good deal, and I thought that case had no bearing on this. It raises a totally different question."

The principal case now stands for argument in the House of Lords.

The reporter has been informed that the question whether, under the circumstances, an appeal to the [569] House of Lords was warranted by the statute (17 & 18 Vict. c. 125, ss. 34, 35), was discussed before Bramwell, B., at Chambers, and that the learned Baron, after full deliberation, decided that it was. See *Levy* v. *Green*, 30 Law Times, 241, where it was held by the court of Queen's Bench that there is a right of appeal under these sections, if, upon a motion to enter a nonsuit or verdict, or for a new trial, the rule drops in consequence of the judges being equally divided in opinion,—the failure of the appeal being considered, upon a liberal construction of the statute, to be equivalent to the rule being discharged.

JOHNSON *v.* GOSLETT, HOLGATE, JOHNS, KINGCHURCH, PETER, WILLINGALE, AND WEATHERLEY. Nov. 28th, 1857.

[S. C. 27 L. J. C. P. 122; 4 Jur. N. S. 50; 6 W. R. 127.]

Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l.* each, to be paid upon allotment; and setting forth the usual reports of the mining captain that the mine was in full operation, and stating that the money was to be paid to Messrs. L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of fifty shares, and paid 50*l.* to L. & Co., who gave him a receipt describing that sum as having been received by them for the company. The plaintiff, having afterwards discovered that not more than 1435 shares had ever been subscribed for or paid upon, brought an action against the directors to recover back his deposit, on the ground of failure of consideration: Held, affirming the judgment of the court of Common Pleas,—that all the directors were liable, notwithstanding the account at the bankers' was kept in the names of five of them only.

This was an appeal by all the above-named defendants except Johns, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), against the decision of the court of Common Pleas discharging a rule whereby it was ordered that the plaintiff should shew cause why the verdict found for him on the trial of this

cause should not be set aside, and instead thereof a verdict be entered for the defendants, on the ground that, in the case of a cost-book com-[570]-pany, the plaintiff is not entitled to recover the price of his shares, or his deposit, notwithstanding all the shares have not been subscribed for; and on the ground that there was no evidence against two of the defendants, Willingale and Weatherley: see 18 C. B. 728.

The case stated for the opinion of the court of error, was in substance as follows:—

The action was brought to recover 50l. for money alleged to have been received by the defendants for the plaintiff's use, being the amount alleged to have been paid by the plaintiff to the defendants on the allotment to him of fifty shares in the Perran Wheal Alfred Copper and Lead Mining Company. The defendant Henry Johns did not appear, and the plaintiff signed judgment against him by default pursuant to the 33rd section of the Common Law Procedure Act, 1852. The other defendants appeared, and pleaded never indebted, on which issue was joined.

The cause was tried before Jervis, C. J., at the sittings in London after Hilary Term, 1856, when the jury found a verdict for the plaintiff for 50l., under the direction of the learned judge, who reserved the points upon which the said rule to shew cause was afterwards granted, as aforesaid.

The following evidence was given at the trial:—

The plaintiff produced a prospectus, and proved that it was published and issued by the authority of all the defending defendants. This prospectus was read in evidence, and was as follows:—

"Perran Wheal Alfred Copper and Lead Mine, Perranzabuloe, Cornwall.

"Held under lease for twenty-one years, at a royalty of 1/18th.
"Capital 12,000l., in 12,000 shares of 1l. each; to be paid on allotment.

"To be conducted on the cost-book principle.

[571] "Directors and managing committee.

"William Goslett, Esq., 32 South Molton Street, Oxford Street.
"William Holgate, Esq., Staines, Middlesex.
"Henry Johns, Esq., 68 Upper Thames Street.
"Samuel Kingchurch, Esq., 7 Alfred Place, Bedford Square.
"John Peter, Esq., 31 Great St. Helen's.
"Thomas Willingale, Esq., Phœnix Wharf, Wapping.
"Samuel Weatherley, Esq., New Cross.

"Bankers.

"Sir J. W. Lubbock, Bart., Foster, & Co., 11 Mansion House St., London.

"Brokers.

"George Batters, Esq., 26 Throgmorton Street, London.
"William Froom, Esq., 27 Change Alley, Cornhill.

"Solicitor.

"Chester Cheston, Esq., 1 Winchester Buildings, Old Broad Street, City.

"Managing Agent.

"Captain John Davies, St. Agnes.

"Secretary.

"Mr. William Battye.
"Offices, 33 Great Winchester Street.

"Prospectus.

"This company is formed for the purpose of working the Perran Wheal Alfred Copper and Lead Mine, in the parish of Perranzabuloe, in the county of Cornwall.

This extensive sett is situate about three quarters of a mile south of the Great Perran St. George Mine, so celebrated for the production of copper; the cross courses of which run into and pass through this mine.

"The strata is a light blue killas highly mineralized, and very congenial to mineral deposits; and several [572] champion lodes of great promise are known to be within its boundaries.

"Operations in this mine were commenced by a company about forty-two years ago; and a cross-cut adit or drift extended upwards of 150 fathoms, for the purpose of intersecting and draining the lodes. The first lode thus intersected was driven on for several fathoms, and, although only a few fathoms deep, produced several tons of rich copper ore: but the parties, having very limited means at their command, were unable to erect suitable machinery for properly developing its resources; and ultimately they abandoned the mine.

"Other important discoveries have since been made in driving the adit: two copper lodes south of the shaft, called the Wheal Prosper lodes, were cut and driven through, and shew excellent copper. A lead lode also further south has been cut, and excellent silver lead broken therefrom.

"The present proprietors took possession, and commenced working on the 1st of January, 1853, under lease from Sir R. Vyvyan, Bart., for twenty-one years from December last, at the moderate royalty of 1/18th; and since that period have built most substantially an engine-house, boiler-house, stack, &c., and procured from Messrs. Sandys, Vyvyan, & Co. a new 30-inch cylinder steam-engine, which was set to work on the 26th of February last, and is of ample power for efficiently working the mine.

"The engine-shaft is now being sunk on the course of the lode, by nine men, at 8l. per fathom. The lode is about four feet wide, and of great promise, being composed of beautiful friable quartz, prian, iron pyrites, blende, and copper-ore. It has a declination southward of sixteen inches in the fathom, and will form a general junction with the two other champion lodes seen in the adit south of the shaft, at about thirty fathoms below the present bottom, which can be reached at a mode-[573] rate expense: and there is no doubt that at this junction very large deposits of ore will be found.

"The directors have agreed with the proprietors for the purchase of this mine, and all the machinery and works thereon, clear of all costs up to 31st of March; and the proprietors have agreed to take shares for the full amount of their interest in the mine, and have further agreed that one fourth of such shares shall remain in the hands of the directors until the mine shall have been brought into a dividend-paying state.

"Applications for shares to be made to the secretary, at the office of the company, where specimens of the ore may be seen, and at the brokers'.

"Reports.

"'Perran Wheal Alfred, 19th March, 1853.

"'I have great pleasure in informing you, that, since resuming the sinking of the shaft, the copper-lode has considerably improved, and that there is every prospect of getting into a good course of ore in a few fathoms' sinking. The lode in the bottom of the shaft is four feet wide, and well defined; and, although only ten fathoms from "grass," is orey throughout; and I believe that every stone broken from the lode produces copper-ore; indeed, I never saw better indications so near the surface, nor prospects more cheering.

"'The next copper lode south of the shaft is only nine feet distant, and is evidently throwing off its branches and mineralizing the strata dividing the two lodes. On sinking five or six fathoms deeper, we shall cross cut to this lode, to ascertain which is the most productive.

"'The lead lode is also of great promise; and, to convince you of its productiveness, we employed two men on Thursday last to sink on it under adit. Samples of the ore I hope to send you on Wednesday: but nothing more can be done on this lode advantageously till rods and pump-work are connected to the engine.'

(Signed) "'JOHN DAVIES.'

[574] "Extract from report of Captain W. Hooper.

"'I beg to transmit to you the following report of the above mine, which I have carefully inspected. The locality in which the mine is situate is of established

reputation for mining, being in the vicinity of Perran Wheal George, Wheal Leisure, and other mines, which have all paid large dividends, and having its lode parallel with theirs: and, as far as surface appearances can be held to be indicative of a mine's merits, everything in the present instance is of a decidedly favourable character, while the underground indications are so promising as to convince every practical miner that this mine will realize the most sanguine expectations.

"'The lodes vary from three to five feet wide, composed principally of a beautiful quartz, for the most part compact, but in a lesser degree porous and friable, containing a number of crystalline fissures studded with rich cubes of sulphurate of copper: and the lode altogether is so thickly impregnated with these ores as to make it extremely difficult to break a stone not bearing a portion of them. The lodes also carry mundic, sulphurate of zinc, chlorite, &c. The gozzan is rich and congenial, bearing beautiful stones of copper-ores.

"'One very important feature,—perhaps the most important,—is, the contiguity of three copper lodes, which, according to their ascertained underlie at the adit level, will form a junction at about thirty fathoms under the adit.

"'The continuous and effectual prosecution of the engine-shaft to this level will without doubt speedily place this mine in that position of value which its present appearances and discoveries so strongly indicate.

"'To the south of these lodes is a silver lead lode, traversing the sett, from which various quantities of silver-lead have been raised. The gozzan on this lode is very fine, and the country around it characteristically congenial for large deposits of this mineral. Accom-**[575]**-panying this lode is a beautiful flookan one foot wide. By a run of flat rods from the engine, this lode could be well tried, and in all probability would yield profitable returns: and I have no hesitation in stating, that, when properly developed, Perran Wheal Alfred will prove a permanent and valuable undertaking.'" (Signed) "'W. HOOPER.'"

It was proved that the directors and managing committee named in the above prospectus were the defendants.

It was also proved that the plaintiff applied for shares about the 21st of April, 1853, through seeing the prospectus, by a letter bearing that date, and signed by him, which was put in, and of which the following is a copy:—

"To the committee of management of the Perran Wheal
Alfred Copper and Lead Mining Company.

"Gentlemen,—be pleased to allot me one hundred shares in this company: and I undertake to accept the same, or any less number you may allot me, according to the rules and regulations of the cost-book, and to pay the deposit thereon."

Fifty shares in the company were allotted to the plaintiff. The plaintiff paid 50*l.*, being the deposit on the said fifty shares, to Sir J. W. Lubbock & Co., the bankers mentioned in the prospectus, and received from them a receipt, of which the following is a copy:—"Perran Wheal Alfred Copper and Lead Mining Company. Bankers' receipt No. 27. London, May 3rd, 1853. Received, on account of the above company, fifty pounds. Sir John William Lubbock & Co. T. Harding. This receipt will be exchanged for certificates at the company's office, of which due notice will be given."

Two or three months afterwards, the plaintiff exchanged the said bankers' receipt for certificates signed by the secretary named in the above prospectus, and by the defendants Goslett and Kingchurch, which were put **[576]** in and read. They were in the following form, changing the numbers only:—

"The Perran Wheal Alfred Copper and Lead Mining Company,

"Perranzabuloe, Cornwall.

"Conducted on the cost-book principle.

"In 12,000 parts or shares, of 1*l.* each.

"No. 6671 to 6680.

"The holder of this certificate [blank left for name] is entitled to ten parts or

shares in the above company, to be held subject to the rules and regulations of the said company.

"W. GOSLETT } Directors.
"S. KINGCHURCH }

"W. BATTYE, Sec.

"N.B.—The holder of this certificate may at any time require the above shares to be registered in his name in the cost-book, at the office of the company."

Not more than 1435 shares in the said company had ever been subscribed for or paid upon before or after the company commenced business.

At a meeting of shareholders held on the 5th of April, 1854, at which the plaintiff was not present, a resolution was carried, to dissolve the company.

The plaintiff received a letter signed by William Battye, secretary to the company, of which the following is a copy, on or about the date thereof:—

"Gt. Winchester St., 24th August, 1854.

"Perran Wheal Alfred.

"Sir,—I beg to inform you that a special meeting of shareholders in the above mine will be held here on Monday, the 4th of September, at 1 o'clock, for the purpose of considering the propriety of selling the mine, machinery, &c., and to make an order for the sale, and for the appropriation of the money."

[577] A special meeting was held in pursuance of the above notice (but not attended by the plaintiff), at which a resolution was passed to sell the mine, machinery, &c.; and which were afterwards accordingly sold.

The plaintiff called William Battye as a witness, who stated that he was the secretary to the said company: and, on cross-examination, he stated that he was acquainted with cost-book mines; that it was usual to begin with less than the capital paid up; and that they sometimes began with a very small part of the capital. On his re-examination, he stated, that he had been concerned in twenty or thirty cost-book mines; that they always told subscribers that the capital was not paid up, when they began working: and, on further cross-examination, the witness stated that they frequently began working with part of the capital, without notice to the subscribers. This witness also proved that meetings of the directors of the company were held on the 18th of April, 1853, and on the 2nd of May, 12th of May, 26th of May, and 9th of June following; and that the directors present, and the proceedings at such meetings, were correctly entered in the minute-book, which was put in and read, and was as follows:—

"At a meeting of directors of Perran Wheal Alfred Mine, held at the offices of the company, No. 33 Great Winchester Street, on Monday, the 18th of April, 1853, present, Messrs. William Holgate, Henry Johns, C. Cheston, John Peter, S. Weatherley, S. Kingchurch, William Goslett,—

"The minutes of the last meeting held 4th April, were read.

"Resolved,—that the prospectus be inserted in the '*Times*' and '*Daily News*' three times, and in the '*Leeds Mercury*' and '*Hull Advertiser*' twice.

"That the salary of Captain Davies be six guineas per month, commencing 1st April."

[578] "At a meeting of directors of Perran Wheal Alfred Mine, held at the office, No. 33 Great Winchester Street, on Monday, 2nd of May, 1853, present, Messrs. John Peter, S. Kingchurch, William Holgate, George Batters, and William Froom,—

"The minutes of the last meeting, held 18th of April, were read and confirmed.

"The brokers, Messrs. Batters and Froom, were instructed to make a market for the shares, and purchase shares for that purpose."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33 Great Winchester Street, on Thursday, 12th May, 1853, present H. Goslett, S. Kingchurch,

"The cost-sheet was produced, amounting to 97*l.* 9*s.* 8*d.*, for labour cost, and

45l. 18s. for merchants' bills; when it was ordered that cheques be drawn for the amounts.

"A cheque was ordered to be drawn for 7l. 4s., for the secretary's salary and petty-cash." (Signed) "HENRY JOHNS."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33 Great Winchester Street, on Thursday, the 26th of May, 1853, present, Henry Johns, in the chair, John Peter, S Weatherley, S. Kingchurch, W. Goslett,

"The minutes of the last meeting were read and confirmed.

"The secretary reported that Mr. Willingale has sold his interest in the mine, and therefore ceased to be a director.

"Captain Davies's report was read, and received with much satisfaction.

"The secretary was instructed to prepare a form of scrip-certificate.

[579] "The following accounts were presented for payment, when cheques were ordered to be drawn for the same,—Baily Brothers, for advertising, 76l. 13s. 4d.; W. Mitchell, do. 20l. A cheque was also drawn, amounting to 15l., for the deputation expenses." (Signed) "JOHN PETER."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33 Great Winchester Street, on Thursday, the 9th of June, 1853, present, John Peter, W. Goslett, S. Kingchurch,

"The bankers' book was produced, shewing a balance in favour of the mine of 465l. 14s.

"The cost sheet was produced, amounting to 63l. 6s. 8d. for labour cost, and 23l. 18s. 11d. for merchants' bills. Order, that cheque be drawn for the same.

"The secretary laid before the meeting a form of scrip-certificate for shares. The same was approved, and ordered to be printed, as follows:—

"1000	5l.	5,000l.
350	10l.	3,500l.
175	20l.	3,500l.
		£12,000.

"W. GOSLETT."

The plaintiff also called as a witness one Thomas Harding, who proved that he was clerk to Messrs. Lubbock & Co., the bankers, and that the banking account kept by the company with Messrs. Lubbock & Co. had been and was kept in the names only of the defendants Kingchurch, Goslett, Johns, Peter, and Holgate.

The cost-book of the company was also given in evidence, containing the rules and regulations of the company, which rules and regulations were headed, —"Rules and regulations of the Perran Wheal Alfred Mining Company, formed or established 22nd March, **[580]** 1853." The more material of these rules were as follows:—

"1. The several persons whose names are for the time being entered as shareholders in the cost-book shall be partners or shareholders in a mining company formed or established for the purpose of opening and working certain mines now called or known by the name of Perran Wheal Alfred Copper and Lead Mines, in the parish of Perranzabuloe, in the county of Cornwall, and all other metals upon or under certain lands known by the name of Perran Wheal Alfred, in the parish of Perranzabuloe, in the county of Cornwall, which are held for a term of twenty-one years from the day of , 1853, under a lease granted by to , as trustees for the company, and for converting, manufacturing, selling, and disposing of the produce of such mines.

"2. The name or style of the said company shall be the Perran Wheal Alfred Mining Company.

"3. The places of business of the said company shall be at the works at Perranzabuloe, at the offices of the company, No. 33 Great Winchester Street, Old Broad Street, London, or at such other place as for the time being may be the offices of the said company in London.

"4. The capital of the said company shall be 12,000l., which shall be divided into

12,000 parts or shares of 1l. each, of which 6000 shall be allotted and vested to and in favour of the former proprietors of the mine, as and for their interest therein.

"5. The trustees of the said lease shall when and if required by the directors, execute a deed declaring that they hold the said mines under and by virtue of such lease as trustees for the benefit of the shareholders in the said company, according to their respective shares and interests therein: and, if any or either of the said trustees, or any future trustees, shall resign or die, or [581] become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning or dying, or becoming incapable or unwilling to act as aforesaid; and the said premises shall be forthwith assigned and vested in the said new trustees or trustee jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company.

"6. The said company is formed, and the business thereof shall be conducted and carried on, on the cost-book principle; subject, nevertheless, to such provisions as are hereinafter contained.

"7. Mr. William Battye, of No. 33 Great Winchester Street, Old Broad Street, London, shall be the secretary and purser of the said company, subject, nevertheless, to the control of the managing committee or directors, or of the shareholders of the said company.

"8. A committee of managers, consisting of members hereinafter called directors, shall be appointed; and William Goslett, William Holgate, Henry Johns, Samuel Kingchurch, John Peter, Thomas Willingale, and Samuel Weatherley, shall be the present directors of the said company; and the said shall be the chairman of the said directors at their first meeting: and, at every succeeding meeting, every other director shall in turn or rotation, according to the order in which his name stands in the before-mentioned list (as the case may be), be and act as chairman: and, if at any meeting the director next in rotation should not be present, then such one of the directors as would be next in rotation if all the preceding directors had served the office of chairman, shall be and act as the chairman of such meeting.

"9. No person shall be capable of being a director [582] unless he shall hold and continue to hold during his directorship one hundred shares in the said company. The certificates thereof shall be deposited with and remain in the possession of the company: and, in case any director shall cease to hold the said number of shares in the said company, or shall take the certificates thereof out of the possession of the said company, he shall be deemed to have resigned his office as a director from the time of his so ceasing to hold the said number of shares, or of his taking the certificates out of the possession of the said company, and a new director may be appointed in his place, as hereinafter mentioned.

"10. In order to constitute a board of directors, there shall be three directors at the least present.

"11. The said shall be the trustees of the said company, and C. Cheston, of, &c., shall be the attorney and solicitor of the said company.

"12. Messrs. J. W. Lubbock, Bart., & Co., for the time being, shall be the bankers of the said company; but the directors may from time to time, as and when they shall in their absolute discretion think proper, change the bankers of the said company.

"13. The directors shall meet once a month, or oftener if they shall think fit and proper, for the purpose of superintending the affairs and concerns of the said company: and they shall have full power at any meeting or meetings to adopt any resolution they may think necessary for the benefit of the said company: and the purser and other officers of the said company shall be subject to their discretion and control, and shall be liable to be removed from the offices which they may hold in the said company, at the discretion of the directors, who may appoint other persons to supply the places of those who may be so removed, or may have resigned.

"14. At every meeting of the directors, the chairman [583] to be appointed as hereinbefore mentioned shall preside; and all questions considered at every such meeting shall be determined by a majority of votes, each member having one vote: and, in case of an equality of votes, the chairman shall have a casting vote.

"15. A general metting of shareholders shall be held in the month of in every year; and the secretary shall convene such meeting by giving seven days'

notice at least of such meeting to every shareholder, by letter addressed to him or her according to his or her description and residence in the cost-book; which letters may be sent by post or delivered at his or her residence. The present directors shall remain in office until the ordinary meeting of shareholders of the company, to be held in the month of , 1853; and, at such meeting, the shareholders present personally or by proxy may either continue in office the before-mentioned directors, or any number of them, or may elect fresh directors to supply the place of those not continued in office; the present members of the board of directors being eligible. And, at every ordinary general meeting to be held in the month of in every year thereafter, the shareholders present personally or by proxy shall elect directors for the ensuing year. And, at every meeting of the shareholders of the company, the director who was chairman at the last meeting of the directors, or, in his absence, some one of the directors, or, in the absence of all the directors, any shareholder to be chosen as hereinafter mentioned, shall be chairman of such meeting: and, in either of such last-mentioned cases, such chairman shall be appointed by a majority of the votes of the shareholders present at such meeting.

"16. The present directors shall, from and after the day of , 185 , be entitled to retain out of the funds of the said company at and after the **[584]** rate of per annum, to be divided amongst those directors who have attended meetings, and in proportion to the number of their attendances respectively, as a remuneration for their services,—the chairman of each meeting receiving for the meeting of which he was chairman a remuneration double of that received by the other directors.

"17. All the directors, trustees, and other officers of the company shall be kept indemnified by the said company from and against all the losses, damages, and expenses which may be incurred in relation to the management or concerns of the said company, except the same losses, damages, and expenses may have been sustained or incurred by the wilful default or neglect of the parties sustaining or incurring the same.

"19. All payments due from shareholders shall be made to the bankers for the time being of the said company in London; and all moneys and securities for money belonging to the said company shall be paid into or deposited in the hands of the said bankers, to the account of the directors of the said company for the time being; and all payments for and on behalf of the said company exceeding 5*l.* shall be paid by cheque on such bankers; and all cheques for money shall be signed by at least two directors, and countersigned by the secretary; and no such cheques shall be signed, except at a meeting of directors.

"20. In case of the resignation or death of any director, or if he or she shall cease to hold 100 shares in the said company, or shall not deposit the certificates thereof with the said company, or, having so deposited them, shall take them out of the possession of the said company, contrary to the provisions of rule 9, the vacancy so occasioned may be filled up by the other directors, by the election of a new member as a director.

"21. The board of directors, at their own instance, **[585]** or any one or more shareholder or shareholders whose shares shall amount to parts of the whole number of shares, shall have the power at any time to require the directors to convene an extraordinary general meeting of shareholders, which meeting shall be convened by circular letter addressed to and forwarded by post to the shareholders according to the last address entered in the cost-book, and stating the object of such meeting; and, at every such meeting as last aforesaid, the shareholders then personally present, or by proxy, or the major part thereof, shall be at liberty to amend alter, or annul, either wholly or in part, any of the provisions, rules, and regulations of the company; and to make any new or other rules, regulations, or provisions in lieu thereof, which shall thenceforth be binding upon the said company and the shareholders thereof.

"23. The shareholders shall be at liberty, at reasonable times, to inspect the cost-book.

"25. Every shareholder shall be at liberty, on giving notice in writing to the purser, for entry in the cost-book, and on forfeiture of all moneys paid upon his or her shares, to relinquish such shares in the said company; and thenceforth he or she shall cease to have any interest in, and be freed from all future liability in respect of,

the said company: provided that no such relinquishment shall be of any effect, unless and until the shareholder so relinquishing his or her shares shall have satisfied all his or her then existing liabilities to or in respect of the said company."

The question for the decision of the court of appeal, is,—whether the said rule to shew cause ought or ought not to have been made absolute.

If the court should be of opinion that the said rule ought to have been made absolute, the said verdict for the plaintiff was to be set aside, and instead thereof a verdict entered for the defendants. If the court should [586] be of opinion that the said rule was properly discharged, the said verdict was to stand.

The appeal came on to be heard in the Exchequer Chamber on the 9th of May, 1857, the judges present being, Coleridge, J., Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., and Channell, B.

J. H. Hodgson (with whom was Byles, Serjt.), for the defendants, the appellants. The main point is, whether there was any evidence to fix Willingale and Weatherley. It was incumbent on the plaintiff to shew that the money sought to be recovered was received by all the defendants. Now, as to Willingale, there is no evidence at all. He never was present at any meeting of the directors: the only circumstance which can at all affect him is the prospectus, which seems to have been issued with his authority. The mere fact of his name appearing as a director in the prospectus, clearly does not render him liable The argument and the decision on this point in the court below rest upon the fact that the prospectus directs the payments to be made to Lubbock & Co. as the bankers of the company, and that the bankers gave a receipt for it as for money received on account of the company; Willes, J., in particular, observing that it was matter of indifference in whose names the account was kept in the books of the bankers. Assuming but not admitting that to be so, it still leaves untouched the question as to who constituted the company. The facts in *Burnside* v. *Dayrell*, 3 Exch. 224, 6 Railway Cases, 67,—which was not cited in the court below,—are remarkably coincident with those of the present case. There, an allottee in a projected railway company had paid his deposit into the bank named in the prospectus, which had been circulated by the defendant's sanction, his name appearing therein [587] as one of the provisional committee, and as chairman of the committee of management; but the defendant had not personally superintended the allotment of shares, and had taken no active part in the concern, and had been present once only at any meeting, when he acted in the capacity of chairman, but dissented from the proceedings: and it was held, in an action by the plaintiff against the defendant for the recovery of his deposit, on the abandonment of the scheme, that the defendant was not liable. [Martin, B. Did the court there suggest by whom the money was received?] No. In giving judgment, Pollock, C. B., says: "The defendant can only be liable because he was the person, or one of the persons, to whom the deposit was paid. There was no evidence that such was the case in the present instance. The defendant never acted at all, except by once attending a meeting as chairman, and by concurring in the circulation of the prospectus. The attendance on the 3rd of November has nothing to do with this part of the case: the prospectus only points out the course to be pursued by the parties desirous of getting shares, namely, by application to the provisional committee. If, acting on this, the plaintiff applied to A., B., and C., three members of the provisional committee, and deposited the money with them, this might bind the defendant to permit the plaintiff to be a member of the company when formed, but it does not make the defendant liable for money not paid to him, when the project has failed. The plaintiff must recover back his money from the parties to whom it was paid. Although the money was paid to the bankers named in the prospectus, it was not paid to the use of the defendant, nor was there any proof that the defendant ever received or could have received any part of it. There was no evidence that he was one of the persons in whose name the account was opened with the bank where the money [588] was kept." There is no difference, as far as the defendant is concerned, between the case of money received by other members of the provisional committee, and goods furnished by order of other members of the committee. The parties paying the money must look to those to whom they paid it, as tradesmen furnishing goods must look to the parties by whom they were ordered, or, if credit was given, they must prove that it was with the sanction of those whom they seek to charge." [Martin, B. That case was decided just after the turning of the tide in the provisional committee cases.] It has never been overruled. [Erle, J., referred

to *Wontner* v. *Shairp*, 4 C. B. 404. Bramwell, B. To whom is the plaintiff's letter of application for shares addressed?] To the committee of management. [Coleridge, J. Of whom Willingale is one. Bramwell, B. Willingale issues a prospectus in which he is called a director. Surely that is primâ facie evidence that he is a director (*a*). Coleridge, J. The receipt of the money **[589]** by the bankers is a receipt on account of the company. Bramwell, B. Suppose the money had been paid at the office of the company, five only of the directors being present,—would a payment to those five be a payment to all the directors?] No doubt, it would be assumed to have been received by all. [Martin, B. It is immaterial to whom the money is paid, provided it was paid in the manner directed by Willingale.] There was no evidence that Willingale ever sanctioned the issuing of the letter of allotment. As he never acted, and the account to which the money was paid was not in his name, it is submitted there was no evidence to shew that the money was either expressly or impliedly received by him.

Then, as to the other point. It cannot be disputed, that, in general, one who takes shares in a public company which is to consist of a given number of subscribers and amount of capital, may repudiate the transaction unless the whole amount is raised: but, where the party knows at the time he subscribes his money that the undertaking is to be proceeded with at once, notwithstanding that a part only of the shares are disposed of, the case is different. Here, the plaintiff learned from the prospectus that the mine was in actual work; and he must have known that his money would at once be applied, for, unless the mine continued to be worked, and royalties to be earned, the mine would be forfeited. [Bramwell, B. The important in-**[590]**-quiry is, not whether the mine was at work, but whether the company was formed. How soon may a company be said to be formed? As soon as three or four people have been induced to part with their money?] At all events, the scheme is not to be deemed abortive until a reasonable time for the formation of the company has elapsed. The application for shares was made on the 21st of April, 1853. The prospectus shews that the company was then established. It was in evidence that it is usual in the case of cost-book companies to begin with less than the whole amount of the nominal capital paid up. *Nockels* v. *Crosby*, 3 B. & C. 814, 5 D. & R. 751,—which will probably be cited on the other side,—was the case of a tontine, where all the subscriptions must necessarily be paid up before the association can begin its operations. [Martin, B. Do you contend that there should be a new trial on the ground that the question was not properly submitted to the jury? or, that there was no evidence to go to a jury? And, are we to draw inferences of fact?] It is submitted that the question should have been left to the jury. [Coleridge, J. What do you say should have been left to the jury upon this point?] Whether the plaintiff did not authorize the application of his money to the purposes of the concern, notwithstanding that all the shares had not been allotted. [Coleridge, J. It seems (from the report of the case in the court

(*a*) See *Drouet* v. *Taylor*, 16 C. B. 671. A company was projected for the working of mines in Belgium. A prospectus was printed, describing the objects of the association, naming A., B., C., and D. as directors, and Messrs. Martin, Stone, & Co. as the bankers of the company, and stating that "the deposits would be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of the company." In an action by an allottee of 500 shares, to recover back, on the abandonment of the project, the 250l. paid by him thereon to Martin, Stone, & Co., the plaintiff, in order to shew D. to have been a director, proved that he was seen ten or twelve times at the offices of the company, and twice in the directors' room; that he took some of the prospectuses for the purpose of circulation amongst his acquaintance; and that his name appeared, with the others, at the head of the company's account with the bankers. The plaintiff also put in the bankers' pass-book, containing entries of receipts of cash on account of the company; but there was nothing to identify any part of it as the 250l. paid in by the plaintiff. The pass-book was received, as being evidence because proved to have been seen in the hands of C., one of the defendants:—Held, by the Exchequer Chamber, that the pass-book was no evidence against D., there being no proof of the account having been opened in his name, with his consent, or subsequent acquiescence; and that there was no evidence to go to the jury that D. was a director at the time that the plaintiff paid the 250l. to Martin, Stone, & Co. And see 14 C. B. 487.

below) that the Lord Chief Justice told the jury that the circumstance of this being the case of a company for working a mine on the cost-book principle, did not take it out of the ordinary rule: and that direction is not now complained of.] The case proceeded upon that assumption, which, it is submitted, is an erroneous one. [Coleridge, J. For anything that appears before us, the Lord Chief Justice may have left the case to the jury precisely in the way in which you now insist it ought to have been left.] **[591]** The case of *The Great Cambrian Mining and Quarrying Company*, 2 Kay & J. 253, is a strong authority to shew that the plaintiff here has no cause of action. There, a mining company by its prospectus and certificates professed to be a company in 30,000 shares of 1l. each, to be conducted upon the cost-book principle: the directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so soon as one third of the shares should have been subscribed; and, by another, that no person should be recognised as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and been duly registered in the cost-book as an adventurer: W. H., having seen the prospectus, but not the rules, applied verbally and paid for and received certificates of shares in the company: the certificates stated that the shares were to be held subject to the rules of the company: the company failed: W. H. a year after he received the certificates brought an action to recover back his money, and the action was compromised: it was held, that, although W. H. had not signed the rules, still, having applied and paid for and accepted the certificates of shares, he had authorized the company to register his name in the cost-book without his signing the rules; that the contract was complete; and that he was a "contributory."

J. Brown (with whom was Douglas Brown), contrà. If the learned judge who tried the cause had been asked to leave it to the jury whether the case was varied by the circumstance of this being a cost-book mining company, he would have done so. The point, however, was, with the assent of both sides, reserved as a point of law for the consideration of the court. [Martin, B. How do we know, as a matter of law, what **[592]** a cost-book mine is?] Vice-Chancellor Wood, in the case of *The Great Cambrian Mining and Quarrying Company*, expressly says that rules peculiar to the cost-book system must be proved. And the like was ruled in *Barstow* v. *Reynolds*, 24 Law Times, 83, 118, 278. [Crompton, J. We are bound by the grounds stated in the rule, upon which the judgment of the court below proceeded.] The authorities are clear, that a party does not become liable as a contributory merely by reason of his applying for shares and paying the deposit, unless the company is actually formed in accordance with the terms of the prospectus. It is said that the present case is taken out of the ordinary rule, because the plaintiff must have known when he subscribed his money that the mine was to commence working at once. That, however, is a fallacy. The prospectus shews that the mine was being worked by the former proprietors; and that the capital required for the formation of the company was 12,000l. In *Hutton* v. *Thompson*, 3 House of Lords Cases, 161, 192, where the question was whether a party who had applied for shares and paid a deposit in a company which was provisionally registered, but was never finally established, was liable as a contributory, the Lord Chancellor said: "The case of *Nockels* v. *Crosby*, 3 B. & C. 814, 5 D. & R. 751, long ago decided that the preliminary expenses of an abortive scheme must be borne by the projectors, and cannot be thrown upon those who agreed to become shareholders in a projected company which was never established." That has been acted upon over and over again. So, in *Ashpitel* v. *Sercombe*, 5 Exch. 147, 162, Patteson, J., in delivering the judgment of the Exchequer Chamber, says: "There seems to be no doubt that the plaintiff, having paid his money for shares in a concern which never came into existence, or a scheme which was abandoned before it **[593]** was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to his use, unless he can be shewn to have consented to or acquiesced in the application of the money which the directors have made." Then it is said that there was no evidence to fix Willingale with the receipt of the money, his name not appearing at the head of the account at the bankers': and *Burnside* v. *Dayrell*, 3 Exch. 224, 6 Railway Cases, 67, was relied on. That case, however, is inconsistent with *Moore* v. *Garwood*, 4 Exch. 681, which more nearly resembles this case. There, the deposit was paid into one of the banks mentioned in the prospectus of the company, on account of the company, and to their credit, the defendant being a member of the managing and also of the pro

visional committee: and, upon application by the plaintiff for a return of his deposit, he received from the attorney of the company an answer to the effect that arrangements for that purpose were being made; and it was held, that there was evidence that the money was had and received by the defendant. [Erle, J. The account here was kept in the names of five of the directors only. Crompton, J. Parties paying in money would suppose they were paying it to the credit of the company, though, for their own purposes, they chose to keep the account in the names of a certain number of directors only.] The prospectus, which was issued by all the directors, contains an express authority for the payment of deposits to the credit of the company with the bankers. And by the rules of the company, the general control over the funds at the bankers' is given to all the directors,—see rule 12.

Hodgson was heard in reply.

Cur. adv. vult.

[594] COLERIDGE, J., now delivered the judgment of the court:

This was an appeal from the judgment of the court of Common Pleas upon a rule to enter a verdict for the defendants; and the rule was granted on two grounds,—first, that, in the case of a cost-book company, the plaintiff is not entitled to recover the price of his shares, or his deposit, if all the shares have not been subscribed for,—and secondly, that there was no evidence against two of the defendants, Willingale and Weatherley.

The court of Common Pleas discharged the rule; and, it having been granted on those two grounds, we are limited to the consideration of those only, and are of opinion that the defendants failed on both, and that the court therefore rightly discharged the rule.

Upon the first,—the general rule appears to be admitted, and the defendants contend only, that, the company being formed on the cost-book principle, it does not apply. The question then arises, on what contract did the depositors' or subscribers for shares in fact pay their money? Was it not that the receivers should hold it to be applied to the purposes of the projected company if, and when, it should be fairly established? and, if it should not be established, to be returned to them? In other words, that, in the event of the non-establishment, and in the absence of authority to employ it in the meantime otherwise, it should be held to the use of the parties paying it in? The shares not being taken is one great and common cause of the failure to establish such companies; though it does not follow, in the extreme case put in the argument, that a concern should necessarily be deemed abortive, because one or two, or proportionably a few less than the stipulated number of shares should be taken, and the company goes on notwithstanding. Here, a great proportion of the shares were not taken: and the concern was in fact aban-**[595]**-doned. There would, therefore, have been ample evidence in an ordinary case to warrant the jury in finding that the state of facts had arisen on which the deposits ought to be returned. Now are we aware of anything in the cost-book principle which ought to affect this conclusion? It is true that the mine had been at work some years ago, and also that the proprietors from whom the company at the time of issuing the prospectus had agreed to purchase it, were at the date of such agreement in the course of mining operations, or the preparation for them: but it does not therefore follow that the subscribers must be taken to have authorized the directors to expend their money in continuing such operations, so long as the share-list remained to a considerable extent unfilled, and while it was uncertain whether it would ever be filled up, and the concern really established. This, however, was for the jury.

On the second question, we think that the prospectus issued by the authority of all the defendants, and the rules and regulations, were evidence against all that money for shares might be properly paid to the bankers named in the prospectus, and in the rules and regulations, as the agents of the directors. These bankers gave receipts as for the company: and, though they entered the moneys received to an account in the names of particular directors, this could not affect the right of the parties paying them in. That was an act between the bankers and the directors subsequent to the paying in, with which those who paid in had no concern. We think, therefore, that the defendants were responsible to the depositors for the moneys so paid in. On both grounds, therefore, we think that the judgment should be affirmed.

It is right to state that my Brother Wightman must not be understood as taking part in this judgment.

Judgment affirmed.

[596] SAMPSON *v.* HODDINOTT (*a*). Nov. 28th, 1857.

Error upon a judgment of the court of Common Pleas,—ante, vol. i., p. 490. Judgment affirmed (without argument), by consent.

[597] SHEEHY *v.* THE PROFESSIONAL LIFE-ASSURANCE COMPANY. Nov. 28th, 1857.

[S. C. 27 L. J. C. P. 233; 4 Jur. N. S. 27; 6 W. R. 103. Approved, *Royal Mail Steam Packet Company* v. *Braham*, 1877, 2 App. Cas. 387. Distinguished, *Dennis* v. *Leinster Paper Company*, [1901] 2 I. R. 348.]

The 43 G. 3, c. 53 (Irish), s. 8, provided that, whenever it appeared to the court out of which the process issued that all due diligence had been used to have the process personally served, yet that, under the special circumstances, appearing to the court by affidavit, it was impossible to procure personal service, it should be lawful for the court to substitute such other kind of service as to them should seem fit.—The 8th section of the 13 & 14 Vict. (Irish) c. 18, in the case of corporations, provides for service upon corporate bodies having a known and responsible officer or agent, by serving such agent, and authorizes the plaintiff, in default of appearance by the defendants, upon affidavit of such service, and of the publication of a notice of the issuing of the writ in the *Dublin Gazette* and in a local newspaper, to enter an appearance and proceed.—And the 9th section enables the court or a judge, where it is made to appear that the defendant has not been personally served, and that due and proper means were used to serve the writ, "or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent, or has removed to avoid service, or on any other good and sufficient grounds," to authorize such substitution of service through the post-office, or in such manner as to them or him shall seem fit.—A writ of summons issued out of the court of Queen's Bench in Ireland, after the passing of the last-mentioned act, against an incorporated joint-stock company registered and carrying on business in London, and also carrying on business by one R., an agent, in Dublin, was, under an order of the court for substituted service, served by delivering a copy, with a copy of the order, to the Dublin agent, R., and by sending similar copies by post, addressed to the company's agent at their office in London. An appearance was afterwards, by leave of the court, entered upon such service, and judgment signed against the company:—Held,—affirming the judgment of the court of Common Pleas,—that an action might be maintained upon such judgment in the courts of this country; there being nothing to shew that it was contrary to natural justice, or pronounced without jurisdiction.

Error upon a judgment of the Exchequer Chamber, affirming a judgment of the court of Common Pleas, in an action upon a judgment of the Queen's Bench in Ireland,

(*a*) The defendant being the moving party, the names of the plaintiff and defendant in the proceedings in error, in this, as in the next case, were reversed. The reporter has, however, thought it more correct to describe the cause by its original title, the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 148,—having abolished writs of error, and declared that "the proceeding to error shall be a step in the cause."

The same inconvenient uncertainty prevails in practice with regards to appeals under the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125, ss. 34 et seq. Sometimes the original title of the cause is preserved throughout, whichever side may be the appellant, as in *Roberts* v. *Eberhardt*, ante, p. 482, and *Hickman* v. *Cox*, ante, p. 523, and sometimes the names of the parties are reversed.

The case which started in the court below as *Hickman* v. *Cox and Wheatcroft*, became in the House of Lords "*Wheatcroft* and *Blackwell and Smith*," the parties having arranged to take the opinion of the court of ultimate appeal in another case arising out of the same deed, which involved a claim for goods sold and delivered as well as upon a bill of exchange.

The more convenient course in these cases obviously would be, to intitule them as all other appeals have usually been intituled, "*Eberhardt*, *Appellant*, *Roberts*, *Respondent*," for instance.

and also for costs of an order made in the suit there,—the original action being brought upon a policy effected with the defendants as hereinafter stated.

In January, 1852, the defendants, a joint-stock company duly registered pursuant to the statute 7 & 8 Vict. c. 110, carried on the business of life-assurance in London under the style of the Professional Life-Assurance Company, their principal office being at No. 76 Cheapside, London, where one Edward Baylis was their manager, secretary, and actuary. They likewise had an agent in Dublin, named Ramsay, who was employed to obtain life-assurances for them there.

On the 15th of January, 1852, the plaintiff commenced an action against the company in the court of Queen's Bench in Ireland, upon a policy of insurance effected [598] with them through their Dublin agent, and on the same day a copy of the writ of summons was served upon Ramsay by one Egan, a messenger. No notice of the issuing of that writ was ever given or inserted in the *Dublin Gazette* or in any of the local newspapers in the county, city, or district in which the defendants resided or carried on business, or in which Ramsay resided or carried on business, as required by the 13 & 14 Vict. c. 18, the act then in force for the regulation of process and procedure in Ireland.

On the 16th of January, upon the motion of the plaintiff, founded on an affidavit of service by Egan, an order was made by the court of Queen's Bench in Ireland, that service of the writ upon the defendants, by delivering a copy of the writ and of the order to Ramsay, and sending copies thereof through the post to the London agent, should be deemed good service.

On the 19th of January, Egan served papers purporting to be copies of the writ and order (but which papers in fact were not true copies, the word "Life" being omitted therefrom respectively in the description of the company) upon Ramsay, and sent true copies of the writ and order through the general post, in a letter addressed to Baylis at the company's office in London.

On the 29th of January, upon an affidavit by Egan of the due service of the writ and order, an order was made by the Irish court that the plaintiff might enter an appearance for the defendants, therein described as "The Professional Assurance Company." An appearance was accordingly entered by the plaintiff; and, on the 4th of February, a declaration was filed, and on the 16th judgment was signed for want of a plea.

On the 21st of February, an application was made on behalf of the defendants to the court of Queen's Bench in Ireland, to set aside the appearance and declaration, on the ground of irregularity: but the rule was refused, with costs.

[599] This action was commenced on the above judgment, and on the order for costs, on the 18th of December, 1852. The defendants pleaded never indebted, and also a special plea alleging that they never were served with process in the original action, that the appearance was irregularly entered for them by the plaintiff, and judgment signed against them when they were not within the jurisdiction of the Irish court, and had not been served with any summons or process to appear to the action. To this plea the plaintiff replied the order for substituted service, and the service under it. The defendants rejoined that they were at the time the order was obtained a corporation aggregate within the intent and meaning of the 13 & 14 Vict. c. 18, and that the order was obtained upon an affidavit representing that Ramsay was an agent of the company within the act, whereas in fact he was not such agent. The plaintiff surrejoined, setting forth the affidavit and the order for substituted service, and averring that the affidavit was true. To this the defendants demurred; and they also joined issue.

The demurrer was argued in the court of Common Pleas, in Trinity Term, 1853, before Jervis, C. J., Maule, J., Cresswell, J., and Williams, J., when judgment was given for the plaintiff, on the ground that the plea did not shew that the defendants had not notice of the writ. See the report, 13 C. B. 787.

The issues of fact came on for trial at the sittings after the same term, when the facts were stated in a special verdict, which came on for argument in the court of Common Pleas in Trinity Term, 1857; and the court, after time taken to consider, gave judgment for the plaintiff on the first count, and for the defendants on the second. See 2 C. B. (N. S.) 211.

The defendants thereupon brought error in the Exchequer Chamber, and the case now came on for argu-[600]-ment before Coleridge, J., Erle, J., Martin, B., Crompton, J., and Watson, B.

The grounds of error were,—"That the judgment declared on was irregularly obtained in the court of Queen's Bench in Ireland, and was a nullity as against the defendants,—that the defendants were not properly served with the writ or a copy of the writ of summons issued in the action in which the judgment was signed in Ireland,—that the name of the company in the writ of summons so issued differed from the registered name of the defendants,—that Ramsay was not such an agent of the company in Ireland as the act of 13 & 14 Vict. c. 18, for the regulation of process and practice in Ireland contemplated, upon whom a writ of summons issued against the defendants could be served,—that Baylis was not and is not shewn to be or to have been the 'London agent' of the company mentioned in the order of the court of Queen's Bench in Ireland of the 16th of January, 1852,—that it does not appear that any copy of the writ of summons issued in the Irish court, or of the order of the court, was ever served upon or ever reached Baylis, or the London agent of the company,—that the order of the court of Queen's Bench in Ireland, of the 16th of January, to substitute service, was not intituled or made in the action there pending against the defendants,—that no copy of the writ of summons was served upon Ramsay, pursuant to the order of the 16th of January, 1852—that no appearance was properly entered for the defendants in Ireland,—that there was not and had not been any sufficient or any notice of the issuing of the writ of summons in the *Dublin Gazette* and one local newspaper, as required by the act—that there was no affidavit of any such notice as required by the 8th section of the statute,—that there was not and is not any such judgment against the defendants, and binding upon them in this action, [601] as mentioned in the first count,—that no action lies upon the order or rule declared on in the second count of the declaration,—that there was no rule or order made against the defendants in their registered name, or at all, so as to bind them,—that the 9th section of the act does not apply to a corporation at all, and at all events not to a corporation out of Ireland,—that the 8th section of the act does not apply to proceedings against the defendants' company,—that the defendants' company is not a company or corporation within the jurisdiction of the court in Ireland,—that there was not and is not any such secretary or officer of the defendants as contemplated by the 8th section of the act above referred to,—that there could be no service on any such officer within the meaning of that section,—that the 43 G. 3, c. 53, is not applicable to this case, and the judgment in Ireland cannot be sustained by virtue of such act,—that the court of Queen's Bench in Ireland had no jurisdiction to authorize an appearance to be entered for the defendants, nor had that court jurisdiction to give judgment against the defendants, or to make such rule or order as in the declaration mentioned,—and that, even if they could have had such jurisdiction under the act referred to, there were conditions precedent to such jurisdiction, which had not been complied with or observed."

Bovill, Q. C. (with whom was Byles, Serjt.), for the defendants. The main question arises upon the issue on never indebted. The judgment upon which this action is brought is obtained against the defendants, a corporation established in London, where they have an office and an agent. It appears also by the special verdict that the defendants carried on business likewise in Dublin, where they had an agent named Ramsay. A writ of summons having issued against the defend-[602]-ants in the court of Queen's Bench in Ireland, the service was effected by delivering a copy to Ramsay, the agent in Dublin, and by sending another copy by the general post addressed to Mr. Baylis, the agent of the defendants in London, at their principal office. No notice of the issuing of the writ was given in the *Dublin Gazette* or in any local newspaper of the city or district where the agent resided: but an order of the court was obtained declaring that the above should be deemed good service of the writ upon the company. And upon that order an appearance was entered for the defendants, and judgment signed. The question is, whether that is a valid judgment, binding upon the defendants in this country. Now, it is an indisputable principle of law, that no court can by its own inherent power acquire any jurisdiction beyond the limits of the territory in which it is established. Even the legislature of the three kingdoms cannot create a jurisdiction over subjects beyond their limits. It may, indeed, provide for the service of process on persons abroad; and a judgment obtained upon such service may be of force and efficacy against persons and property within the jurisdiction: but it can have no extra-territorial jurisdiction: See Story's Conflict, §§ 539, 556, 557. [Martin, B. If you say that the judgment is a nullity, I can

understand you.] The first proposition contended for is, that there can be no jurisdiction beyond the territorial limits, by means of a service such as this. On the other hand, it will be insisted that the Irish court has acquired a jurisdiction over this corporation either by virtue of its own practice or by one or other of two statutes,—the 43 G. 3, c. 53, or the 13 & 14 Vict. c. 18. It was contended on the argument in the court below that the last-mentioned statute repealed the former: but the court gave judgment for the plaintiff on the ground either that the 8th section of the 43 G. 3, c. 53, **[603]** was not repealed by the 9th section of the 13 & 14 Vict. c. 18, or that the 9th section was complied with. The case, it is submitted, is not within either statute. The object of the 43 G. 3, c. 53, as declared by the preamble, was, to assimilate as far as might be the process of the Irish courts to that of the superior courts of this country: and the 8th section enacted, "that, whenever it appeared to the court out of which the process issued, that all due diligence had been used to have the process of the court personally served, yet that, under the special circumstances of the case, appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to procure personal service, that then and in such case it should and might be lawful for the court out of which the process issues, to substitute such other kind of service as to them should seem fit." In the first place, it is submitted that that provision has no application to corporations at all. A corporation could not be served personally: the only mode of enforcing its appearance to process was by distringas: and that mode failed where the corporation had no land or goods within the jurisdiction. The Irish courts seem to have assumed that the 8th section of the 43 G. 3, c. 53, did apply to corporations: but the practice will not enlarge the language of the act of parliament. The question of the power of the Irish courts to order substituted service was much considered in the case of *Phelan* v. *Johnson*, 7 Irish Law Rep. 527. Lord Chief Baron Brady, in giving judgment, refers to the statutes then in force for regulating the service of process in England, 12 G. 1, c. 29, and 5 G. 2, c. 27, and says,—"No powers are given by those statutes to substitute the service of process; in other respects, they are analogous to the 43 G. 3, c. 53; but the first of them contains very remark-**[604]**-able words. It provides, that, in all cases where the cause of action shall not amount to the sum of 10*l.* or upwards, and the plaintiff shall proceed by way of process against the person, he shall not arrest the defendant, but shall serve him personally, within the jurisdiction of the court, with a copy of the process. So that, in that act, there is no power to substitute service; and it is expressly required that the service be made within the jurisdiction. That being the condition of the law in England, the 43 G. 3, c. 53 (Irish), is now to be considered. It is analogous to the 12 G. 1 and the 5 G. 2 (English) so far as those acts prohibit arrest for sums under a specified amount, and in the mode of enforcing appearances. The 3rd section of the 43 G. 3, c. 53, is that which corresponds with the 2nd section of the 12 G. 1, c. 29; but it omits those remarkable words, 'within the jurisdiction of the court.' And that appears to have been done studiously. It is an omission deserving of great observation, and calculated to raise serious questions as to what were the purposes of the legislature in passing the 43 G. 3. Consequent on that omission, there is in the 43 G. 3 a special provision which exists in none of the English acts, viz. the 8th section, which authorizes the court to substitute service of the process. I apprehend that for the last forty years,—I may say, from the passing of that act,—there has been a current of decision, in this court, at least, which I conceive has put this construction upon this act of parliament, that it warrants the substitution of service upon a party not bodily present in this country." This court, it is conceived, will hardly go along with the Chief Baron in that He then goes on —"In cases of actions upon policies of insurance, service of process has been from time to time substituted upon persons acting as agents of the insurance company, and making this contract for them; and that course of practice, hitherto undisturbed **[605]** by any authority or legal proceeding, has continued: establishing the existence of a power in the court to act in substituting service of process upon persons not bodily present within the jurisdiction. So that it occurs to me, that, taking the course and practice of this court as one long established, it really comes to no more than a question of discretion how far the court will exercise the power given to it by the act; and I think it has not unwisely considered that it had this power, having regard to the omission of those remarkable words in the 43 G. 3, and the introduction

of the clause authorizing the substitution of service into it. How far that modification of the English acts was made in the 43 G. 3, by reason of the peculiar circumstances of this country, is not for me to consider. I may think it was designed to meet the circumstances of the country; but it is sufficient to say that there is no unsubstantial ground for the opinion that the court originally was right in assuming that the act gave them jurisdiction to substitute service on persons not bodily within the jurisdiction." That was not, like this, the case of an attempt to enforce a judgment so obtained out of Ireland: and the Chief Baron at the end of his elaborate judgment has this important qualification,—"How far the plaintiff may make any judgment he may obtain in this case available, or whether he can make it available elsewhere than in Ireland, is not for us to consider: but, regard being had to the decisions in England with respect to foreign judgments, I think it would be difficult for the defendant to contend successfully that a judgment here would not bind him there." And undoubtedly it would, if the case were brought within the words of an act of the imperial legislature. [Martin, B. Do you contend that this proceeding was a nullity?] Yes. The case of *The Bank of Australasia* v. *Nias*, 16 Q. B. 717, shews that, in an action on a foreign or colonial **[606]** judgment, the judgment is examinable for the purpose of shewing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, though it is not examinable upon the merits, as, for the purpose of shewing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. It all comes to a question of jurisdiction. [Coleridge, J. The 43 G. 3, c. 53, assumes that the jurisdiction exists; it merely professes to regulate the practice of the court.] To make this a valid judgment, it must be shewn that the provisions of the statute have been strictly complied with; and this cannot be done. For instance, the 8th section requires that the special circumstances which are to set the court in motion shall be made to appear by the affidavit of the plaintiff, or his attorney, or the attorney employed for the purpose of having the process personally served: and that provision was not complied with here; for, the only affidavit produced was that of a common process-server. The words "as to them shall seem fit," do not impower the court to authorize a service in a foreign country. The 13 & 14 Vict. c. 18, virtually repealed and put an end to the powers and provisions of the 43 G. 3, c. 53, at all events as to the new process established by that act. The title of the act is, "An act for the regulation of process and practice in the superior courts of common law in Ireland:" and the preamble states that "the process now in use for the commencement of personal actions in Her Majesty's superior courts of common law in Ireland is, by reason of its variety, multiplicity, and fiction, inconvenient and objectionable, and it is expedient, for the better administration of justice, to establish uniformity of process and practice in the said courts." It is impossible in the face of that to say that all the old statutes and ancient practice as to service of process, are **[607]** still existing. [Crompton, J. Appearance sec. stat., for instance.] Just so. The new act contains various provisions for "substituted service." In Dwarris on Statutes, 2nd edit. p. 477, it is said: "It is, as a maxim, generally true, that, if an affirmative statute which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." For this the author cites *Slade* v. *Drake*, Hobart, 298, *Wethen* v. *Baldwin*, 1 Sid. 55, 56, *Rex* v. *Sparrow*, 2 Stra. 1124, and 2 T. R. 395. Now, here, the recital of the 13 & 14 Vict. c. 18, virtually sweeps away all the old process, and all former statutory provisions applicable to it. The 2nd section provides for the ordinary case of service, which must be personal, and within the jurisdiction of the court. The 7th section provides for the entry of appearance, where the defendant has been served personally. Then comes the 8th section, which proposes to make provision for the service of process upon incorporated bodies and the like, and which in substance and in terms applies to the case now before the court: and that requires a notice of the issuing of the writ to be given in the *Dublin Gazette* and in a local newspaper. The argument on the other side is, that, notwithstanding that express provision, the 43 G. 3, c. 53, s. 8, is still in existence, and authorizes the court to substitute service in any manner and in any place they may think proper. It is conceded that the case is not within the 13 & 14 Vict. c. 18. [Coleridge, J. Here is a corporation, residing, as far as a corporation can reside, out of the jurisdiction of the court, but having a known responsible agent within the jurisdiction, through whom

they can be properly served. Suppose there has been no personal service, but application is made to a judge at Chambers to authorize substituted service, and a question arises as to [608] whether or not there has been a sufficient notice given in the *Gazette*, and the judge improperly decides that there has been, and directs an appearance to be entered; and suppose that order was brought for review before the Irish court, and they improperly upheld it: could all that be ripped up in an action upon the judgment in this country?] It is submitted that it might. [Erle, J. Do you contend that this judgment was erroneous and reversible in Ireland? or was it a mere irregularity?] It is altogether a nullity: it proceeds upon an assumption which has no foundation in fact, viz. that the requirements of the statute have been complied with. [Erle, J. Where jurisdiction depends upon a fact, the question whether a court can give itself jurisdiction by finding the fact, is one I have never seen decided.] The court of Common Pleas decided that the case was either within the 9th section of the 13 & 14 Vict. c. 18, or within the 43 G. 3, c. 53. There is nothing, however, in the former enactment which applies to corporations: it could only be intended to apply to persons capable of being served personally: if it embraced corporations, it would virtually repeal the 8th section. This difficulty was attempted to be got over by a reference to the interpretation clause, s. 51: but the words in s. 9, are not "party" and "person," but "defendant." Upon this point, the court below express no opinion,—Cresswell, J., in delivering judgment, observing, that, "if it had been necessary to the maintenance of this action to say that the 9th section gave the court power to order substituted service in this case, there would probably have been some difference of opinion on the bench." [Coleridge, J. You are inviting us to consider whether that which was done in the Irish court was rightly done there. If this had been the case of an individual residing in Ireland, instead of a corporation carrying on business here, the question would have been [609] the same. Could the individual in that case have set up the absence of natural justice, in an action brought upon the judgment here? Erle, J. I have always understood that the only ground upon which our courts can refuse to give effect to a foreign judgment is, that the whole foundation of the proceeding in the foreign court fails.] The contention here is, that the whole foundation for this judgment fails, because the court of Queen's Bench in Ireland had no jurisdiction. [Watson, B. The question is whether the proceeding is contrary to natural justice.] Story, in § 539, says: "Vattel (B. 2, ch. 8, § 84) lays down the true doctrine in clear terms. 'The sovereignty (says he), united to domain, establishes the jurisdiction of the nation in its territories or the country which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.' On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." And Parke, B., in *Jefferys* v. *Boosey*, 4 House of Lords Cases, 815, 926, says: "It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and, when legislating for the benefit of persons, must primâ facie be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect."

Shee, Serjt. (with whom were J. A. Russell and Fin-[610]-lason), contrà (*a*). The

(*a*) The points for argument on the part of the plaintiff were as follows:—

"1. That the original judgment cannot be deemed a nullity, unless it appear clearly that it was obtained in a manner contrary to natural justice; and that this by no means appears, for it does not appear that the defendants had not notice and knowledge of the writ before the judgment, nor that they were not actually served with it in time to appear:

"2. That it sufficiently appears that the defendants had notice of the writ, and were actually served with it in time to appear thereto before the judgment was signed:

"3. That, according to the common law of England and Ireland, such service as it appears took place could at the worst be only irregular; so that the judgment would,

only question for the consideration of the court now is, whether the substituted service authorized by the Irish court was so defective and nu-**[611]** gatory that a judgment founded upon it is contrary to natural justice, and incapable therefore of being made the foundation of an action in the courts of this country. The answer to the objections which have been urged on the other side is threefold, — first, that the proceedings in the Irish court were in strict conformity with the 13 & 14 Vict. c. 18, s. 9, — secondly, that they were good at common law, independently of any statutory provision, — thirdly, that the grounds of the judgment are not examinable here at all. 1. The statute contemplates and provides for three cases, — one, where an appearance may be entered, under s. 7, on the defendant's default where he has been served personally; and this is a mere re-enactment of the law as it stood before, — the second, under s. 8, where the defendants are a corporation or aggregate body in Ireland, who are to be served through a known officer or agent; and, in that case, to make the service good, a notification of the **[612]** issuing of the writ is to be given in the *Dublin Gazette* and in a local newspaper, and the third, under section 9, which contemplates two conditions of things, one applicable to cases where the defendant (including corporations) is within the jurisdiction, the other where the defendant is out of the jurisdiction and can be properly served through an agent, or has removed to avoid service. The present case falls within the second category. On these, or "on any other good and sufficient grounds" (of which the court alone is to judge), it may authorize a substitution of service in such manner as it shall think fit. It is true that "defendant" is the only word used in describing the party to be affected by the service. But the interpretation clause provides that "any words importing the singular number or the masculine gender only shall be understood to include several persons as

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unless such service were set aside for irregularity, be valid; and that, whether it could be so set aside, was a matter merely of practice, which it must be presumed was decided according to the course and practice of the court in Ireland, and on which there is by law no appeal to the courts of this country:

"4. That, even supposing it necessary, in order to sustain the judgment, to have recourse to the statute referred to, whether Ramsay was an 'agent' within its meaning and effect, was a question of fact properly determinable by the court in Ireland, and which it appears was determined by that court, and which it must be presumed was rightly determined:

"5. That, even if the court can see that the question was wrongly determined, it appears that it was a mere matter of irregularity, not affecting the validity of the judgment:

"6. That it appears that the defendants did by their counsel and attorney actually appear in the court in Ireland, and apply to set aside the judgment on the ground that notice of it had not been published in the *Gazette*, and did admit that they had been in fact served with, or had notice and knowledge of, the writ in time to appear thereto according to its exigency:

"7. That all the matters relied on by the defendants are matters of mere irregularity of which they cannot now take advantage, and were not conditions precedent to the validity of the service or judgment:

"8. That Ramsay was an agent of the company within the meaning of the statute, upon whom service might be made:

"9. That Baylis was a manager or agent of the company upon whom service might be made, and that his having been served out of the jurisdiction of the Irish court, or by letter, was a mere matter of irregularity, of which the defendants did not when before the Irish court seek to take advantage, and of which they cannot now take any advantage, and that judgment upon such service was valid:

"10. That the company was a corporation within the meaning of the statute, and within the jurisdiction of the Irish court:

"11. That the statute 43 G. 3, c. 53, s. 8, and the 8th and 9th sections of the statute 13 & 14 Vict. c. 18, did apply to the company, and authorize such proceedings as it appears took place, and which it is contended rendered the judgment regular and valid:

"12. That the court in Ireland had jurisdiction to make such orders as it appears they made, and that such orders rendered such proceedings as it appears took place regular and sufficient, and the judgment regular and valid."

well as one person, and bodies corporate as well as individuals," unless it be otherwise provided, or there be something in the subject or context repugnant to such construction. Now, the word "defendants" in s. 8 is expressly intended to include corporations. [He was here stopped by the court.]

COLERIDGE, J. Without expressing any opinion upon a great deal of the argument which has been urged on the part of the defendants,—and certainly, so far as my own individual opinion is concerned, desiring not to be understood as acquiescing in many of the points which have been made,—upon the short point of the interpretation which is to be given to the 9th section of the 13 & 14 Vict. c. 18, I think the judgment of the court of Common Pleas must be affirmed. That section contemplates a case where the plaintiff has not been able so to proceed as to authorize him, without applying for the assistance of the court, to enter an appearance for the defendant. If this had been the case **[613]** of an individual, without taking upon myself to decide whether the Irish court pronounced rightly or wrongly,—a question with which we have nothing at all to do, —it seems to me to be quite clear that that court was acting within its jurisdiction, and having determined it, we have no right to question the propriety of its judgment. The only question really is, whether or not the section I have referred to applies to the case of a corporation. Mr. Bovill has contended very strenuously that it does not: he says that, though by the interpretation clause (s. 51) "person or persons" may include bodies corporate as well as individuals, yet in this section the word "defendant" only being used, it cannot extend to a corporation. Now, we have only to look to the section immediately preceding, to satisfy ourselves that "defendants" must be taken to extend to and include corporations. The word "defendant" is there used directly after a provision in respect to an incorporated body having a known or responsible officer or agent who may be served personally: the section then goes on to provide, that, "if any such defendant," &c.,—clearly comprising amongst others the defendants mentioned in the previous part of the section. Then, if that be so as to section 8, I do not see why we should not hold the word "defendant" in s. 9 also to extend to corporations,—a construction which certainly is more in accordance with good sense and the necessities of the act of parliament than that contended for on the part of the plaintiffs in error. Cases must frequently arise where substituted service becomes necessary as to corporations. That is really the only question we have to determine: for, it is not for us to consider whether the court of Queen's Bench in Ireland rightly or wrongly held substituted service to be admissible. That is a question of mere practice, and not of jurisdiction. For **[614]** these reasons I think the judgment of the court below should be affirmed.

ERLE, J. I concur with my Brother Coleridge in thinking that the judgment of the court of Common Pleas ought to be affirmed. If I had been satisfied that the defendants in the original suit never were in court so as to have an opportunity of being heard in their defence, it might have been necessary to consider whether a judgment pronounced against them was not so contrary to natural justice that it ought not to be held binding and conclusive against them in this country. Before I consent to the reversal of this judgment, I must be satisfied that the Irish court had no jurisdiction, and that its proceedings were contrary to natural justice. Now, so far from the court having acted without jurisdiction, the case seems to me to be precisely one of those for which the legislature intended by s. 9 to provide; and, so far from the proceeding being in my judgment contrary to natural justice, I am not at all prepared to say that I should not have come to the same conclusion that the Irish court came to. The legislature having, in s. 7, provided for personal service in the case of individuals, proceeds in s. 8 to enact that every writ issued against an incorporated body having a known and responsible officer or agent, may be served personally on such agent: and, in the event of non-appearance, the plaintiff may, upon affidavit of such personal service, and upon giving notice in the *Dublin Gazette* and in a local newspaper, enter an appearance for the defendants. Section 9 is an additional provision for cases not before regulated: it enacts that, "in case it shall be made appear by affidavit to the satisfaction of the court in which the appearance to the process should be made, &c., that any defendant,"—which is a word quite wide enough to embrace a cor-**[615]**-poration,—"has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent

or representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorize such substitution of service, through the post-office, or in such manner, and with such extension of time for service and appearance, as to them shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance by such defendant in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had entered his, her, or their appearance, any usage or law to the contrary notwithstanding." These words appear to me to give the court a very large and wholesome jurisdiction to determine in what cases they will in their discretion allow a substituted service, though all the requirements of the statute may not have been strictly complied with. So far, therefore, from thinking that the judgment upon which this action is brought was pronounced without jurisdiction, or contrary to natural justice,—if it were necessary for me to go that length,—it appears to me that there was ample foundation for it, and consequently that there is no ground for impeaching the judgment of the court below.

CROMPTON, J. I am of the same opinion, and upon the same ground. The 7th and 8th sections of the 13 & 14 Vict. c. 18, regulate the mode of proceeding by the plaintiff himself to bring the defendant into court. **[616]** The 7th provides for personal service of process upon an individual. The 8th provides for the case of corporations upon whom personal service in the ordinary way cannot be effected. In both, it is the plaintiff who is, without any leave of the court, to make the regular service under the act: but, when that power is given in the case of corporations, the legislature limit it by requiring, in addition to the affidavit of service on the person to whom the process is given, that a notice shall also be given in the *Dublin Gazette* and in a local newspaper. Then comes the 9th section, which seems to me to be extensive enough to reach the case of a corporation as well as of an individual. When the sufficiency of the service is to be judged of by the court or a judge, there may be very good reason for dispensing with the notice in the *Gazette* and newspaper. Corporations are expressly comprised within the term "defendants" in s. 8; and there is no reason why they should not also be included in s. 9. That section gives the court or judge very general power not only as to the mode of serving defendants, but also as to service on agents or representatives of defendants. It impowers the court or judge, in the most general terms, where it is made to appear "that the defendant resides out of the jurisdiction of the court and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within the jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds," to authorize "such substitution of service through the post-office or in such manner as to them or him shall seem fit." I cannot, therefore, see that the court in Ireland did wrong when they made the order for substituted service upon which the judgment was signed. At all events, I think it is impossible to say that it was a matter upon which they were not competent to decide, or which was out of their **[617]** jurisdiction, or that their decision upon it was contrary to natural justice.

MARTIN, B. I am of the same opinion. According to my view of the statute, the 7th section is directed to the common case of personal service upon individuals; and my own opinion is, that the 8th section is exclusively directed to service upon persons who represent corporate bodies in Ireland, for, I find, that the proviso requires notice in the *Dublin Gazette* and in a local newspaper, and it would be manifestly absurd to require a notice of that sort in the case of bodies corporate elsewhere than in Ireland. I cannot think it was intended by the legislature to do so nugatory a thing as to require a notice to be given in the *Dublin Gazette*, which probably has no circulation out of Ireland, or in a local Irish newspaper, for the purpose of informing an English corporation that a writ has been issued against them by an Irish court. My impression is, that the 9th section was intended to meet this very case; for, it enables the court or a judge to authorize such substitution of service as to them or him shall seem fit, where it is made to appear to their or his satisfaction that any defendant has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court and can be properly served through or upon any agent or

representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds. If I were to take upon myself to decide as to the regularity or irregularity of the proceedings in the Irish court, I should incline to think that they were perfectly regular. But I am of opinion **[618]** that we have nothing to do with that. It is, and of necessity must be, incident to every court itself to decide as to the regularity of its own procedure. If, indeed, the proceeding is such as to be repugnant to natural justice, another principle supervenes, and the court whose aid is invoked to enforce it may decline to grant it, and may declare the whole to be void To say that the proceeding here was contrary to natural justice, appears to me to be absurd; for, the court seem to have taken especial care that the process should come to the knowledge of the defendants before they allowed the appearance to be entered; having not only directed that the process should be served upon their agent in Dublin, but also that it should be transmitted to their London agent, through the general post-office. I entirely agree with what is said in the judgment of the court of Common Pleas, that what was done here, if objectionable at all, amounts only to an irregularity, and cannot affect the validity of the judgment. I found my opinion upon what has fallen from the rest of the court; but, further, I think the proceedings in the Irish court were perfectly regular.

Watson, B. I entirely concur in the judgment pronounced by my Brother Martin. The action being brought upon the judgment of a court of competent jurisdiction, it was incumbent on the defendant to shew that the proceeding which led to that judgment was without jurisdiction. If it could be shewn that the whole proceeding was contrary to natural justice, we should be bound to give effect to the objection. But it seems to me that the utmost that could be said here is, that there has been an irregularity. But I found my judgment on this, that the 7th and 8th sections of the 13 & 14 Vict. c. 18, point out the mode of procedure by the plaintiff; and that the 9th section provides that **[619]** the court may order substituted service, in certain specified cases, "or on any other good and sufficient grounds," through the post-office,—which most emphatically extends to a mode of service on persons residing out of Ireland,—or in such other manner as they may think fit. And I cannot see why, when the interpretation clause (s. 51) has said that the words "party" and "person" shall extend to and include any corporation or other public body, the word "defendant" should not also include a corporation, being defendant. The 9th section was meant as a general provision applicable to all cases where the defendant cannot be found or avoids service, or on any other grounds which the court or judge may deem sufficient. It seems to me that the court on this occasion acted carefully and strictly within the statute, and that the proceedings were perfectly regular. For these reasons, I think that the judgment of the court below must be affirmed.

Judgment affirmed.

End of Michaelmas Vacation.

[621] Cases Argued and Decided in the Court of Common Pleas, in Hilary Vacation, in the Twenty-First Year of the Reign of Victoria.

The Judges who usually sat in banco in this term, were,—Cockburn, C. J., Williams, J., Crowder, J., and Byles, J.

Memoranda.

On the first day of this Term, the following members of the College of Doctors of Law, who had been appointed Her Majesty's Counsel learned in the law, were called within the Bar:—Dr. Adams, Dr. Phillimore, Dr. Deane, and Dr. Twiss.

Monday, the 25th of January, being the day of the celebration of the marriage of the Princess Royal of England with Prince Frederick William of Prussia, was observed as a holiday in all courts.

[622] Pritchard *v.* The Merchant's and Tradesman's Mutual Life-Assurance Society. 1858.

[S. C. 27 L. J. C. P. 169; 4 Jur. N. S. 307; 6 W. R. 340. Distinguished, *Stuart* v. *Freeman*, [1903] 1 K. B. 47.]

A policy was effected, in the usual form, on the life of A., in consideration of the payment of certain annual premiums on the 13th of October in each year,—with a condition that the policy should be void, amongst other grounds, "if the premiums were not paid within thirty days after they should respectively become due; but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made," and payment of a certain fine.—An annual premium became due on the 13th of October, 1855. The thirty days allowed by the condition for payment of the premium expired on the 12th of November,—on which day A. died. On the 14th of November, the plaintiff (for whose benefit the policy was effected) sent the company a cheque for the premium, for which they on the following day obtained the cash, giving a receipt as for "the premium for the renewal of the policy to October 13th, 1856, inclusive,"—both parties being ignorant that A. was then dead:—Held, that the payment did not under the circumstances revive the policy.—And semble, that, the contract being for payment of the sum insured on the future event of the death of A., a payment of the premium within the thirty days, but after A.'s death, would not be a payment within the condition.

The declaration stated, that, by a policy of assurance numbered 954, bearing date the 13th of October, 1853, under the hand and seal of the United Mutual Mining and General Life-Assurance Society, and of three of the directors thereof, and under the hand of the plaintiff, then being the resident director of the said society, and which society then being a joint-stock company duly and completely registered under the provisions of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110,—reciting that Sir George Back, R.N., Martin Stutely, and Wilbraham Taylor, had proposed and agreed to effect an insurance with the said society in the sum of 2000*l.* upon the life of Richard Paul Hase Jodrell, and that the said assured had paid at the office of the said society the sum of 91*l.* 15*s.* as a premium for twelve calendar months, commencing on the day of the date of the said policy, it was witnessed, that, if the said R. P. H. Jodrell should die at any time within the said term of twelve calendar months, to be computed from the day next before the day of the date of the said policy, or if he should survive the said term, and the said assured, their executors, administrators, or assigns, should pay or cause to be paid at the office of the said society the like premium as aforesaid on or before the 13th day of October then next, and at the expiration [623] of every subsequent twelve calendar months during the life of the said R. P. H. Jodrell, then the funds and property of the said society, according to the deed of settlement thereof, should be liable, within three calendar months after proof satisfactory to the directors should have been received at the office of the said society of the death of the said R. P. H. Jodrell, to pay unto the said Sir G. Back, M. Stutely, and W. Taylor, or to their executors, administrators, or assigns, the said sum of 2000*l.* thereby assured: That the said R. H. P. Jodrell survived the said term, and the said Sir G. Back, M. Stutely, and W. Taylor paid at the office of the said society the like premium as aforesaid, to wit, the sum of 91*l.* 15*s.*, on the 13th day of October then next, to wit, on the 13th of October, 1854, and also the like premium as aforesid, to wit, the sum of 91*l.* 15*s.*, at the expiration of the subsequent twelve calendar months, to wit, on the 13th of October, 1855, as and for the annual premiums upon and for the renewal of the said policy: That the defendants, on the 11th of November, 1853, by a policy of insurance then made between them and the plaintiff as agent for and on behalf and for the benefit of the said United Mutual Mining and General Life Assurance Society, the said plaintiff being then a shareholder and an assured member and the resident director of the said United Mutual Mining and General Life-Assurance Society, and having an interest to the extent of 500*l.* and upwards in the life of the said R. P. H. Jodrell, and the said United Mutual Mining and General Life Assurance Society having an interest in the life of the said R. P. H. Jodrell in respect of and to the amount of the policy of insurance first hereinbefore

mentioned and recited,—assured to the plaintiff the sum of 500l. to be paid on the death of the said R. P. H. Jodrell; which said last-mentioned policy of assurance was and is in the words and figures fol-**[624]**-lowing, that is to say,—"The Merchant's and Tradesman's Mutual Life-Assurance Society, No. 5 Chatham Place, Blackfriars, London. No. U X 2245. Premium, 4l. 11s. 9d. per cent. per annum. Sum assured, 500l. Premium, 22l. 18s. 9d. Whereas Thomas Pritchard, on behalf of the trustees of the United Mutual Mining and General Life-Assurance Society, of 54 Charing-Cross, London, having an interest in the life of R. P. H. Jodrell, of, &c., hath agreed to open a policy of assurance with the Merchant's and Tradesman's Mutual Life-Assurance Society, subject to the conditions of the deed of settlement of the society bearing date the 9th day of March, 1847, and hath made a certain declaration in writing, bearing date the 6th day of October last, touching the age, state of health, and other circumstances attending the said R. P. H. Jodrell, which it hath been agreed shall form the basis of the contract between the said Thomas Pritchard and the society: And whereas the said society have agreed to assure to the said Thomas Pritchard the sum of 500l., to be paid to the said trustees, their executors, administrators, or assigns, within three months after the decease of the said R. P. H. Jodrell, at the annual premium of 22l. 18s. 9d.; and the said Thomas Pritchard hath paid the sum of 22l. 18s. 9d. until the 13th day of October now next ensuing, and hath agreed to execute the said deed of settlement, or some deed of covenant in conformity thereto, when he shall be required so to do, and hath also agreed to pay the annual premium of 22l. 18s. 9d. on the 13th day of October in every succeeding year: Now, we whose names are hereunto subscribed, being three of the directors of the said society, do, for ourselves and our assigns, covenant, promise, and agree with the said assured, and the executors, administrators, and assigns of the assured, that, if the said R. P. H. Jodrell shall die on or before the said **[625]** 13th day of October next ensuing the day of the date of these presents, or if he shall live beyond that period, and the said assured, or the assigns of the said assured, shall on or before the 13th day of October now next, and afterwards upon or before the 13th day of October in every succeeding year during the natural life of the said R. P. H. Jodrell, pay to the directors of the said society, at the office of the said society, the like annual premium of 22l. 18s. 9d., and if the said assured, or the assigns of the said assured, shall and do during the continuance of this assurance, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements contained in the said deed of settlement which on the part of the said assured are and ought to be observed, performed, fulfilled, and kept, and all such orders, rules, and regulations as since the date hereof have been or shall hereafter be made at any general court of the said society to explain, amend, alter, correct, extend, add to, or vary the same in any manner howsoever, according to the true intent and meaning thereof, and also execute the said deed of settlement, or deed of covenant, within the time in that behalf aforesaid, if required so to do, We, or the directors of the said society for the time being, will or shall within three calendar months next after satisfactory proof shall have been made, according to the rules and practice of the said society, of the death of the said R. P. H. Jodrell, well and truly pay or cause to be paid, out of the funds of the said society, unto the said assured, their executors, administrators, and assigns, the full sum of 500l. so hereby assured: Provided always, that no personal liability shall attach to us, the directors executing this policy, nor to the members at large of this society respectively; and that the assurance hereby granted shall at all times be subject to the terms and conditions printed on the back of this **[626]** policy, and to the stipulations of the said deed of settlement. (Signed by three of the directors.) Condition of life-assurance. This policy will become void, and all moneys paid on account thereof to the society become forfeited to the said society, in any one of the events mentioned in the next following clauses Nos. 1, 2, 3, 4, and 5, respectively, 1. If the within-mentioned declaration contain any untrue averment, or withhold any circumstance touching the party on whose life the assurance is made, with which the directors ought to be made acquainted, —2. If the premiums be not paid within the number of days next hereinafter limited after they become due respectively, that is to say, yearly premiums within thirty days, half-yearly premiums within fifteen days, quarterly premiums within seven days: but this policy may be revived within three calendar months, on satisfactory proof of the health of the party on whose life the assurance is made, and the payment of a fine of

2s. 6d. per. cent. upon the sum assured; or within six calendar months, on payment of 5s. per cent.; or within twelve months on such satisfactory proof being given, and payment of such fine as the directors may think fit to impose, —3. If the party on whose life the assurance is made shall die by duelling, by his own hand, or by the hands of justice, —except to the extent of any bonâ fide interest vested in any other person or persons under an assignment by deed for a valuable consideration in money, or by way of security or indemnity, or legal or equitable lien, —and except in so far as the directors may, under the authority vested in them, think proper to return any part of the premiums that may have been paid, not exceeding the value of the policy, —4. If the party on whose life the assurance is made shall proceed to parts beyond the seas, save and except within the limits and on the conditions hereinafter prescribed,—5. If the party on whose life the assurance is made shall die in [627] consequence of having been employed in actual service in any military or naval capacity, or, being or becoming a seafaring person, shall go upon the sea in course of his occupation, save and except upon the conditions hereinafter prescribed. But the policy will not become void or forfeited, in the following events,—1st. If the party on whose life the assurance is effected (not being a naval, military, or sea-faring person on duty) shall proceed to or from any part of the same hemisphere, not being in a state of war, civil war, tumult, or pestilence, distant more than thirty-four degrees from the equator: 2nd. If the party on whose life the assurance is made shall depart beyond the limits mentioned in the last proviso or condition, or proceed to such parts of the world as are in a state of war, tumult, or pestilence, or, being a military, naval, or sea-faring person, shall enter into active service, and the party effecting the insurance shall within three calendar months after such contraction give notice thereof at the office of the society, and pay such premiums as the directors shall think commensurate with the extra risk, or, in lieu thereof, shall at any time previous to such departure sign a memorandum to be written on this policy, to the effect, that, when the assurance shall become a claim, such extra premium as would have been paid during the period of engagement in active service or residence in foreign parts, as well as sea risk, with interest at 5l. per cent. per annum, shall be deducted from the amount assured. Memorandum: It is hereby agreed that the within policy shall be subject to the same conditions as those set forth in the policy of the United Mutual Mining and General Life-Assurance Society, numbered 954, and dated October 13th, 1853; to the intent that the liability of the assurers shall be precisely the same as that of the said society, to the extent of the sum hereby assured." Averment, that the said R. P. H. Jodrell lived beyond the said 13th day of October next [628] ensuing the date of the policy of assurance last above recited, and the plaintiff, within thirty days after the premium became due, to wit, on the 7th day of November, 1854, paid to the directors of the said Merchant's and Tradesman's Mutual Life-Assurance Society, at the office of the said society, the like annual premium of 22l. 18s. 9d.; and the plaintiff afterwards, in the next succeeding year during the life of the said R. P. H. Jodrell, and within thirty days after the premium became due, to wit, on the 8th of November, 1855, obtained from the directors of the said United Mutual Mining and General Life-Assurance Society, a banker's cheque drawn by three of the directors of the said United Mutual Mining and General Life Assurance Society, upon the London and Westminster Bank, St. James's Square, in favour of the defendants, for the sum of 22l. 18s. 9d., and the said cheque was afterwards, on the 14th day of November, 1855, and before notice to the plaintiff, or to the said United Mutual Mining and General Life-Assurance Society, of the death of the said R. P. H. Jodrell, delivered to and received by the defendants as and for and on account of the yearly premium of 22l. 18s. 9d. on the said last mentioned policy of assurance due on the 13th of October, 1855; and the said cheque was afterwards presented by the defendants at the London and Westminster Bank, and duly honoured; and the defendants afterwards, on the 15th of November in the year last aforesaid, delivered at the office of the said United Mutual Mining and General Life-Assurance Society a receipt in the words and figures following, that is to say,—"Merchant's and Tradesman's Mutual Life Assurance Society. Head Office, Cannon Street, London Bridge. Receipt No. 5770. Policy U X 2245, dated November 11th, 1853. Sum assured, 500l. Premium, 22l. 18s. 9d. Received, the 15th day of November, 1855, from the United Mutual Life Company the sum of twenty-two pounds [629] eighteen shillings, and nine pence, being the premium for the renewal of policy to October 13th, 1856, inclusive, dated and numbered

as above. George Thomson, Manager, T. Musgrave, Secretary :" That the said policy made by the defendants was, within three calendar months after the premium became due in manner and form aforesaid, renewed and revived by them to the 13th day of October, 1856, without requiring proof of the health of the said R. P. H. Jodrell, and without payment of any fine; and that the defendants dispensed and waived such proof and payment: That the said R. P. H. Jodrell died before the 13th day of October, 1856, to wit, on the 12th day of November, 1855, and did not die by duelling, by his own hand, or by the hands of justice, and did not proceed to parts beyond the seas, save and except within the limits and on the conditions prescribed in the said policy, and did not die in consequence of having been employed in actual service in any military or naval capacity, and was not and did not become a sea-faring person: That, although, more than three calendar months before the commencement of this suit, the defendants had notice of the death of the said R. P. H. Jodrell; and although the plaintiff and the said United Mutual Mining and General Life-Assurance Society were, and each of them was, ready and willing to make satisfactory proof, according to the rules and practice of the defendants, of the death of the said R. P. H. Jodrell; and although a reasonable time had more than three calendar months before the commencement of this suit elapsed for requiring such proof; and although the defendants did not require the same, and admitted the fact of the death of the said R. P. H. Jodrell; and although the declaration of the plaintiff in the said policy of assurance mentioned did not contain any untrue averment by the plaintiff, or withhold any circumstance touching the [630] party on whose life the assurance was made, with which the directors ought to have been made acquainted; and although the plaintiff and the said United Mutual Mining and General Life-Assurance Society had, and each of them had, always from the time of the making by the defendants of the said policy of insurance performed and fulfilled all things on his or their part to be performed and fulfilled; and although the said United Mutual Mining and General Life-Assurance Society had become liable to pay and had paid the sum of 2000l. under and by virtue of the said policy of assurance in this declaration first above mentioned; and although the funds of the said Merchant's and Tradesman's Mutual Life-Assurance Society had been and still were sufficient to pay the said sum of 500l. on the said policy of assurance,—of all which premises the defendants had notice; yet neither the defendants nor the said parties whose names were affixed to the said policy, nor the directors for the time being of the said Merchant's and Tradesman's Mutual Life-Assurance Society had, nor had any or either of them, paid the said sum of 500l., or any part thereof.

The declaration also contained a count for interest.

Second plea, to the first count,—that the said R. P. H. Jodrell died before the expiration of thirty days after the 13th of October, 1855, to wit, on the 12th of November in that year, and before the said cheque was delivered to and received by the defendants, and before the said policy was renewed or revived as alleged; and that, at the time of the said delivery to or receipt by them of the said cheque, or of their presenting the same for payment, or of its being honoured, or of their said delivering the said receipt, or of their said renewing and reviving the said policy, or of their said waiving or dispensing with such proof and payment, as in the first count alleged, the defendants had not any notice, [631] knowledge, or information whatever of the said R. P. H. Jodrell being dead; and they received the said cheque, and presented it for payment, and received payment of the same, and delivered the said receipt, and made the said renewal and revivor, and waived and dispensed with such proof and payment, under the bonâ fide but mistaken supposition and belief, and did then really suppose and believe, that the said R. P. H. Jodrell was then alive; and the defendants, on knowing the fact of his being dead, and within a reasonable time after they first had such knowledge, repudiated the said policy, and all liability thereunder, and tendered and offered the plaintiff to pay to him the said 22l. 18s. 9d., being the amount of the money paid on the said honouring of the said cheque: and that, at the time of the delivery to and receipt by the defendants of the said cheque, the said R. P. H. Jodrell was dead, and that the said cheque was not delivered to or received by them until after the expiration of thirty days after the 13th of October, 1855; and that the said annual premium upon the said policy of 22l. 18s. 9d., which became payable on the 13th of October, 1855, was not paid according to the terms of the said policy, or the provisions or conditions thereon indorsed, during the natural life of the said R. P. H. Jodrell, or on or before or within thirty days after the said 13th of October, 1855.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the death of the assured, as alleged in the plea, is no answer to the plaintiff's claim on the policy, which was renewed and revived as in the declaration mentioned; and that the plea, although it confesses, does not avoid the cause of action alleged in the declaration."

John Gray (with whom was J. E. Davis), in support [632] of the demurrer (*a*). The question is, what is the effect of a payment and acceptance of premium after the expiration of the thirty days allowed by the second condition. It appears that a cheque was drawn for the amount of the premium within the thirty days, but not paid over to the defendants until after the thirty days had expired: and that, unknown to either party, the person insured had died within that period. The dates are material. The premium was payable on the 13th of October, 1856; the thirty days allowed by the condition expired on the 12th of November, on which day Jodrell, the party insured, died; a cheque for the amount of the premium was drawn on the 8th of November, but it was not actually handed over to the defendants until the 15th. It is clear, that, in an or-[633]-dinary case, if, after the expiration of the thirty days, proof were given (under the 2nd condition) of the health of the party on whose life the assurance was effected, and the 2s 6d. per cent. paid and accepted, it would have continued the policy. Now, it was competent to the society to waive such proof: and that is alleged and admitted on this record. The question, then, is reduced to this, is the waiver to be of no effect, because, unknown to either party, the life had already dropped? [Crowder, J. In that case the parties would not be contracting with reference to a living man.] The society require nothing in the shape of a warranty that the man is living. The case of *The Earl of March* v. *Pigot*, 5 Burr. 2802, is very much in point. The wager there was originally proposed between young Mr. Pigot, the defendant, and young Mr. Codrington, to run their fathers (to use the Newmarket phrase) against each other. Sir William Codrington, the father of Mr. Codrington, was then a little turned of fifty: Mr. Pigot's father was upwards of seventy. Lord Ossory computed the chances, according to the above-mentioned ages of their respective fathers. Mr. Codrington thought the computation was made too much in his disfavour; whereupon Lord March agreed to stand in Mr. Codrington's place: reciprocal notes were accordingly given between the Earl and Mr. Pigot. Mr Pigot's note ran thus, "I promise to pay to the Earl of March 500 guineas, if my father dies before Sir W. Codrington. W. Pigot:" the Earl's was,—"I promise to pay to Mr. Pigot 1600 guineas, in case Sir W Codrington does not survive Mr. Pigot's father. March" No mention was made, at the time of this transaction, about their fathers being then dead or alive: but the fact was, that Mr. Pigot's father was then actually dead; he having died in Shropshire, one hundred and fifty miles from London, at 2 o'clock in the morning of the same day on which the bet was [634] made at Newmarket, after dinner. This fact, however, was not then known to any of the parties: nor was there any reason for suspecting that Mr. Pigot's father

(*a*) The points marked for argument on the part of the plaintiff were as follows:

"That the death of the assured as alleged in the plea, is no answer to the plaintiff's claim on the policy; and that, upon the renewal and revival of the policy as mentioned in the declaration, and admitted by the plea, the policy was in as full force and effect as if the renewal premium had been actually paid upon or before the 13th of October, 1855.

"That the defendants are estopped from saying that the payment of the premium as alleged in the declaration was not a renewal and revival of the policy from the 13th of October, 1855, to the 13th of October, 1856:

"That a contract by way of assurance made on the 15th of November, 1855, to pay the plaintiff 500*l.* in the event of the death of the third person before the 13th of October, 1856, was a good and valid contract in law, notwithstanding the death of the assured before the 15th of November, 1855, without notice to the plaintiff: the plaintiff being interested in the life of the assured; and the contract not being a wagering policy or otherwise void under the statute 14 G. 3, c. 48:

"And that the allegation in the plea, of a tender or offer by the defendants to re-pay the premium after the renewal and revival of the policy, should have also averred that the defendants always were and still are ready to pay the same to the plaintiff."

was then dead. On the part of the defendant, it was objected, that the contract was void, as being without consideration, for, his father being then already dead, there was no possibility of his winning; and that it was a contract in futuro, manifestly made upon the supposition of a then future contingency. The jury having found for the plaintiff, upon a rule for a new trial, it was insisted, on the part of the plaintiff, that the event of either of the two fathers being then already dead did not occur to the parties; that, if it had, it would not have varied the bet: and that retrospect was included as well as futurity; to which it was answered, on behalf of the defendant, that, by the law of England, it is necessary to insert the words "lost or not lost" in ship-policies, otherwise the insurance is void if the ship was then already lost; that the bet in question went upon the idea that both fathers were then living; and the case of *The Mills Frigate* was referred to, which was an insurance upon a ship which had a latent defect wholly unknown to the parties, and the insurers were held not liable, upon account of the ship's not being sea-worthy, though such defect was not known. Lord Mansfield said: "I differ totally in opinion from that doctrine. The determination in that case (which was made by my Lord Chief Justice Wilmot and me, to whom it was referred,) was made quite upon another ground: and the change of opinion in the court of Common Pleas happened upon the citing of two cases that had been determined before me; which cases were mistaken. The insured ought to know whether his ship was sea-worthy or not at the time when she set out upon her voyage: but, how should he know the condition she might be in after she had been **[635]** out a twelve-month? The question is, what the parties really meant. The material contingency was, which of these two young heirs should come to his father's estate first. It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them whether one of their fathers should be then sick or dead. All the circumstances shew, that, if it had been then thought of, it would not have made any difference in the bet: and there was no reason to presume that they would have excepted it. The intention was, that he who came first to his estate should pay this sum of money to the other, who stood in need of it. That the event had happened, was in the contemplation of neither party. Both notes are so penned as to be applied to what was to happen. But the nature of such a contract, and the manifest intention of the parties, support the verdict of the jury, that he who succeeded to his estate first, by the death of his father, should pay to the other, without any distinction whether the event had or had not at that time actually happened." And Aston, J., said: "It was originally intended to be a bet between two young heirs apparent: and the material point to be settled was, to fix the difference of the chances of the survivorship of their fathers. The mere survivorship was the thing intended to be betted upon." [Williams, J. That case is not very accurately reported: one part of Lord Mansfield's judgment is somewhat obscure.] In *Mead* v. *Davison*, 3 Ad. & E. 303, 4 N. & M. 701, which was an action on a policy of insurance on a ship "lost or not lost," Lord Denman, in delivering the judgment of the court, says,—"The case of *The Earl of March* v. *Pigot*, referred to in the argument, is a direct authority in principle in favour of the right to recover, if the loss was known to neither party at the time of effecting the policy. According to the **[636]** same case, and, indeed, on the plainest general principles, if the loss had been known to the assured only, the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. His conduct might, indeed, appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz. the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen." [Willis, J., referred to *Sutherland* v. *Pratt*, 11 M. & W. 296.] In Phillips on Insurance, 3rd edit vol. i., p. 501, § 925, it is said: "The risk may be assumed by the underwriters for an anterior period, and cover losses prior to the date of the policy, provided there is no concealment or misrepresentation by either party. For this purpose, the clause 'lost or not lost' is introduced. But this clause is not necessary: it is sufficient if it appear by the description of the risk, and the subject of the contract, that the policy is intended to cover previous losses." [Williams, J. Sir B. Shower, in his argument in *Jefferyes* v. *Legendra*, 1 Show. 320, 324 (*a*), says: "Policies are to have a

(*a*) S. C. 3 Lev. 320, 4 Mod. 58, Carth. 216, Holt, 465.

reasonable intendment: so, if the ship or goods were lost before the policy was made, and the party insured had notice, though the words 'lost or not lost' be inserted, yet the policy is void. If general, without these words, yet, if lost before the policy made, it is void, because of the improbability supposed that any man would engage against that which has already happened." For this is vouched the authority of a Genoese jurist, Straacha de Mercatura, 143, 222.] The receipt of the premium after the expiration of the thirty days does not operate the creation **[637]** of a new policy, but is a mere waiver of a forfeiture, and an adoption of the payment as if made in due time. The distinction, therefore, of "lost or not lost," has no bearing on this case. [Willes, J. You say that the payment on the 15th of November had a retrospective effect. Is not that contradictory to the terms of the receipt, which is stated to be for a "renewal" of the policy, —pointing to the future?] It is the ordinary form of receipt in use: the same that would have been given if the payment had taken place within the thirty days, and in the lifetime of the party. [Crowder, J. Would an original policy have been good, the party being dead at the time the insurance was effected? Would not that be within the case of *Coutourier* v. *Hastie*, 5 House of Lords Cases, 673? (*a*)[1] Was not this a receipt of money in ignorance of facts which, if known, would have prevented the parties from accepting the payment?] **[638]** This is not like the case of an action to recover back money which has been paid under a mistake of fact. If a man enters into a contract under a mistake, that mistake will not absolve him from the performance of his contract. Here the payment was to cover the risk from the 13th of October, 1855, to the 13th of October, 1856. [Crowder, J. But the man was dead when the transaction took place.] So he was in the case of *The Earl of March* v. *Pigot*. [Crowder, J. That is a totally different matter.] The effect of the payment and receipt of the premium here was, to make the policy as valid and efficacious as if the money had been paid in due time.

Hawkins (with whom was J. A. Foot), contrà (*a*)[2]. The second plea is a good answer to the action. The plain and obvious intention of the contract between the parties was, that any renewal of the policy under the second condition could take place only during the natural life of the assured. By the terms of the policy, the first premium which was paid was for the assurance of the life of Jodrell for twelve months, 'to be computed from the day next before the date of the policy," and the future payments were to be made on or before **[639]** the 13th of October then next (1854), and "at the expiration of every subsequent twelve calendar months during the life of Jodrell. Thirty days are allowed for payment of the premium: but this must be taken in conjunction with the policy itself, and must be understood to mean, provided the assured

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(*a*)[1] And see *Coutourier* v. *Hastie*, 8 Exch. 40, and *Hastie* v. *Coutourier* (in Cam. Scac.), 9 Exch. 102. There, a cargo of corn was shipped by A. at Salonica, in February, 1848, for delivery in London. On the 15th of May, it was sold by Hastie, a factor, who made the sale on a del credere commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27s per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c. upon handing shipping documents." In fact the corn had been sold at Tunis, a short time before the date of the contract, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract. In an action brought against the factor (by his principals) for the price, it was held by the House of Lords that the contract contemplated that there was an existing something to be sold and bought, and capable of transfer, which that being the case at the time of the sale by the factor, he was not liable.

(*a*)[2] The points marked for argument on the part of the defendants were, —

"That the second plea was good in substance, that the death of the assured, as alleged therein, was an answer to the plaintiff's claim on the policy, notwithstanding it was renewed as in the declaration alleged, that the plea avoided the cause of action alleged in the declaration, that, the cheque not having been delivered until after the expiration of the thirty days allowed for paying the premium and keeping the policy on foot, and the defendants having received it and got it cashed under the bonâ fide belief that Jodrell was alive, and offering to return the money in a reasonable time after the discovery of his death, was a good defence to the action."

be still living. This is clear from the subsequent clause of the second condition, which provides, that, if the premium be not paid within the thirty days, the policy may be renewed within a limited time, upon certain terms, viz. "on satisfactory proof of the health of the party on whose life the assurance is made, and the payment of a fine of 2s. 6d. per cent." Suppose Mr. Jodrell had died on the 13th of October, and before the payment of the premium for the ensuing year, and, after his death, in ignorance of the fact, Pritchard had paid and the company had received the premium for renewal,—what would have been the position of the defendants? Could it be said that that was a payment within the terms of the policy? The thirty days' indulgence clearly do not give the party any greater privileges than he would have had if the premium was paid on the day on which it actually became due. If the assured could not have made the payment on the 13th of October, à fortiori he could not have done so within the thirty days. That was decided by this court in the recent case of *Simpson* v. *The Accidental Death Company*, ante, vol. ii., p. 257. Here, the fact of the party being alive is a condition precedent to the policy's being revived by the payment of the premium and fine. [He was stopped by the court.]

Gray, in reply. *Simpson* v. *The Accidental Death Company* is very distinguishable from the present case: the insurance against accident must necessarily be made by the party himself; the very nature of the con-[640]-tract excludes payment by his executors. The company having received the premium for the renewal of the policy here, it is the same as if they had received it within the days of grace. [Crowder, J. You must not assume that a payment within the thirty days, the life having dropped in the interim, would sustain the policy.] That the assured should be living at the time the payment takes place, cannot be a condition precedent to the validity of the policy, provided the payment is made within the time prescribed by the policy, or within the extended period given by the conditions.

Williams, J. I am of opinion that our judgment must be for the defendants. Looking at the facts as they appear upon the pleadings, it is clear to my mind that the payment of the renewal premium was made by the plaintiff and accepted by the defendants, not on any new contract, but by way of indulgence under the contract contained in the original policy. Looking at the policy and the conditions annexed to it, I cannot entertain a doubt that the premium was paid and accepted upon an implied understanding on both sides that the party insured was then alive. Both parties were labouring under a mistake, and consequently the transaction was altogether void. We were much pressed during the argument with the case of *The Earl of March* v. *Pigot*, where it was held that a wager upon the life of an individual was good, notwithstanding the life had already dropped at the time the wager was made. But when closely looked at, it will be found that that case has no bearing whatever upon the present. It appears from the report that the wager made between the plaintiff and defendant was, that the latter should pay to the former 500 guineas if the father of the latter should die before a gentleman named: and the question was, whether the wager was avoided by the fact (unknown to [641] both parties at the time of the wager) of the defendant's father being actually dead at that time. Lord Mansfield,—no objection being made to that course being taken,—left it to the jury to say what was the understanding of the parties as to the terms of the wager: and the jury appear to have come to the conclusion that it would have made no difference whether the event had then actually taken place or not, and that it was in truth a mere wager as to which of the two originally named parties should first come to his inheritance, – the subject-matter of the bet being the mere survivorship of the respective parents. It is impossible to draw any such inference as to the meaning of the parties here. It cannot for a moment be doubted, that, if the defendants had known of the death of Jodrell at the time the premium was tendered, they would have refused to accept it. The whole transaction,—the payment and the receipt of the money, —was founded upon a mistake.

Crowder, J. I also am of opinion that the defendants are entitled to judgment on this demurrer. The plea sets up a state of things which appears to me to be an answer to the action. It is clear that the policy, which was to enure from the 13th of October, 1854, to the 13th of October, 1855, had expired, together with the thirty additional days allowed by the condition for the payment of the premium for its continuance; and that the assured died before the payment was made and the receipt given. It is contended on the part of the plaintiff that an intention is manifested by

the receipt that there was to be a renewed insurance from the by-gone 13th of October till the 13th of October in the following year, without any reference to whether the party was dead or alive at the time the payment was made. Looking at the whole scope of the instru-**[642]**-ment, I cannot comprehend what grounds there are for supposing that any such intention could exist. As to the case of *The Earl of March* v. *Pigot*, it seems to me to be an authority directly in point against the plaintiff: for, it is stated by Lord Mansfield, and found by the jury, that the making of the bet would not have been influenced by the consideration of whether the event had or had not actually happened at the time. It could not be (and in fact it was not) contended here that the death was an unimportant circumstance. Looking at the character of the second condition, making the policy void if the premiums be not paid within the number of days therein limited after they become due respectively, and stipulating that the policy may be revived within three months, on satisfactory proof of the health of the party on whose life the assurance is made,—it is manifest that it was of the essence of the contract that the party should be alive and in good health at the time of such revival. It is said, however, that the company waived such proof, and are therefore bound by their contract as if such proof had actually been given. I cannot, however, assent to that proposition. The common sense of the thing is, that the whole transaction was a mistake.

WILLES, J. I also am of opinion that the defendants are entitled to judgment on this demurrer. Taking the policy without the conditions, it is clear that the plaintiff could have no claim whatever against the company thereon after the 13th of October, 1854, unless he duly paid the premium for each ensuing year on or before that day. Then comes a condition (the second), which provides that the policy shall become void, if the (yearly) premiums be not paid within thirty days after they become due respectively. Stopping there, it might be a question, —and it is one which persons insured would **[643]** be wise not to raise,—whether this does not contemplate a payment by the assured himself; or whether, as has been contended on the part of the plaintiff, the effect of this condition is absolutely to extend the period for the payment of the premium, so that, if the assured should die within the thirty days, the company are still bound to accept the money, such payment to all intents and purposes enuring as a payment within the time limited by the policy, so as to entitle the representatives of the assured to recover upon the policy, even though the assured should be dead at the time the premium was paid. The inclination of my opinion,— if it be necessary to express one, and perhaps it is, for it has an important bearing on the case,—is, that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years provided the future premiums are paid within thirty days after the expiration of each period of insurance. However that may be, the payment here was not made within the thirty days. But then comes this further condition, "but this policy may be revived within three calendar months, on satisfactory proof of the health of the party on whose life the assurance is made, and the payment of a fine of 2s. 6d. per cent. upon the sum assured," &c. I am at a loss to see how that provision aids the plaintiff's case. It assumes that the subject upon which the insurance is to attach is a living person, otherwise the stipulation for satisfactory proof of health would be idle and absurd. The very foundation of a life-policy, as explained by the Exchequer Chamber in *Dalby* v. *The India and London Life Assurance Company*, 15 C. B. 365, is, that it is a contract for the payment of a certain sum upon the future death of a person then in being, in consideration of the present payment of a premium. The re **[644]**-newals, like the original policy, clearly are only for the future assurance of a living person. Then it is said, that, by accepting the premium after the expiration of the thirty days, the directors must be taken to have waived the giving of proof of the health of the party on whose life the assurance was made, and that the payment enured as a payment made in due time, and that the policy was thereby revived. Taking that literally, it is, that the directors waived the production of proof of the state of health of a man who was supposed to be alive, not the fact of his being alive. They cannot be assumed to have waived the condition that the person whose life was insured should really be a living person at the time the renewal or revival of the policy takes place. Then it was said that the payment and acceptance of the premium created a new contract. But in truth it is no new contract at all: it was intended as a payment under the original contract. The

result is, that the policy was not renewed, and our judgment must be for the defendants.

BYLES, J. I also think that the defendants are entitled to judgment. An important question is glanced at here, viz. as to the effect of a payment of the premium on a life-policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or, as they have sometimes been called, the days of grace. I am not aware of any authority upon that subject, except what fell from this court in the recent case of *Simpson* v. *The Accidental Death Company*, ante, vol. ii., p. 257. It is unnecessary on the present occasion to pronounce any opinion upon that question. It may be observed, that, whatever might have been the construction if the policy had been utterly silent in this respect, here it is in terms a contract or un-**[645]**-dertaking against the happening of a future event. "Dead or alive,"—which would be equivalent to "lost or not lost" in a marine policy,—seems to be excluded by the terms of the policy and the third condition. But the objection that the payment did not take place within the thirty days, clearly appears to me to be fatal to the plaintiff's claim. The payment and receipt were ultrà the condition and under a mistake. The effect would be that the plaintiff might maintain an action to recover back the premium so paid, on the ground of its having been paid and received under a mistake of fact.

Judgment for the defendants.

POWIS *v.* BUTLER AND ANOTHER, Executors of Charles Walton, Deceased.
Jan. 18th, 1858.

[Affirmed in Exchequer Chamber, 4 C. B. N. S. 469.]

The executors of one whose name has since his decease been inserted in the last-filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials.

This was a scire facias against the defendants as executors of the last will and testament of Charles Walton, deceased, who was at the time of his death a shareholder in the Royal British Bank, upon a judgment obtained by the plaintiff in this court in an action against Robert Palmer Harding, the official manager of the said bank. The writ called upon the defendants to shew if they had or knew of anything to say for themselves why the plaintiff should not have execution against them of the debt and costs therein mentioned, to be levied upon the goods and chattels which were of the said Charles Walton, deceased, in the hands of the defendants as such executors as aforesaid to be administered; and, by consent of the parties, and by **[646]** direction of the court, the following case was stated without any pleadings:—

The Royal British Bank was a joint-stock banking company incorporated and carrying on business under the provisions of the statute 7 & 8 Vict. c. 113.

The said bank stopped payment on the 3rd of September, 1856; and, on the 24th of the same month, an order was made by Vice-Chancellor Kindersley to wind up the affairs of the said bank under the Joint-Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45; and, on the 13th of October last, the above-named Robert Palmer Harding was duly appointed, and still was, official manager of the said bank.

The plaintiff, on the 1st of January, 1856, deposited with the Royal British Bank the sum of 250l., and received a note of which the following is a copy:—

"Royal British Bank, Islington Branch.

"No. 9070. London. 250l. "1st January, 1856.

"Received on deposit from Mr. Henry Powis, 2 Islington Green, the sum of two hundred and fifty pounds, to be accounted for, with interest at the rate of 5l. per cent. per annum, ten days after notice.

"By order of the court of directors,

"Entered, R. Grey, Acct. "W. J. MILLARD, Manager."

At the time of the stoppage of the bank, the sum of 8l. 13s. 1d. had become due

for interest upon the said deposit, of which 3l. 13s. 4d. was due for interest on the 16th of April, 1856, when the said Charles Walton died, as hereinafter mentioned.

The plaintiff had also a drawing account with the bank: and there was due to him on such drawing account at the time of the stoppage of the bank 310l. 16s. 11d.; which three sums in all amounted to 569l. 15s. 2d.

On the 9th of October last, a petition for adjudication **[647]** in bankruptcy was presented against the said Royal British Bank, under which the said bank was duly adjudged bankrupt: and, at a meeting for the proof debts, held at the court of bankruptcy, the plaintiff duly proved his said debt against the said bank at the sum of 569l. 15s. 2d. The plaintiff also proved his debt before the chief clerk of Vice-Chancellor Kindersley, under the Winding-up Act.

On the 2nd of December last, the plaintiff commenced the said action against the official manager of the said bank, to recover the said sum of 569l. 15s. 2d.; and, on the 23rd of December, judgment was obtained against the said official manager for that amount, and 6l. 6s. 4d. costs of suit, making together 576l. 1s. 6d.

A writ of fi. fa. was issued on the 23rd of December, 1856, upon the said judgment, directed to the sheriffs of London, to levy the sum of 576l. 1s. 6d., besides, &c., upon the effects of the said bank, to which there was a return of nulla bona: and it is admitted that the bank had no property from which the plaintiff could obtain the satisfaction of his judgment debt.

In June, 1856, a memorial was duly filed under the provisions of the said act of parliament (7 & 8 Vict. c. 113), setting forth the title of the said company, the names and places of abode of the members thereof, and the other particulars required by the act, which was the last memorial filed by the bank. In this memorial appeared the name of the deceased, Charles Walton, described therein as of Tulse Hill, Surrey, ship-owner.

The said Charles Walton died on the 16th of April, 1856, having previously made his will, by which he appointed the defendants the executors thereof; and the defendants proved the said will in the prerogative court of the Archbishop of Canterbury on the 15th of May, 1856.

The deceased at the time of his death was possessed **[648]** of twenty shares in the said bank: but the defendants have not been, or claimed to be, registered as shareholders in the said bank in respect of such shares, or any of them, nor made any declaration under the 26th and 27th sections of the said act of parliament.

By the 9th section of the deed of settlement of the said bank, dated the 2nd of July, 1849, and executed by the said Charles Walton, it was declared that there should be no benefit of survivorship between the proprietors.

On the 16th of April, 1856, the day of the testator's death, there was a sum of 107l. 5s. 1d. standing in the books of the said company to the credit of the plaintiff upon his said drawing account; and that was the whole amount then due to him upon such account. On the 19th and 24th of the same month, the plaintiff drew out of the bank upon the said account more than 107l. 5s. 1d., without paying into the bank any sum or sums specifically to meet or provide for the amount so drawn out, or any part thereof. Sums, however, were from time to time during the months of April, May, and June, 1856, paid into and drawn out of the said bank by the plaintiff upon the said drawing account: the result of which was, that, on the 30th of June, 1856, a sum of 36l. 15s. 8d. was due as a balance from the bank to the plaintiff upon such account. A copy of the account accompanied the case, and was to be considered as part thereof.

In or about the month of August, 1856, the defendants instructed their brokers, Messrs. Hichens & Harrison, members of the Stock-Exchange, to sell the said twenty shares; and, on the 21st of the said month of August, the said Messrs. Hichens & Harrison sold ten of the said shares to certain brokers named Vigne & Sons, and the remaining ten of the said shares to a broker named Russell; and, on the 28th of the same **[649]** month of August, being the same day in the said Stock Exchange, the said Messrs. Hichens & Harrison received from the said Messrs. Vigne & Sons and Mr. Russell respectively a memorandum or ticket containing the name, address, and occupation of the person to whom the shares so purchased by the said Messrs. Vigne & Sons and Mr. Russell respectively were to be transferred; and, on the following day, viz. the 29th of the said month of August, the said Messrs. Hichens & Harrison by their clerk forwarded to the head banking-house of the said bank the particulars required by the charter or deed of incorporation of the said bank, and at

the same time requested that the deeds of transfer of the said shares to the respective purchasers might be prepared by the proper officer of the bank. The said clerk was informed by a duly-qualified officer of the said bank that the said Messrs. Hichens & Harrison might prepare such transfers themselves, and the necessary forms of deeds of transfer were then given by such officer to the said clerk for that purpose. The said Messrs. Hichens & Harrison accordingly prepared two deeds of transfer of the said shares; by one of which deeds the defendants assigned and transferred ten of the said shares to Joseph Renfrey, being the person named as the purchaser thereof in the said ticket or memorandum so received from the said Messrs. Vigne & Sons as aforesaid; and by the other of such deeds the defendants assigned and transferred the remaining ten of the said shares unto James Meston, being the person named as the purchaser thereof in the said ticket or memorandum received from the said Mr. Russell as aforesaid. Such deeds were respectively duly executed by the defendants before the said bank stopped payment, and with the certificates of the said shares were delivered to the brokers of the respective purchasers; and the defendants duly received the purchase **[650]** or consideration moneys in such deeds of transfer respectively mentioned to be paid to them.

The bank had not observed the terms of the charter as regards requiring the giving of notice to the bank previous to transfers being made of shares: but, when such transfers were executed, the course pursued by the said bank was, to have the deeds of transfer lodged with the bank, and then the same were entered on a register of transfers kept by the bank; and a memorial was indorsed on the transfer-deed indicating the fact of the same being registered.

In reference to the said transfers to the said Joseph Renfrey and James Meston, the bank had suspended business before the said two deeds of transfer could be registered.

On the 12th of January, 1857, an order was made by the Master of the Rolls to administer the estate of the said Charles Walton, deceased, in Chancery; and, by an order dated the 18th of February, 1857, it was ordered that the said Henry Powis (the above-named plaintiff) be restrained until the further order of the court from taking or prosecuting any proceedings at law against the above-named defendants as executors of Charles Walton, deceased, or either of them, for or in respect of any debt or sum of money claimed by the said Henry Powis to be due or owing to him from the Royal British Bank, or on any judgment obtained by him against Robert Palmer Harding as official manager of the said bank; and it was ordered that the said Henry Powis be at liberty to go in and prove under the said order dated the 12th of January, 1857, for his costs of his proceedings at law up to the time of his having received notice of the said order, and also his debt, if any, for recovery whereof the proceedings at law were taken against the said official manager.

The plaintiff, pursuant to such last-mentioned order, **[651]** claimed to prove the debt alleged to be due to him, under the said order dated the 12th of January, 1857, when the chief clerk of the Master of the Rolls adjourned such claim into court for argument. On such claim being argued, the Master of the Rolls directed the question to be submitted to a court of common law; and, to enable the plaintiffs to take the necessary steps, by an order dated the 26th of March, 1857, on the said Henry Powis undertaking not to issue execution on any judgment, rule, or order which might be obtained at law, without the leave of the court of Chancery, his Honour ordered that the said order dated the 18th of February, 1857, so far as it restrained the said Henry Powis from taking or prosecuting any proceedings at law against the defendants as executors of Charles Walton, deceased, or either of them, for or in respect of any debt or sum of money claimed by the said Henry Powis, be discharged.

Since the stoppage of the bank, the plaintiff has received the sum of 516*l.* 11*s.* 3*d.* on account of his said judgment-debt, viz. two dividends under the said bankruptcy amounting in the whole to 227*l.* 15*s.* 7*d.*, and 288*l.* 15*s.* 8*d.*, the proceeds of an execution against another shareholder in the bank upon the judgment.

The plaintiff claims the sum of 59*l.* 10*s.* 3*d.* as still due to him upon the said judgment, after giving credit for the sums so received by him.

The question for the opinion of the court is, whether the plaintiff is entitled to issue execution upon the said judgment against the defendants, to be levied upon the goods and chattels which were of the said Charles Walton, deceased, in the hands of the defendants as such executors as aforesaid to be administered.

If the court should be of opinion that the plaintiff was so entitled, then judgment was to be entered up for the plaintiff, for such sum as the court should direct, [652] and costs of suit, together with all costs of and occasioned by the previous proceedings of the plaintiff against the defendants as such executors as aforesaid to obtain satisfaction of the said judgment. If the court should be of a contrary opinion, then judgment of non-pros., with costs of the action, and all other costs occasioned to the defendants by the above proceedings against them, should be entered up for the defendants.

The following was the account annexed to the case:—

Henry Powis in account with the Royal British Bank.

1856.				
Brought forward		£973	17	6
April 5.	Sundries	122	2	1
19.	Do.	190	2	1
30.	Do.	172	8	0
May 10.	Do.	180	0	0
17.	Do.	129	1	0
24.	Do.	128	10	0
26.	Do.	31	0	0
27.	Do.	24	0	0
31.	Cash	65	0	0
June 9.	Do.	208	5	0
17.	Do.	90	0	0
21.	Do.	110	0	0
27.	Do.	75	0	0
Carried forward		£2199	5	8

1856.				
Brought forward		£821	5	6
April 4.	Wormsley	28	19	0
14.	Palmer	13	10	0
	Green	20	9	0
	Thompson	15	19	0
	Nelson	9	1	9
15.	Barnard	4	7	0
16.	Baker	19	6	0
	Williams	44	16	6
	Berens	3	12	3
	Wreford	7	8	6
	Block	63	6	3
	Hind	20	14	10
19.	Sharp	41	16	9
	Nelson	30	9	0
26.	Pyott	10	15	0
29.	Hutton	32	14	6
May 2.	Carlisle	12	4	0
7.	Stevenson	32	13	6
12.	Hind	25	13	0
	Phillips	40	10	0
	Irvin	7	7	6
	Evans	17	4	0
	Thompson	200	0	0
[653]				
May 12.	Pratt	7	13	6
	Scofield	7	0	0
16.	Swainson	37	2	0
	Stagg	50	12	0
19.	Thompson	100	0	0
27.	Leverson	10	4	7
29.	Sharp	204	7	0
31.	Wilson	20	11	0
June 7.	Milson	19	10	0
11.	Solomon	15	13	0
12.	Thompson	121	13	0
	Leaf	15	0	0
17.	Swaine	11	16	6
	Thompson	145	3	0
19.	Bushay	5	13	0
	Lamb	12	0	0
	Palmer	7	15	6
25.	Green	16	9	8
	Barnard	9	1	0
	Hallen	19	0	11
28.	Pepper	12	0	0
Carried forward		£2372	8	6

Brought forward			£2499	5	8	Brought forward	£2372	8	6
						June 30. Pitt	7	15	6
						Sharp	29	4	0
						Pearson	52	1	0
						Commission	1	1	0
						Balance	36	15	8
			£2499	5	8		£2499	5	8
1856.						1856.			
July 1.	Balance		36	15	8	July 5. Milson	11	12	6
	To Cash		182	0	0	25. Hone's draft	27	5	6
26.	Do.		77	16	0	10. Thompson	73	15	0
27.	Do.		116	5	6	Thompson	43	13	6
28.	Do.		30	5	6	Aug. 4. Lane	40	0	0
Aug. 9.	Cash		150	0	0	11. Burlage	5	5	6
15.	Sundries		130	12	3	Brown	4	8	0
30.	Cash		168	2	11	Thompson	42	18	6
						12. Levean	33	3	10
						13. Slatten	20	9	5
						[654]			
						Aug. 13. Hurd	7	6	0
						Edgcomb	3	4	0
						Barnard	14	2	9
						Wolf	3	18	0
						14. Sharp	28	15	10
						Kirby	4	2	3
						Block	40	0	0
						15. Hutton	71	5	0
						Green	11	4	6
						16. Milson	10	5	0
						52. Stevenson	12	10	10
						30. Milson	32	15	0
						Sept. 1. Sack	39	0	0
						Balance	310	16	11
			£891	17	10		£891	17	10
		Balance	£310	16	11				

Beasley, for the plaintiff. The main question is, whether the defendants are not chargeable as "existing shareholders" under the 7 & 8 Vict. c. 113, s. 21, their testator's name appearing on the memorial of shareholders last filed under the act. That section enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act as existing shareholders of the company." [Cockburn, C. J. You contend that the man's name being in the memorial is equivalent to the names of his representatives being there; and that the memorial is conclusive evidence?] Precisely so. [Williams, J. Is not the authority to place his name there revoked by his death?] In ordinary cases it would be so; but not under this statute. The 6th section incorporates all those who become shareholders and their legal representatives; and s. 7 enacts, that, notwithstanding such incorporation, they and their several executors, **[655]** &c., shall continue liable as if not incorporated. [Cockburn, C. J. If death cancelled Walton's liability, his executors could incur none. You are, in truth, seeking to fix the executors with an original liability.] The 21st section gives creditors a right to have execution against executors of a deceasod person as existing shareholders. The shares are personal assets, which vest in the executors. The 16th section requires the memorial to be filed, and impowers any person to inspect it on payment of a small fee. The 17th section provides for occasional changes therein; and the 18th gives the form of the memorial. The 19th section,—which is to be construed with the 21st,—makes the memorial conclusive: it enacts, "that a true copy of any such memorial, certified under the hand of one of the commissioners of stamps and taxes for the time being, upon proof made that

such certificate has been signed with the hand-writing of the person certifying the same, whom it shall not be necessary to prove to be a commissioner of stamps and taxes,—shall be received in evidence as proof of the contents of such memorial, and proof shall not be required that the person by whom the memorial shall purport to be verified was, at the time of such verification, the manager or one of the directors of the company." [Willes, J. *Ness* v. *Angas*, 3 Exch. 805, and *Ness* v. *Armstrong*, 4 Exch. 21, decided that personal representatives were not liable under the 7 G. 4, c. 46.] The language of the 6th section of that statute was different from that of the 19th section of the act now under consideration. [Willes, J. The words are the same in both statutes,—"shall be received in evidence as proof," &c.] The only means a creditor has of knowing who are shareholders is the memorial; and that does not disclose the death of the party. The 26th section provides for a mode in which an executor may become an actual shareholder,—in **[656]** which case he would incur a liability different from that contemplated by s. 21. [Willes, J. The 26th section only affects the rights of the executor. May you not rely on the 7th section (*a*) as making the executors liable?] That section, coupled with the 21st, clearly does make them so. [Willes, J., referred to 2 Williams on Executors, 5th edit., 1583.] The next question is, whether the defendants are discharged by a bonâ fide transfer of the shares before the bankruptcy of the concern (the transferrees' names not appearing on the register of shareholders). This point is disposed of by the case of *Dossett* v. *Harding*, ante, vol. i., p. 524, where it was held, on the authority of *Henderson* v. *The Official Manager of the Royal British Bank*, 7 Ellis & B. 356, that a shareholder whose name is properly inserted in the last return or memorial filed at the stamp office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares. [Williams, J. We are bound by that case. We there held that the memorial was conclusive, the shareholder being alive.] Then, as to the last point, it is submitted that the plaintiff is entitled to appropriate the payments to the drawing account, and to recover the balance on the deposit account.

Phipson, contrà. The plaintiff would have had no claim against Walton himself if he had been alive. It appears from the case, that, on the 1st of January, **[657]** 1856, the plaintiff opened a deposit-account with the bank, upon which there was due to him at the time of their stoppage in September, 1856, 258l. 13s. 1d., and at the time of Walton's death, 253l. 13s. 4d. He had also a drawing-account, upon which there was due to him at the time of commencing the action 310l. 16s. 11d.: but the whole of that accrued since the death of Walton except about 23l. The judgment in the action was obtained on the 23rd of December, 1856, for 569l. 15s. 2d. and costs. The plaintiff has since received, by payment of dividends under the bankruptcy, and from the proceeds of an execution against another shareholder, 516l. 11s. 3d. Independently, therefore, of the broad question as to the liability of the executors to be proceeded against either as absolute or quasi shareholders, the plaintiff has no right to proceed against the estate of Walton at all. The claim as against Walton is altogether wiped off by the appropriation of the payments to the earlier items. [Williams, J. The payments are in reduction of the judgment-debt. The real question is, whether executors are liable under s. 21.] It is submitted, that, under that section, executors cannot be proceeded against at all, independently of the question arising on the state of the account. The 16th section of the statute requires the company to file a memorial containing the names and places of abode of all its existing shareholders; and the 17th requires them to make an additional return of all who have ceased to be members, or who have become members or shareholders of the company since the last return. In June, 1856, notwithstanding Mr. Walton was then dead, he is returned as an existing shareholder; and it is now contended that his executors are bound by this wrongful act of the directors. [Crowder, J. Is the creditor, who is innocent, to be damnified by that? He looks to the return.] The liability imposed by the 9th, 10th, and **[658]** 13th sections is imposed only upon existing shareholders: and these are the only clauses giving jurisdiction. What

(*a*) It provides "that, notwithstanding such incorporation, the several shareholders for the time being in the said banking business, and those who shall have been shareholders therein, and their several executors, administrators, and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the said company, subject to the provisions hereinafter contained, as fully as if the said company were not incorporated."

authority is there for issuing execution against one who is not a shareholder? [Crowder, J. Then you dissent from the decision in *Dossit* v. *Harding*, ante, vol. i., p. 524?] It is impossible to apply the machinery of the statute to a non-existing person. He cannot be served with notice, or be summoned: and you cannot reach executors, until they have done some act to make them shareholders. [Cockburn, C. J. Are you right in saying that there is no liability in the shareholders but that pointed out by the clauses you refer to? The 6th section makes them a corporation; but the 7th section expressly declares, that, notwithstanding such incorporation, the shareholders, and their several executors, administrators, successors, and assigns, shall continue liable for all the dealings, covenants, and undertakings of the company, subject to the provisions thereinafter contained, as fully as if the company were not incorporated. The only limit is, that resort must first be had to the assets of the company. Subject to the provisions contained in the execution clauses, the shareholders remain liable: and I must confess I do not see why their representatives should not also be liable. In *Fell* v. *Burchett*, 7 Ellis & B. 537, where it was held that a creditor cannot maintain an action against a shareholder, his only remedy being by action against the corporation, and execution in the statutable mode,—the court of Queen's Bench construed the words "subject to" as meaning "according to." Lord Campbell, in giving judgment, after observing upon the difficulty of reconciling the various provisions of the act, says: "My solution is, that the intention was, to guard against an inference which, it was apprehended, might be drawn from the incorporation under the letters-patent in s. 6, that the shareholders should **[659]** not in any way be liable to make satisfaction to the creditors; with this view it was in s. 7, by way of proviso, enacted that the shareholders past and present should be and continue liable, 'subject to the provisions hereinafter contained.' Giving effect to those words as meaning that they should be liable after the corporation had been sued, after its assets had been exhausted, and the other provisions complied with, s. 7 is made to harmonize with the subsequent sections. 'Subject to the provisions,' is not proper language to express this meaning: but, looking to the whole scope of the act, we are justified in considering 'subject' as a word improperly introduced, but meaning 'according.' By this construction, the individual liability is preserved, but the oppressive multiplication of suits is avoided." If read literally, the shareholders would be liable on specialty debts for twenty years, and on simple contracts for six years, instead of three years, as provided by s. 10. In conformity with the principle laid down in *Fell* v. *Burchett*, the court of Exchequer, in *Harris* v. *The Official Manager of the Royal British Bank*, 2 Hurlst. & N. 535, intimated an opinion that a judgment against a banking co-partnership,—the bank now in question,—cannot be registered so as to affect the estate of a shareholder against whom no judgment has been obtained. If, then, an action will not lie against a shareholder on s. 7, what is the meaning of the enactment? The shareholders are to be liable only in the manner thereinafter provided: and that is confined to proceedings against persons who are shareholders. [Williams, J. You say the words "executors and administrators" in s. 7 are inoperative?] Unless they become shareholders. Under this statute, executors are liable for contribution where execution has been executed against other shareholders: the legislature has, in s. 14, given a distinct remedy against them as such. [Crowder, J. **[660]** Does it follow that executors cannot be proceeded against by scire facias in cases where they could not be proceeded against by motion?] The legislature could hardly have intended to make shareholders liable in any other way than that which they have so clearly and distinctly pointed out. [Willes, J. Would scire facias lie against the heir of a shareholder who dies seised in fee-simple?] It is apprehended not. [Willes, J. It certainly would be singular to hold that the land which the heir takes by descent shall be liable by reason of the company having represented one to be a shareholder who was not so in point of fact. [In *Fell* v. *Burchett*, all the judges agree that the 7th section is declaratory of the mode in which recourse is to be had against those who are shareholders. The concluding words of s. 10 are remarkable,—"nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed." If this act had not been passed, executors clearly would not have been liable at all. [Williams, J. If the executors became new shareholders, they would not be liable at the time this debt was contracted.] The true meaning of s. 21 is, that the persons whose names appear in the last-delivered memorial, are to

be liable to all legal proceedings under the act as existing shareholders of the company, and their executors to all such proceedings as executors are liable to.

Beasley, in reply. The effect of *Fell* v. *Burchett*, 7 Ellis & B. 537, is, that shareholders are to be liable only in the way pointed out in s. 13, and are not to be harassed by a multiplicity of actions, when full remedy is given to the creditor under the judgment against the company. There can be no hardship in holding the ex-[661] ecutor to be liable de bonis testatoris. Some light is thrown upon the construction of this act by the judgment of Parke, B., in *Bradley* v. *Eyre*, 11 M. & W. 432.

[It was conceded, that, though Mr. Walton was dead at the time of the filing of the last memorial, his name had been properly inserted as a shareholder in several previous memorials.]

Cockburn, C. J. I am of opinion that our judgment in this case must be for the defendants. This is a proceeding by scire facias under the 7 & 8 Vict. c. 113, to enforce against the executors of one Charles Walton, a deceased shareholder, a judgment obtained against the Royal British Bank, no sufficient satisfaction having been received from the property of the company. The facts, as stated in the special case, and admitted on the argument at the bar, are in substance these,—that Walton was a shareholder of the company at the time of the making of some former returns or memorials under the statute, but that, in the interval between the making of those returns and the last memorial filed by the company, in June, 1856, he died, and, notwithstanding that event, his name was inserted in the last-mentioned memorial; that the plaintiff had a claim against the company in respect of a balance due to him on a deposit account, and also on an ordinary drawing account; and that he commenced his action thereon against the company after the death of Walton. It has been contended, on the part of the plaintiff, that, inasmuch as the name of Mr. Walton appeared as a shareholder upon the memorial filed in June, 1856, by the operation of the 21st section of the statute, his estate in the hands of his legal representatives is liable to satisfy this debt. The words of that section are, "that the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall [662] be liable to all legal proceedings under this act as existing shareholders of the company." I am far from saying that I concur in Mr. Phipson's view, viz. that the effect of the 6th, 7th, 10th, and 13th sections of the statute is, that a person whose name appears upon the memorial, and his estate and effects, are liable only during the lifetime of such shareholder, and that no proceedings can be taken against his legal representatives after his death to fix his estate even in respect of a claim for which he would have been himself liable if alive. It is not necessary to give any opinion upon that point. If it were, I should think it a matter which required much more consideration than I have yet been able to bestow upon it: but the present impression of my mind is the very reverse. The meaning of the 21st section appears to me to be this,—that, where a person who is a shareholder, or whose name appears as a shareholder in the last-delivered memorial, and who would have been personally liable to proceedings under the act as an existing shareholder if living, dies, his legal representatives are liable also; but, that, where the party himself would not have been personally liable, if alive, though his name appeared upon the register, his personal representatives are not liable in respect of his estate. The words of the section are, "the persons whose names shall appear from time to time in the then last delivered memorial, and their legal representatives, shall be liable," &c. I do not think that can be read in the disjunctive. In the present instance, Mr. Walton, the shareholder, died before the plaintiff obtained his judgment against the company. Death had then removed him from the reach of all legal proceedings under the act. I think the utmost the legislature meant by this 21st section is, that the legal representatives are liable where the testator or intestate himself, if living, would have been liable: [663] and upon this simple ground I am of opinion that the defendants are entitled to judgment.

Williams, J. I am of the same opinion. The case has been put by Mr. Beasley as turning entirely upon the construction of the 21st section of the 7 & 8 Vict. c. 113: and I agree with my Lord in thinking that we cannot read the word "and" in the disjunctive. The question is, whether we are driven to say, contrary to the truth, that Mr. Walton was a shareholder at the time of the filing of the memorial in June, 1856. I do not think we are. Looking at the terms of the 21st section, it seems to me that the words "persons whose names shall appear in the memorial" are not

applicable to a case like this, where the person whose name appears in the memorial was not living at the time the proceedings were taken. I think the meaning of the clause is, that, if the person whose name is on the memorial is living at the time the proceedings are taken, he is liable as an existing shareholder, and, if he dies, his liability attaches to his legal representatives. It is very like the case of abatement of legacies: if a legatee dies in the lifetime of the testator, the legacy lapses; but, if he survives the testator and then dies, it goes to his personal representative as part of his personal estate: and a legacy lapses equally if given to a man and his legal representatives (*a*). It is unnecessary to advert to the argument urged by Mr. Phipson, that the liability of the person whose name appears in the memorial exists only during his lifetime, and that no proceedings can be taken against his representatives after his death, so as to charge his estate, even in respect of a claim for which he would himself have been liable, had he been living. I should require much **[664]** more time for consideration before I could come to that conclusion.

CROWDER, J. I also desire to give my judgment upon the construction of the 21st section only, without offering any opinion upon the other sections of the act. It is to be assumed that Mr. Walton's name had properly been inserted in former memorials, but that he was dead at the time of the filing of the last-delivered memorial, and that the proceedings to enforce the judgment against his estate were not commenced until after his decease. The words of the 21st section are, "that the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act as existing shareholders of the company." It cannot be predicated of a person non-existent, that he became liable to proceedings under the act as "an existing shareholder." The fair meaning of the whole clause must be, that the liability attaches to persons on the memorial who are capable of being proceeded against, and whose liability, in case of their death, passes to their representatives, so that there may be no failure of proceedings where the liability has once attached. I am by no means satisfied that the language of that section can be reconciled with that of some of the other provisions of the act, or that a consistent construction can be put upon the whole. But I am clearly of opinion that Mr. Walton did not come within the category of persons liable to be proceeded against under s. 21, inasmuch as he was not in existence at the time the memorial was filed or the proceedings commenced; and therefore I think the defendants are entitled to judgment.

WILLES, J. I am of the same opinion. The 21st section of the statute in question certainly raises consider-**[665]**-able difficulty. Construed literally, it amounts to this, that the persons who file the memorial under s. 17, have the power of putting therein the name of any person they please, without such person having any remedy or any means of withdrawing his name therefrom. When that comes to be considered, the absurdity of it will be found so great that the courts will feel it necessary to put such a construction upon the section as will prevent such a consequence. Possibly there may be a remedy by indictment against persons who so conduct themselves. It is unnecessary, however, to consider that now. I found my judgment in this case upon the grounds already stated by the rest of the court. The 21st section, when speaking of the liability of persons as existing shareholders, must mean persons who would be liable to have legal proceedings taken against themselves. Here, the testator, Walton, was dead at the time of the filing of the memorial in June, 1856. No proceeding, therefore, could be taken under the act against him; nor do I think any proceedings could be founded against his legal representatives on s. 21.

Judgment for the defendants.

FRY *v.* RUSSELL. Jan. 18th, 1858.

[S. C. 27 L. J. C. P. 153; 4 Jur. N. S. 193.]

A shareholder whose name is properly inserted in the last-delivered memorial, remains liable to execution under the 13th section of the 7 & 8 Vict. c. 113, although he has subsequently bonâ fide transferred his shares, and the transfer-deed has been duly executed by the transferee, and registered under s. 23.

(*a*) See Williams on Executors, 4th edit. 1036, 1038.

This was a scire facias against the defendant as an alleged shareholder in the Royal British Bank, on a judgment obtained by the plaintiff in an action in this court in which the now plaintiff was the plaintiff, and Robert Palmer Harding, the official manager of the said Royal British Bank was the defendant, for the sum [666] of 75l. 16s. 7d., and 5l. 7s. 4d. (for costs), to enable the plaintiff to have execution upon the said judgment to satisfy the plaintiff the sum of 68l. 2s. 2d. which is now due on the said judgment and still unpaid; and by consent of the parties, and by the direction of the court, the following case is stated, without pleadings:—

The Royal British Bank was a joint-stock company incorporated by Royal Charter dated the 20th of June, 1849, for the purpose of carrying on the business of a joint-stock bank in England under the statute 7 & 8 Vict. c. 113, "An act to regulate joint-stock banks in England."

The said bank stopped payment on the 3rd of September last; and on the 24th an order was made by Vice-Chancellor Kindersley to wind up the affairs of the said bank under the Joint-Stock Companies Winding-up Acts, 7 & 8 Vict. c. 111, and 11 & 12 Vict. c. 45: and, on the 13th of October last, the said Robert Palmer Harding was duly appointed the official manager of the said bank, and has continued to be such official manager up to the present time.

On the 9th of October last, a petition for adjudication in bankruptcy was presented against the said Royal British Bank, under which the said bank was duly adjudged bankrupt; and, at a subsequent meeting for proof of debts, held at the court of bankruptcy before the commencement of the said action against the said official manager of the said bank, in the matter of the petition against the said bank, the plaintiff proved his said debt according to the form prescribed by the bankrupt law.

On the 6th of February last, the plaintiff, having first proved his debt under the winding-up proceedings, commenced the said action against the said Robert Palmer Harding, the official manager of the said bank, to recover the said sum of 75l. 17s. 5d., which was then [667] due to him from the bank; and, on the 24th of February last, judgment was obtained against the said official manager of the said bank, for the sum of 75l. 17s. 5d., and 5l. 7s. 4d. costs of suit, making together the sum of 81l. 4s. 11d.

A writ of fieri facias was issued on the said 24th of February last upon the said judgment, directed to the sheriffs of London, to levy the said sum of 81l. 4s. 11d. upon the effects of the said bank, at the head offices of the said bank in Threadneedle Street; and, on the following day, the said sheriffs made a return to the said writ, as follows:—"The within named the Royal British Bank hath not any goods or chattels in our bailiwick. John Joseph Mechi and Frederick Keats, sheriffs."

The said British Bank had not any goods or chattels elsewhere from which the plaintiff could obtain satisfaction of his said judgment-debt; and any other execution against the property and effects of the said bank would have been ineffectual for that object.

A memorial was made out and filed at the Stamp-Office by the manager of the said bank, a copy of which memorial accompanied and was to be part of the case,—and this was the last-delivered memorial of the said bank. The admissibility and effect of this memorial was disputed by the defendant.

In this memorial, the name of the defendant, described as of Albert Villas, Seven Sisters Road, Upper Holloway, gentleman, appeared, and still appears, as a shareholder of the said bank.

On the 2nd of March, 1857, the plaintiff caused the defendant to be duly served with a proper ten days' notice of his intention to issue execution on the said judgment against the property and effects of the defendant as a shareholder in the said bank; and such notice had expired before any proceedings were taken by the plaintiff against the defendant.

[668] The defendant, in the month of March, 1856, became the holder, by purchase, of four shares in the said bank; and, on the 28th of July in the same year, he sold the same four shares, through Messrs. Thomas Fenn & Co., share brokers, of the London Stock-Exchange, in the open market, for 164l., and, with the consent of the directors of the said bank, regularly transferred the same to John Kilpatrick, by a deed of transfer executed by him and the said John Kilpatrick, dated the 2nd of August, 1856, duly made in compliance with the charter of the said bank; and the deed of transfer was on the said 2nd of August duly entered in the register of shareholders of the said bank; and the name of the said John Kilpatrick was then entered as the proprietor

of, and he became a shareholder in, the said bank, and has so continued ever since, in respect of the said shares: and the defendant contends that he then wholly ceased to be a shareholder in the said bank, or to have any interest therein, and that his liability as such then determined, except as specially provided in the said act of parliament.

The defendant never held or was possessed of or entitled to any share or shares in the said bank, except the aforesaid four shares, and except two other shares which were tranferred into his name by William Nairn in the year 1850, as a security for a debt; and these last-mentioned two shares were sold by him, and duly transferred to the purchaser thereof, in June, 1851; and no liability is sought to be fixed upon the defendant in respect of his having held those shares.

The question for the opinion of the court was, whether the defendant was liable, as an existing shareholder of the said Royal British Bank, to the plaintiff in this action.

If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff **[669]** for 68l. 2s. 2d. and costs of suit. If the court should be of opinion in the negative, then judgment of non-pros., with costs of the action, was to be entered up for the defendant.

Beasley, for the plaintiff (*a*)[1]. This question, like that in *Powis* v. *Butler*, ante, p. 645, turns upon the construction of the 7 & 8 Vict. c. 113, s. 21, which enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act as existing shareholders of the company." In this case, Mr. Russell had bonâ fide transferred his shares, and the transfer-deed had been duly executed by the transferree, and registered pursuant to the 23rd section; but his name appeared on the last-delivered memorial, and consequently he is liable as "an existing shareholder." The case is disposed of by the decision of this court in *Dossett* v. *Harding*, ante, vol. i., p. 524, where it was held that a shareholder whose name is properly inserted in the last return or memorial filed at the Stamp-Office, cannot get rid of his liability under s. 21, by a sebsequent bonâ fide transfer of his shares. The memorial is all that a creditor can have recourse to for information: and a **[670]** certified copy is by s. 19, to be "received in evidence as proof of the contents of such memorial."

Milward, contrà (*a*)[2]. The real question turns upon the construction of the statute generally, and not merely upon the meaning of the 21st section. None of the cases have any application, with the exception of *Dossett* v. *Harding*; and that is distinguishable; for, the affidavit of the party sought to be charged did not shew that the transfer was in the proper form, or that it was executed by the transferree, or registered by the company. Upon this subject the observations of Kindersley, V. C., in the case of *In re The Royal British Bank, Ex parte Walton*, 3 Jurist, N. S. 853, are well worthy of attention. [Crowder, J. Your argument, then, is, that the 21st section means that the memorial shall be primâ facie evidence only, not conclusive.] Yes. It was so held by Coleridge, J., at Chambers, in a case where the name of a party had been erroneously inserted in the new memorial. The 6th section provides that the company may be incorporated. The 7th section enacts, "that, notwithstanding such incorporation, the several shareholders for the time

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(*a*)[1] The points marked for argument on the part of the plaintiff were,—

"That the defendant is liable to execution against him at the suit of the plaintiff: That, although the defendant may not have been a shareholder de facto at time of the judgment recovered in the original action, he is nevertheless liable to have execution issued against him as an existing shareholder, his name appearing in the last-delivered memorial at the Stamp-Office: And that, notwithstanding that the defendant may have transferred his shares, his liability to have executions issued against him continues so long as his name appears in the said memorial."

(*a*)[2] The points marked for argument on the part of the defendant were, –

"That he was not liable to the execution sought to be had against him; that, as he was not a shareholder in fact at the time of the judgment recovered in the original action, he cannot be fixed as such; that the completed transfer of his shares, and the introduction of a new shareholder in respect of such shares, relieved him from all liability; and that the statute 7 & 8 Vict. c. 113, cannot be construed so as to fix a person not a shareholder in fact with liability as if he were a shareholder."

being in the said banking business, and those who shall have been shareholders therein, and their several executors, administrators, successors, and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the [671] said company, subject to the provisions hereinafter contained, as fully as if the said company were not incorporated." The 9th section enacts "that every judgment, decree, or order of any court of justice in any proceeding against the company may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." [Cockburn, C. J. It will not be disputed on the other side, that, but for the 21st section, to make a party liable for the contracts of the company, it must be shewn that he is an actual shareholder.] The proviso in the 10th section is material, —"that no person having ceased to be a shareholder of the company, shall be liable for the payment of any debt for which any such judgment, decree, or order shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same, or for which judgment shall have been obtained after the expiration of three years from the time when he shall have ceased to be a shareholder of such company; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed." That shews what ought to be the construction of the 21st section. It is the duty of the directors to keep the register in order, and to see that a due account is filed of existing shareholders. [Cockburn, C. J. The shareholder has the means of compelling the directors to do their duty in that respect: the creditor has not. Crowder, J. The language of s. 21 would seem to shew [672] that the memorial was to be conclusive.] According to that construction, the memorial is not used as proof of an existing fact, but to create a liability which had no previous existence. The 16th, 17th, and 18th sections shew that it is exclusively the duty of the manager and directors to make and to keep perfect the memorial; and that the shareholders have no control whatever over it. The 21st section may be made reconcileable with all the other provisions of the act by substituting "being" for "as." By the 23rd section, the interest of the transferror ceases on the transfer being registered, and the transferree, and the transferree only, from that moment becomes liable for calls. [Williams, J. What do you conceive to have been the object of the 21st section?] To make the memorial evidence. [Williams, J. That had already been done by the 19th section.] The 19th section merely makes a certified copy admissible. [Willes, J. Under the 6th section of the 7 G. 4, c. 46, the memorial was always received as evidence (*a*). Williams, J. It would be a cruel trap for a creditor, who has no means of information but what the memorial affords him, to hold it to be no [673] more than primâ facie evidence.] It would be equally hard upon the shareholder to hold him conclusively bound by a document over whose preparation he has no control. [Cockburn, C. J. He is a volunteer. He may go to the directors, and get his name taken off the memorial by the means pointed out in s. 17.]

Cur. adv. vult.

Willes, J., now delivered the judgment of the court. In this case the defendant was a shareholder in the company at the time the last memorial was filed, viz. in June, 1856; and, although he had transferred his shares, and the transfer-deed had been duly executed by the transferree, and registered by the proper officer of the company,

(*a*) That section enacted "that a copy of any such account or return so filed or kept and registered at the Stamp-Office as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and when it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

no further memorial had been filed shewing that he had ceased to be a shareholder. The case, therefore, falls precisely within that of *Dossett* v. *Harding*, ante, vol. i., p. 524, and not within the rule laid down in *Powis* v. *Butler*, ante, p. 645 (*a*). Our judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

[674] SINNOTT *v.* THE BOARD OF WORKS FOR WHITECHAPEL DISTRICT.
Jan. 28th, 1858.

[S. C. 27 L. J. C. P. 177; 4 Jur. N. S. 263; 6 W. R. 289.]

An action upon a contract for cleansing the streets of a parish, entered into by the trustees under a local act, is, by virtue of the 90th, 93rd, 94th, and 95th sections of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, properly brought against the district board created under the last-mentioned act.

The declaration stated, that, before the passing or coming into operation of the 18 & 19 Vict. c. 120, intituled "An Act for the better local management of the Metropolis," to wit, on the 4th of August, 1855, by articles of agreement made between the trustees of the parish of St. Mary, Whitechapel, of the one part, being the trustees incorporated by "The Whitechapel Improvement Act, 1853" (16 & 17 Vict. c. cxli.), and the plaintiff of the other part, and sealed with the common seal of the said trustees, and with the seal of the plaintiff,—after reciting that the said trustees had lately advertised for tenders for sweeping and cleansing the streets and other places, and the gutters and channels thereof, as well the footways as carriage-ways, within such parts of the said parish as were not within the liberties of Her Majesty's tower of London and city of London, for eleven months, commencing on the 1st of August then instant; and that the plaintiff had agreed to perform such work in manner thereinafter mentioned for the sum of 1270*l.*, payable as thereinafter mentioned,—it was witnessed, that, in consideration of the covenant thereinafter contained for the payment of the said sum of 1270*l.* to the plaintiff in manner thereinafter mentioned, he the plaintiff did covenant with the said trustees in manner following, that is to say, that he the plaintiff should and would for the full end and term of eleven months to be computed from the 1st of August then instant, in an efficient, workman-like, and proper manner, and to the satisfaction of the said trustees for the time being, and of the person, if any, from time to time acting as their superintendent or inspector or **[675]** other officer in that behalf, three times in every week during the said term of eleven months, and on such days and times of the day as might be from time to time appointed for that purpose by the said trustees for the time being, or by such person so acting, thoroughly cleanse, sweep, load, collect, cart, and carry away, and deposit in or upon some proper place to be from time to time provided for that purpose by the plaintiff out of the said parish, all the dirt, slop, filth, and offensive matter from and out of all and every the streets, squares, ways, lanes, passages, courts, yards, roads, alleys, and places open to the public within such parts of the said parish of St. Mary, Whitechapel, as did not lie within the liberties of Her Majesty's tower of London or city of London, and of and from and out of all the gutters and channels in, along, or across any of the carriage-ways or foot-pavements or footways of the said streets, squares, ways, lanes, yards, roads, alleys, and places as aforesaid; and that, in case the plaintiff should neglect or omit to cleanse, sweep, load, collect, cart, drive, and carry away all the dirt, slop, filth, and offensive matter from and out of any of the said streets, squares, ways, lanes, passages, courts and yards, roads, alleys, and places open to the public, of or from or out of all and every the gutters and channels in, along, or across the carriage-ways or foot-pavements or footways of all the said streets, &c., and places, at and upon the respective days and times appointed for that purpose, and in the manner and to the satisfaction aforesaid, he the plaintiff should pay to the trustees aforesaid for the time being, for every such neglect or omission as aforesaid (over and above all penalties to which in such case the plaintiff might by act of parliament be subject), for and in respect of each and every of the streets and places mentioned and described in the first schedule thereunder written, except such parts as lie within the **[676]** liberties of Her Majesty's

(*a*) This case was argued before that of *Powis* v. *Butler*, ante, p. 645, but the judgment was postponed.

tower of London, the sum of 1l. for every such neglect or omission, and for and in respect of each and every of the streets and places included and comprised in the second schedule thereunder written, except as aforesaid, the sum of 10s. for every neglect or omission, such sums respectively to be considered and recoverable as liquidated damages: Provided always, that, in case the plaintiff should at any time during the continuance of that contract, neglect or omit to cleanse, sweep, load, collect, cart, and remove all the dirt, slop, filth, and offensive matter from or out of all or any part of all or any of the said streets, squares, &c., or from or out of all and every the gutters and channels alone or across the foot-pavements or footways of any of the said streets, squares, &c., at or upon the respective days and times appointed for that purpose, or wherein he or they ought to perform the said matters, and in the manner, and to the satisfaction aforesaid,—then and in every such case it should and might be lawful for the said trustees for the time being as aforesaid, or the person acting as their superintendent or inspector or officer as aforesaid, without notice to the plaintiff, to hire and employ any other person or persons, with carts, horses, men, materials, tools, and implements, to execute, do, and perform the same works so neglected or omitted, and so from time to time as often as any such neglect or omission should happen: And the plaintiff did by the said articles covenant with the said trustees that it should be lawful for the trustees for the time being, and without having made any previous demand, to retain and deduct out of any sum of money that might become due and payable to the plaintiff for or on account or by virtue of that agreement, or otherwise, all and every the costs, charges, and expenses that might be in any way incurred by the trustees for the time being for or by reason of their [677] hiring or employing any other person or persons with carts, horses, men, materials, tools, or implements for any of the purposes hereinbefore mentioned, and for or by reason of any neglect or omission on the part of the plaintiff: and that it should and might be lawful for the said trustees for the time being as aforesaid to retain and deduct out of and from any sum of money that might become due and payable to the plaintiff, all such sums, as liquidated damages, as might under the provisions of the said agreement be payable to the trustees for the time being by the plaintiff for any such neglect or omission as aforesaid, or any costs, charges, and expenses incurred by the trustees in consequence thereof, or in remedying the same: And by the said articles of agreement, in consideration of the plaintiff from time to time well and truly observing, performing, and keeping all the clauses, articles, and matters in the said articles of agreement contained, they the said trustees did,—but covenant only so far as they lawfully might, and so far only as they might without charging or binding themselves or any of them individually, or their heirs, executors, or administrators, or the estate or effects of them or any of them,—covenant with the plaintiff that he should be at liberty for the period of eleven months from the said 1st of August, to take, use, and enjoy for his own proper use and benefit all the dirt, slop, and filth to be by him collected, carted, and carried away, in pursuance of the said articles, from the streets and other places aforesaid; and that the trustees for the time being should and would well and truly pay or cause to be paid unto the plaintiff the sum of 1270l. by four equal payments of 317l. 10s. each, after retaining and deducting thereout all the costs, charges, and expenses, and liquidated damages, if any, as thereinbefore mentioned and agreed or impowered to be retained and deducted,—the first of such [678] quarterly payments to be made on the 1st of November then next ensuing, another of such quarterly payments to be made on the 1st of February, 1856, another of such quarterly payments on the 1st of May then next following, and the remaining quarterly payment on the 31st of July then next following, which had passed before suit: Averment, that the said parish was and is a parish included in a district mentioned in Schedule B. to the said first-mentioned act of parliament, and that all the duties, powers, and authorities in relation to the paving, lighting, watering, cleansing, or improving of such parish at any time vested in the said trustees, and all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of the said parish, and the inhabitants thereof (except and save as in the said act is excepted and provided), had before suit become vested in and were performed and exercised by the defendants pursuant to the said act of parliament; and that, although the plaintiff had done all things, and all things had happened, necessary to entitle the plaintiff to payment of the whole of the said moneys so payable to him as aforesaid, and to maintain the action; yet that no part of the said sum of 1270l. had been paid to the

plaintiff, contrary to the said covenant in that behalf aforesaid, and there was then due to him under and by virtue of such covenant a large sum, to wit, the sum of 1269l.

There was a second count, for money payable by the defendants to the plaintiff for work done by the plaintiff for the said trustees, at their request, and before the coming into operation of the first-mentioned act, and for money before then paid by the plaintiff for the said trustees, at their request, and for money found to be due from the said trustees to the plaintiff on accounts stated between them.

[679] There was also a third count, for work done by the plaintiff for the defendants at their request, and for moneys paid by the plaintiff for the defendants at their request, and for money found to be due from the defendants to the plaintiff upon accounts stated between them, &c.

The defendants demurred "to the first count, and to the counts for work done and money paid for, and money found to be due from, the said trustees," the ground of demurrer stated in the margin being,—"that the part of the declaration demurred to is founded upon contracts with the trustees of the parish of St. Mary, Whitechapel, and that the liability on such contracts is not transferred to the defendants, but that s. 94 of the 18 & 19 Vict. c. 120, provides that such contracts shall be proceeded on and enforced as if the act had not passed," and that the action should have been against the trustees.

Watkin Williams, in support of the demurrer (*a*). The question is, whether this action is properly brought against the new board, or whether it ought not to have been brought against the trustees under the local act. The 90th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts, amongst other things, that "all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, **[680]** or improving of any parish included in any district mentioned in Schedule B. to this act (Whitechapel District being one), or any part of such parish, now vested in any commissioners, vestry, or other body, or in any officer of any commissioners or other body, and all other duties, powers, and authorities in anywise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof (except such duties, powers, and authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto), now vested under any local act of parliament in any commissioners, vestry, or other body, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district; and the provisions of every such act of parliament as aforesaid shall be applicable to the vestry of every parish mentioned in the Schedule A., and to every such district board accordingly, and the offices of all commissioners and persons whose powers are determined by this act, shall cease and be determined, and there shall be no new appointment or election to any such office." And the 94th section provides "that all contracts, agreements, bonds, covenants, or securities made or entered into with or in favour of or by such commissioners or body, or any person on their behalf, or any such officer as aforesaid, before the commencement of this act, shall remain as valid and effectual and be proceeded on and enforced as if this act had not been passed; and no action, suit, prosecution, or proceeding commenced or carried on by or against such commissioners or body, or any of them respectively, shall abate or be discontinued or prejudicially affected by this act, but **[681]** shall continue and take effect as if this act had not been passed; and all moneys coming to such commissioners or body under any such contract, agreement, bond, covenant, security, action, suit, or proceeding, and which would have been applicable by them if this act had not been passed for the purposes of any of the duties or powers hereby transferred to any vestry or district board, shall be paid over to such vestry or board, or as they may direct, and be applied for the like purposes; and all moneys and liabilities which such commissioners or body or officer would have

(*a*) The points marked for argument on the part of the defendants were,—"that the part of the declaration demurred to is founded upon contracts entered into with the trustees of the parish of St. Mary, Whitechapel, and that the liability on such contract is not transferred to the defendants; that the 94th section of the 18 & 19 Vict. c. 120, provides that such contracts shall be proceeded on and enforced as if the act had not passed; and that the action should have been against the trustees."

been liable to pay or discharge under any such contract, agreement, bond, covenant, security, action, suit, or proceeding, out of any rates to be levied under any such powers as aforesaid, if this act had not been passed, and all costs, damages, and expenses which such commissioners or body, or any of them respectively, might, if this act had not been passed, have legally defrayed out of any such rates, shall be paid out of rates to be levied by such vestry or board as hereinafter provided." The contract declared on was entered into with the old trustees on the 4th of August, 1855, for sweeping and cleansing the streets, &c., of the parish for eleven months from the 1st of August, for the sum of 1270l. The Metropolis Local Management Act received the Royal assent on the 14th of August, 1855, and came into operation on the 1st of January, 1856; and this action was commenced after that day, not against the trustees under the local act, with whom the contract was made, but against the new board created under the Metropolis Local Management Act. It is submitted,—first, that, according to the plain and unambiguous language of the 94th section of that act, all contracts and covenants entered into with the trustees under any local act are to be proceeded on and enforced as if that (the general) act had not passed,—secondly, that, if that be the true [682] construction of the section, the court cannot look further, but must give effect to its language,—thirdly, that, even if there could be any doubt, regard being had to the ordinary mode of construing doubtful language in acts of parliament, it is sufficiently apparent that the legislature did not intend to abolish the liability of the local trustees. [Crowder, J. It seems absurd to continue the liability of the old trustees, when all the property and mode of raising and enforcing rates are transferred to the new board. Cockburn, C. J. Is there any provision in the general act for the transfer to the new board of the contracts and liabilities of the old trustees?] None. [Cockburn, C. J. The new rates are to be under the control of the new board. If the contract is to be enforced against the old trustees, how are they to get the money?] As provided by s. 94. The legislature, in abolishing the office of commissioners of sewers, have, in ss. 146, 148, expressly done what the plaintiff will contend ought to have been done here (*a*).

(*a*) The 146th section enacts that "no action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commissioners had continued in full force; and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, the metropolitan board of works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners."

And s. 148 enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedules to this act, shall be vested in the metropolitan board of works; and all persons who then owe any money to the said commissioners of sewers, or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct; and all moneys then due and owing by, or recoverable from, the said commissioners, shall be paid by, or recoverable from, the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants and securities made or entered [into] with or in favour of or by any former or other commissioners, which, under the 11 & 12 Vict. c. 112, were to take effect in favour of, against, or with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been

[683] But, if they had so intended, they would doubtless have used the same language. [Cockburn, C. J. The inconvenience of the construction you are contending for would be enormous: there might be a contract extending over eight or ten years.] If the words of the statute are plain, the court cannot be induced to disregard them because it may see inconveniences which may have escaped the notice of the legislature.

Raymond, contra (*a*)[1]. There can be no doubt that it **[684]** was the intention of the legislature to abolish all pre-existing local bodies, and to substitute for them district boards of works and vestries. This is clearly shewn by the 90th and 95th sections (*a*)[2]. [Cockburn, C. J. As regards future contracts, no doubt, the old bodies are extinguished.] All their duties, powers, and authorities are taken away by s. 90, and all their property **[685]** transferred by s. 93: and the question is whether their liability on contracts is not also transferred to the new board. The 94th section provides that all contracts made by the old body before the commencement of the act shall remain as valid and effectual, and be proceeded on and enforced as if the act had not passed; and that no action or suit commenced by or against the old body shall abate or be discontinued or prejudicially affected by the act, but shall continue and take effect as if the act had not been passed. This provision or exception would have been unnecessary, but that the legislature felt that without it existing suits would have abated. [Cockburn, C. J. The 93rd section transfers all property to the new board. Section 94 keeps alive contracts and actions; and then goes on to provide that all moneys coming to the old commissioners under any such contract, action, &c., and which would have been applicable by them, if that act had not been passed, for the purposes of any of the duties or powers thereby transferred to any vestry or district board, shall be paid over to such vestry or board; and that all moneys and liabilities which such commissioners, &c., would have been liable to pay or discharge under any such contract, &c., out of any rates to be levied under any powers possessed by them, if that act had not been passed, shall be paid out of rates to be levied by such vestry or board as thereinafter provided. Certainly one would have expected

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proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers, if this act had not been passed, and the powers of such commissioners had continued in full force."

(*a*)[1] The points marked for argument on the part of the plaintiff were,—

"That, looking at the various sections of the statute 18 & 19 Vict. c. 120, and especially the 90th, 93rd, 94th, and 95th sections, the liability upon the contract declared on is transferred to the defendants, and that they are, as a consequence, properly sued upon such contracts:

"That it is clear, upon these sections, that an action will lie, notwithstanding (?) the act:

"That the first branch of the 94th section is merely declaratory of a continuous efficacy of prior contracts, and of their validity to sustain an action, as well after as before the passing of the statute, and was not intended to restrict the action to the trustees:

"That, if the trustees are to be sued, this incongruity will arise, that they, having no means of payment, are liable to an action, whilst the board of works, having the means, or the power of acquiring them, and who are directed to pay by the same section, are to escape suit:

"And that, if the trustees are to be sued, the clause against abatement of action (s. 94) is superfluous; for, if they are liable to be sued after the act upon contracts made by them before the passing of the act, à fortiori would pending actions against them not abate; and the clause is then unnecessary."

(*a*)[2] The 95th section enacts, that, "where, under the provisions of any local act in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in either of the schedules A. and B. to this act, or any part of any such parish, any election or appointment of any commissioners or persons whose powers are determined by this act is appointed to take place at any time between the time of the passing of this act and the time appointed for the commencement thereof, the commissioners or persons now acting under such local act shall remain in office and perform and exercise all the duties, powers, and authorities of such act until the commencement of this act, anything in such local act to the contrary notwithstanding."

to find some provision for transferring the liabilities: but there is none; that section leaves it in dubio upon whom the liability to be sued in respect of existing contracts rests, whether the old or the new body. It would have been easy to insert words to make the matter clear.] The only means of paying would be out of the rates made under the act, the power to make rates having been taken away from the old body. [Crowder, J. It certainly would be somewhat anoma-**[686]**-lous that the action should be brought against the one body, and that recourse should be had by mandamus to the other body to obtain the fruits.] By s. 94, all moneys coming to the old body are to be paid over to the new board. [Cockburn, C. J. That is rather against you: it imports that they have been received by the old body.] The 146th and 148th sections may fairly be prayed in aid of the construction of the earlier sections: the court will so interpret the act as if possible to make the whole harmonize. By such a mode of dealing with the language of a statute, the court of Queen's Bench met a similar difficulty in the case of *Ex parte Greenwood*, 27 Law J., Q. B. 29. Here, as in that case, all difficulty will be obviated by looking to the general scope of the act.

Watkin Williams, in reply. If the legislature had intended by the 90th and 94th sections to transfer all the existing liabilities of the old commissioners to the new board, they would have used the same expressions which they have used in the 146th and 148th sections. *Martin* v. *Hemming*, 24 Law J., Exch. 3, 18 Jurist, 1002, shews that recourse cannot be had to extraneous matter to aid the construction of an act of parliament. It is true that the old bodies are abolished, but subject to their continuance for the purpose of all contracts, &c., into which they have entered: and they are still in existence as to the poor. If Sinnott obtains judgment here, a mandamus would lie to compel the new board to pay the money. [Cockburn, C. J. The old trustees have ceased to be interested. The new board alone is interested in resisting the enforcement of the contract, if it is one which ought not to be enforced. Can you suggest any reason why a different consequence should flow from the language of the 90th, 93rd, and 94th sections, from that which would result from the 146th and **[687]** 148th sections?] It is impossible to suggest a reason for it: but such a construction necessarily results from the difference of language used in the different sections.

Cockburn, C. J. After the best consideration I have been able to give to the several clauses of the statute which bear upon this question, I am of opinion that our judgment should be for the plaintiff. The provisions on which the decision turns are no doubt involved in considerable ambiguity: but, upon the whole, I arrive without any hesitation at the conclusion I have stated. The case turns mainly upon the effect which is to be given to the 90th, 93rd, and 94th sections of the act for the better local management of the metropolis, 18 & 19 Vict. c. 120. The 90th section enacts that all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish, &c., now vested in any commissioners, vestry, &c., and all other duties, powers, and authorities in anywise relating to the regulation, government, or concerns of any such parish, &c., except such duties, powers, or authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto, now vested under any local act of parliament in any commissioners, vestry, &c., shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district. The 90th section having thus transferred to and vested in the new board all the duties, powers, and authorities, in respect amongst other things of the cleansing the streets, &c., of the parish, then comes the 93rd section, which transfers to the new board all property, &c., vested in the former commissioners. Then comes the 94th **[688]** section, upon which the decision in this case mainly turns. It enacts that all contracts, &c. made or entered into with or in favour of or by such commissioners, &c., before the commencement of this act, shall remain as valid and effectual, and be proceeded on and enforced, as if this act had not been passed; and that no action, &c. commenced by or against such commissioners shall abate or be discontinued or prejudicially affected by this act, but shall continue and take effect as if this act had not been passed; and that all moneys coming to such commissioners under any such contract, &c., action, &c., and which would have been applicable by them, if this act had not been passed, for the purposes of any of the duties or powers thereby transferred to any vestry or district board, shall be paid over to such vestry or board, and be applied for

the like purposes; and that all moneys and liabilities which such commissioners would have been liable to pay or discharge under any such contract, &c., action, &c., out of any rates to be levied under any such powers as aforesaid if this act had not been passed, and all costs, damages, and expenses which such commissioners might, if this act had not been passed, have legally defrayed out of any such rates, shall be paid out of rates to be levied by such vestry or board as thereinafter provided. Now, the effect of the 93rd and 94th sections appears to be this,—that, all the duties, powers, and authorities of the trustees or commissioners having by s. 90 been transferred to the new board, all property to which the former body was entitled is by the 93rd section transferred to and vested in the new board, and by the 94th section all contracts entered into by and with the former body are to be kept alive: and whereas actions may have been commenced upon such contracts, the section goes on to provide that such actions shall not abate: and then it provides that all moneys coming to the old [689] commissioners shall be transferred to and be paid over to the vestry or new board, and that all liabilities incurred by such commissioners, shall be paid out of rates to be levied by such vestry or new board. It has been contended on the part of the defendants, that, as the contracts of the old body are kept alive, and actions pending thereon are not to abate, the old body, though for all other purposes extinguished, are still continued and kept alive with reference to such contracts. But, upon a consideration of all the provisions of the act which are applicable to the question, it appears to me that that is not the construction which ought to be put upon them. It is clear that the whole duties, powers, and authorities of the old commissioners with reference to this subject are abolished: and it is plain that the legislature considered,—otherwise they would not have enacted the 94th section,—that contracts which had been entered into by the old commissioners, and any actions which might be then pending in respect thereof, would, by reason of the 90th section, have fallen to the ground, unless kept alive by the 94th. And, when we look at the latter part of the 94th section, which provides for the discharge of the liabilities under pre-existing contracts out of the rates levied by the new board, I think the language necessarily implies that but for that provision the liability upon contracts of the former body would have been altogether at an end. The past tense is used,—all moneys and liabilities which such commissioners would have been liable to pay or discharge under any contract, &c. if this act had not been passed. Looking, therefore, at all these provisions,—it being clear that the legislature intended to transfer to the new board all the powers and duties and all the property of the old commissioners, as well as everything that might be coming to them under contracts into which they had entered, and considering also that the [690] legislature has charged the liabilities of the old commissioners upon the rates to be levied by the new board,—I am unable to come to any other conclusion than that the legislature intended with the transfer from the old to the new board of the powers and authorities and the property vested in the former, to transfer also the liability in respect of contracts which had been entered into by the old commissioners. We have been referred to the 146th and 148th sections as leading to a different conclusion. Those provisions relate to a different body, viz. the Metropolitan board of works, to whom the powers, &c. of the old commissioners of sewers are transferred in express language. It is said that the absence of a similar provision in the sections immediately before us shews that the legislature did not intend to transfer to the new district board all the liabilities of the former body. I must confess it does not strike me in the same way. It is impossible to suggest any real distinction between the two cases, or to imagine any substantial reason why the liability should be transferred in the one case and not in the other. The circumstance of these sections being in pari materiâ rather affords a solution of the difficulty. It would have been better, perhaps, if the language of s. 94 had been more clear and precise: but I think we may derive some assistance in construing it from some of the other clauses referred to: and one thing is perfectly clear, that, supposing this is a contract which the plaintiff is entitled to inforce against some one, it follows from the concluding part of the 94th section that the demand must be satisfied out of the rates levied by the new board,—which fully warrants the remark I threw out in the course of the argument, that this is an idle contest upon a matter of mere form. The plaintiff's demand must be paid by somebody; and the act declares that it shall be paid out of the funds raised by the new board, the present defendants. It [691] clearly is most expedient that the new board should be the

parties to be sued. The whole management is transferred to them, as well as the duty of protecting the funds to be levied from unjust demands. They are the parties in whom the funds are vested, and who have to administer them; and it is not only their duty but also their interest to see that they are properly applied. I therefore think that in point of policy and expediency they should be liable to be sued. And, at all events, we have the satisfaction of knowing that in so holding we shall be doing no injustice; for, sooner or later the claim in question must have been enforced against the funds of the new board. Upon these grounds, I am of opinion that the reasonable construction of the act, for all practical purposes, is, to hold that the present action is well brought against these defendants.

WILLIAMS, J. I am entirely of the same opinion. The main stay of Mr. Watkin Williams's argument is the 94th section, which comes by way of proviso on the 90th, whereby all the duties, powers, and authorities in relation to the matters now in question are transferred from the old trustees or commissioners to the new board to be appointed under the 18 & 19 Vict. c. 120. It is insisted that the words of the 94th section are too strong to be got over. That section provides that all contracts made or entered into with or in favour of or by the old commissioners before the commencement of the act, shall remain as valid and effectual, and be proceeded on and enforced, as if the act had not been passed. If it is to be taken literally that all contracts are to be enforced in the same mode as before the passing of the act, undoubtedly there would be an end of the argument. But it does not expressly say so; and we find that followed by a provision which I think fairly enables us to put upon the 94th section a con-**[692]** struction which convenience and justice undoubtedly requires, and justifies us in concluding that the liability to be sued in respect of existing contracts, except as to actions already commenced, is transferred to the new board, and consequently that this action is properly brought against them.

CROWDER, J. I also think we may reasonably put upon this statute the construction which convenience requires. Looking at the whole purview of the statute, it cannot be doubted that it was intended altogether to abolish and extinguish the old body, and to transfer all its powers and duties, rights and liabilities, to the newly created board: and, but for the 94th section, it could hardly have been doubted that that intention was completely and thoroughly carried out. All the duties and powers of the old body are transferred by the 90th section, and all their property by the 93rd. That made the old body a mere nonentity, except as to the affairs of the church and the relief of the poor. The real meaning of the 94th section, I apprehend, is, that all contracts made by or with the former body shall continue as binding as if the act had not been passed. But then it is urged that the legislature go on to say that they shall be proceeded on and enforced as if the act had not been passed, and consequently that they are to be enforced precisely in the same way as before. That, as it appears to me, is by no means a necessary consequence. The meaning, I think, is, that the contracts shall remain as valid and effectual and be enforceable as if the act had not passed, in other words, that contracts made by the former body shall not be vacated in consequence of their having ceased to exist as a body. Then, as to existing actions, the clause provides that they shall not abate or be discontinued or prejudicially affected by the act: but the subsequent part provides **[693]** that the liability thereon shall be defrayed out of the rates to be levied by the new board. The simple question, therefore, is, who are to be the formal parties to be sued? It does not appear to me that we are constrained by any language of the statute to hold that the action must necessarily be brought against the old body, when every effect can be given to it by holding that it may be brought against the new board, from whom the fruits of the judgment must ultimately be obtained. Upon the best consideration I can bring to the question, I am of opinion that the new board are properly made defendants in this case, and that consequently our judgment must be for the plaintiff.

WILLES, J. For the reasons given by the rest of the court, I concur in thinking that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

IN THE MATTER OF JOSEPH HARRIS AND ANOTHER AND THE COCKERMOUTH AND WORKINGTON RAILWAY COMPANY. Jan. 15th, 1858.

[S. C. 1 Rly. & Can. Traff. Cas. 97; 27 L. J. C. P. 162; 6 W. R. 209; 4 Jur. N. S. 239. Applied, *In re Jones and Eastern Counties Railway*, 1858, 3 C. B. N. S. 719. Referred to, *Evershed* v. *London and North Western Railway*, 1877-78, 2 Q. B. D. 267; 3 Q. B. D. 134; 3 App. Cas. 1029. See *Rhymney Iron Company* v. *Rhymney Railway*, 1888, 6 Rly. & Can. Traff. Cas. 64. Referred to, *R.* v. *Railway Commissioners and Distington Iron Company*, 1889, 22 Q. B. D. 655. Discussed, *Liverpool Corn Trade Association* v. *London and North Western Railway*, [1891] 1 Q. B. 132. Discussed and explained, *Phipps* v. *London and North Western Railway*, [1892] 2 Q. B. 229.]

A railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic:—Held, that neither of these was a justifiable reason for the "undue preference" thus given.

A rule was obtained in Trinity Term last, calling upon the Cockermouth and Workington Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway Traffic **[694]** Act, 1854, 17 & 18 Vict. c. 31, injoining the said company to desist from giving to Isaac Fletcher and William Fletcher an undue preference for or in respect of the carriage of coals on the railway of the defendants, and injoining the company to carry coals for the complainants upon equal terms with the said Messrs. Isaac Fletcher and William Fletcher, having due regard to the circumstances, if any, which rendered the cost to the defendants of carrying coals for the said Isaac Fletcher and William Fletcher less than the cost of carrying for the complainants,—with costs.

The affidavits upon which the rule was obtained were in substance as follows:—

A line of railway from Cockermouth to the port and harbour of Workington, about eight miles in length, and called the Cockermouth and Workington Railway, was constructed by the defendants by virtue of an act of the 8 & 9 Vict. c. cxx., and is worked and managed by and under the control of the defendants.

The complainants are proprietors of a colliery called the Millbanks Colliery, situate at Greysouthern, in Cumberland, adjacent to the said line of railway, from which colliery they raise large quantities of coals.

For the more ready conveyance of coals from their colliery to the railway, a siding of about 475 yards in length, and distant 759 yards from the complainants' said Millbanks Colliery, was constructed by the company at the joint expense of the company and the complainants, under an agreement by which the latter agreed to pay to the former annually, for the use of the said siding, a sum equal to 7½ per cent. on the amount expended by the company for their share of the expense of constructing the said siding, which is called the Marron Siding.

The said Marron Siding extends from a point near the complainants' colliery to, and joins the railway at, **[695]** a point called the Marron Junction, distant about 3 miles and 1519 yards from Cockermouth, and about 4 miles and 1120 yards from Workington Harbour.

The Cockermouth and Workington Railway Company allow the complainants to take their waggons from their line to that end of the Marron Siding which is near to their colliery, to be filled with coals; and, when so filled, they are propelled along the siding, partly by the complainants' own power and partly by power supplied by the company, to the Marron Junction, from which point they are carried by the company along their line to a place thereon called the Harry Gill Junction, and thence to a point on the line called the Lowther Junction, and thence along the said company's line to Workington Harbour, where they are disposed of by the complainants.

The said company have for a long time charged to and exacted from the complainants at the rate of 3s. $9\frac{9}{11}$d. per waggon of 60 cwt. for the conveyance of the said

coals from the Marron Junction to Workington, being at the rate of $3\frac{3}{4}$d. per ton per mile, for such conveyance of the said coals. The company have never charged the complainants anything in respect of their allowing them to take their waggons to the end of the Marron Siding to be filled, or in respect of the use of their waggons for the purpose of conveying their coals in them along the said siding to the Marron Junction, or in respect of the power by which the waggons are propelled in part along the Marron Siding to the Marron Junction.

Messrs. Isaac and William Fletcher are the lessees of several collieries situate near to the said Millbanks Colliery, and adjacent to the Cockermouth and Workington Railway; and the coals from the said collieries are raised from several shafts called the "Bridgefoot Pit," "Harry Gill Pit," "Clifton Pit," and "Lowther Pit."

[696] Bridgefoot Pit is 926 yards from the Marron Siding; and the Messrs. Fletcher bring their coals in carts from the said Bridgefoot Pit to the Marron Siding, and load their coals on waggons at the same point on the Marron Siding as the coals from the complainants' colliery are loaded.

The company allow the Messrs. Fletcher to take their (the company's) waggons to the point on the Marron Siding at which they so load them; and the said Messrs. Fletcher, having loaded the said waggons with coals there, send them along the said Marron Siding, partly by means of the complainants' power and partly by means of power supplied by the company, to the Marron Junction, from which point they are carried by the company along the railway in their waggons to Workington Harbour, where they are disposed of.

The coals so obtained by the Messrs. Fletcher from the Bridgefoot Pit, and so carried on the railway, are conveyed to Workington Harbour on the same part of the said line, and for the same distance precisely, as the coals so obtained by the complainants from their said colliery are carried along the said line.

The company never charged Messrs. Fletcher anything in respect of allowing them to take their (the company's) waggons to be filled on the Marron Siding, or in respect of the use of their waggons for the purpose of carrying their coals along the siding to the Marron Junction, or for the power by which the said coal is so in part propelled by the company along the siding to the Marron Junction.

Messrs. Fletcher pay the complainants for the use of the said siding, and for trimming, and so in part propelling the said waggons when so filled along the Marron Siding, a sum agreed upon between them. The complainants' coals and the coals of the Messrs. Fletcher are propelled by means of the complainants' power the [697] same extent of distance along and on the same portions of the Marron Siding, and are also propelled by means of the power of the company the same extent of distance along and over the same portions of the Marron Siding; and there is no difference in the extent of the application of the power of the company in propelling Messrs. Fletchers' coals along the siding, and in propelling the complainants' coals along the said siding.

The Harry Gill Pit is situate about 230 yards from the railway; and Messrs. Fletcher bring their coals from that pit upon the line by a waggon-way belonging to them, extending from the Harry Gill Pit to a point on the line called the Harry Gill Junction, being a point on the line about 293 yards nearer to Workington Harbour than the Marron Junction.

The said coals of Messrs. Fletcher are conveyed along the said waggon-way by power provided by the company to the Harry Gill Junction, whence they are carried by the company on their waggons along their line to Workington Harbour, and are there disposed of by Messrs. Fletcher.

The company allow the Messrs. Fletcher to take their waggons on the Harry Gill waggon-way to be filled, and to take their coals in the said waggons along the said waggon-way to the Harry Gill Junction, without any charge.

The coals of Messrs. Fletcher obtained from the Harry Gill Pit are carried from the Harry Gill Junction to Workington Harbour along the same portion of the company's line as the coals obtained by the complainants from their colliery are carried from the said Harry Gill Junction

The Lowther Pit and Clifton Pit are situate respectively, the said Lowther Pit about 318 yards from the railway, and the Clifton Pit about 1008 yards from the Lowther Pit; and the coals obtained at the Clifton Pit [698] are conveyed by the Messrs. Fletcher on a tram-way and in waggons belonging to them to the said Lowther

Pit; and the Messrs. Fletcher have a waggon-way extending from the Lowther Pit to a point in the line called the Lowther Junction, about 645 yards nearer to Workington Harbour than the Marron Junction; and the said Messrs. Fletcher bring their coals from the said Lowther Pit and Clifton Pit upon the said line by means of their said waggon-way, partly by their own power and partly by the power of the said railway company, to the Lowther Junction; and the same are carried thence by the company in their waggons to Workington Harbour, where they are disposed of.

The company allow Messrs. Fletcher to take their (the company's) waggons on the waggon-way to the Lowther Pit for the purpose of the same being loaded with coals from the said Lowther Pit and Clifton Pit, and allow them to take their said coals to the Lowther Junction, without any charge.

The coals of the Messrs. Fletcher obtained from the Lowther Pit and Clifton Pit are carried from the Lowther Junction to Workington Harbour along the same portion of the line as the coals obtained by the complainants from their colliery are carried from the said Lowther Junction.

The Cockermouth and Workington Railway Company have entered into an agreement with Messrs. Fletcher, which took effect from the 1st of November, 1856, whereby the rates agreed to be charged by the company to the Messrs. Fletcher, for the conveyance of coals to the harbour at Workington from the Marron Junction, the Harry Gill Junction, and the Lowther Junction, respectively, are, 3s. 4d. per waggon of 60 cwt. when the quantity conveyed by the said Messrs. Fletcher on the said line from all or any of the said junctions in any one day does not exceed sixty waggon-loads per [699] day on an average of some number of days to the year agreed upon between them, and 2s. 10d. per waggon of 60 cwt. when the quantity conveyed on the line by the Messrs. Fletcher in any one day from all or any of the said junctions shall not exceed on such average one hundred and twenty waggon-loads, and 2s. 6d. per waggon of 60 cwt. when the quantity conveyed on the said line by the Messrs. Fletcher in any one day from all or any of the said junctions shall exceed on such average one hundred and twenty waggon-loads.

The said rate of 3s. 4d. per waggon of 60 cwt. is at the rate of $2\frac{7}{8}$d. per ton per mile for the carriage of the said coals for the Messrs. Fletcher on the said line from the Marron Junction to Workington Harbour, and is at the rate of $3\frac{1}{10}$d. per ton per mile for the carriage of the coals for Messrs. Fletcher from the Harry Gill Junction to Workington Harbour, and is at the rate of $3\frac{1}{8}$d. per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher from Lowther Junction to Workington Harbour.

The said rate of 2s. 10d. per waggon of 60 cwt. is at the rate of $2\frac{1}{2}$d. per ton per mile for the carriage of the said coals for Messrs. Fletcher on the said line from Marron Junction to Workington Harbour, and is at the rate of $2\frac{11}{20}$d. per ton per mile for the carriage of the coals for Messrs. Fletcher from Harry Gill Junction to Workington Harbour, and is at the rate of $2\frac{13}{20}$d. per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher, from Lowther Junction to Workington Harbour.

The said rate of 2s. 6d. per waggon of 60 cwt. is at the rate of $2\frac{1}{6}$d. per ton per mile for the carriage of the said coals for Messrs. Fletcher on the said line from Marron Junction to Workington Harbour, and is at the rate of $2\frac{1}{4}$d. per ton per mile for the carriage of the said coals for Messrs. Fletcher from Harry Gill Junction to [700] Workington Harbour, and is at the rate of $2\frac{7}{20}$d. per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher from the Lowther Junction to Workington Harbour.

In the report of the directors of the said Cockermouth and Workington Railway Company to the shareholders at their last half-yearly meeting, held on the 31st of January, 1857, occurs the following passage having reference to the agreement with Messrs. Fletcher:—"The shareholders are already aware that an agreement was recently entered into between the directors and Messrs. J. & W. Fletcher for the conveyance of the coals from the Clifton and Crossbarrow collieries over the railway at a fixed scale of charges. The Messrs. Fletcher had long ago been dissatisfied with the amount of the rates charged upon the coals from their collieries adjoining the line; and some months ago they applied for a considerable reduction, stating at the same time that they had represented the matter to their landlord, the Earl of Lonsdale, who gave his approval to the terms they were prepared to offer, and, in the event of the refusal of those terms by the board, he would construct a private tram-way to

Workington for the use of his tenants The alternative of submitting to the required reduction, or of losing the whole of Messrs. Fletchers' traffic on which the prosperity of the line so much depends, claimed the long and anxious consideration of the board. After mature deliberation, and a careful inquiry of competent authorities into the actual cost of the carriage of coals, as well as a comparison of the proposed rates with those charged upon other railways and under similar circumstances, and after fully convincing themselves of Lord Lonsdale's bonâ fide intention to lay down a tram-way if these rates should not be accepted, your directors believed they had no other course to adopt than the one to which they eventually [701] assented; and our agreement with the Messrs. Fletcher, dating from the 1st November last, received the seal of the company. Your directors remain firmly of opinion, that, by this arrangement, they best served the interests committed to their charge. The present rates are as high as the average rate previously received upon the coals from Clifton and Crossbarrow collieries: they are within a fraction of a penny of the estimated average calculated upon in the original prospectus of the company, and higher than the rates charged upon the Newcastle and Carlisle and Whitehaven Junction Railways: and there is every reason to feel satisfied that they will prove remunerative to the company when the rolling stock and permanent way are fully restored to proper working condition."

In consequence of the difference between the rates charged to the Messrs. Fletcher and to the complainants, the latter are obliged to sell their coals at a proportionably less profit than the Messrs. Fletcher sell theirs, in order to keep in the market, and the Messrs. Fletcher gain a proportionably greater profit than the complainants do; and by such difference of rates the Messrs. Fletcher obtain an undue and unreasonable preference and advantage, and the complainants are subjected to an undue and unreasonable prejudice and disadvantage, notwithstanding that the circumstances under which the coals are so carried by the company do not render the cost to them of so carrying for the Messrs. Fletcher less than the cost to them of so carrying for the complainants, or, at all events, do not so far reduce such cost as to justify or render reasonable so great a difference between the charges so made to the Messrs. Fletcher and the charges so made to the complainants, as before stated.

Upon discovering the nature of the agreement between the company and the Messrs. Fletcher, the complainants [702] applied to them to be put upon the same footing; but the company declined to alter their charges.

Manisty, Q. C. (with whom was Bovill, Q. C.), shewed cause, upon affidavits stating, amongst other things, that the Cockermouth and Workington Railway extends from Cockermouth to Workington Harbour, and is eight miles and a half in length; that the cost of its construction was 107,000l. and upwards, and 9000l. and upwards has been expended in the construction of quays and other conveniences at the Workington Harbour, and that the coal and lime sent to Workington Harbour pass over a portion of the Whitehaven Junction Railway, for which a charge of 1½d. per waggon is paid by the company, and therefore the terminal expenses of the coal traffic are great in proportion to the rates charged for coals conveyed by the company to Workington Harbour, and that a terminal charge of 1s. 2d. per waggon ought to be deducted in all cases from the rate charged by the company before a mileage rate can be calculated and ascertained: That the gross revenue of the company for the year ending the 31st of December, 1856, was 10,593l. 12s. 7d., and the gross revenue derived from the carriage of the Clifton and Crossbarrow coals to the harbour of Workington is after the rate of 3000l. and upwards per annum, and that the said coal traffic is increasing and consequently forms an important part of the company's revenue: That the Clifton Colliery is the property of the Earl of Lonsdale, and the Messrs. Fletcher became lessees thereof on the 5th of March, 1856, and had been lessees of the adjoining colliery called Crossbarrow Colliery from the year 1853; that the Clifton Colliery was worked by means of a shaft called the Old Clifton Pit from the year 1848 down to October, 1855, when a new shaft was opened, contiguous to the railway called the Lowther Pit, and the colliery is [703] worked by means of both shafts; that the Crossbarrow Colliery was worked by means of a shaft called the Crossbarrow Pit from 1853 down to February, 1855, when a new shaft was opened contiguous to the railway, called Harry Gill Pit; and that the Clifton and Crossbarrow pits are distant from the railway about a mile each: That the Lowther Pit siding junction is 1¼ miles from Workington, the Harry Gill siding junction 4½ miles, and the Marron Siding junction, where the coals of the complainants are brought upon the railway, 4¾ miles from

Workington; but inasmuch as the company's engines do not leave the railway for the Harry Gill coals, and travel at least 400 yards on the Marron Siding for the coals of the complainants, the company's engines draw the coals from the Marron Siding to Workington nearly half a mile further than those from Harry Gill, and nearly three quarters of a mile further than those from the Lowther Pit; and that the shunting at the Marron Siding is also more difficult and expensive: That the Clifton Pit coals have been conveyed by the railway to Workington Harbour from 1848 down to November, 1856, and during that period they were loaded at the Marron Siding, and were conveyed by the railway the same distance and in the same manner as the coals of the complainants loaded at the same siding; and that the Crossbarrow Pit coals from the time they were conveyed by the railway to Workington Harbour were loaded at the Marron Siding, and conveyed by the railway the same distance and in the same manner as the coals of the complainants: That, between the year 1848 and April, 1853, the complainants were charged 3s. 8d. per waggon of 52 cwt., and the Earl of Lonsdale as occupier of the Clifton Pit 2s. 3d. per waggon of 52 cwt. for coals conveyed by the railway company from the Marron Siding to Workington Harbour; and that, between the 1st of April, 1853, and the 1st of November last, the **[704]** complainants were charged 3s. 6d. per waggon of 55 cwt., and the Earl of Lonsdale and the Messrs. Fletcher, as his lessees of Clifton Pit, 2s. 3d. per waggon of 55 cwt. for the coals conveyed by the company from the Marron Siding to Workington Harbour: That the Clifton Pit is about $3\frac{1}{4}$ miles from Workington by the turnpike-road, and about $1\frac{1}{4}$ miles from the Marron Siding; and that there was a competition between the company and carts for the carriage of the Clifton coals to the harbour of Workington, and it was the low rate of 2s. 3d. per waggon alone which secured the carriage of these coals by railway: That the Crossbarrow Pit was also about $3\frac{1}{4}$ miles from Workington by the turnpike-road, and about 1 mile from the Marron Siding by road; that, on the 1st of April, 1853, the rate for the carriage of the Crossbarrow coals from the Marron Siding to Workington Harbour was fixed at 2s. 9d. per waggon of 55 cwt.; that, at such rates, the carts competed with the railway company for the carriage of the Crossbarrow coals to Workington Harbour, and large quantities were sent there by cart from Crossbarrow; and that, in October, 1853, the Crossbarrow rate was reduced to 2s. 7d. per waggon, but the carts still continued the competition until January, 1855, the rate was reduced to 2s. 4d. per waggon, when the competition by cart ceased: That the rates for the carriage of coals by the company from the Lowther Pit and Harry Gill Pit respectively to Workington Harbour were fixed at 3s. 6d. per waggon of 55 cwt., being the same as that charged to the complainants for coals sent from the Marron Siding: That, in 1853, the weight per waggon from the different collieries was increased to 58 cwt., and a proportionate increase was made upon the rates from all the said collieries: That, in 1856, in consequence of the Messrs. Fletcher constructing a tram-way connecting the Crossbarrow and Clifton Old Pits with the railway, the **[705]** company agreed to charge them 6d. per waggon less for coals brought by that tramway and sent to Workington Harbour than for coals sent there from the Lowther Pit: That, in 1856, the weight per waggon of coals was increased from 58 cwt. to 3 tons by all the coal-owners, and in September last a corresponding increase in the different rates charged to the complainants and the Messrs. Fletcher and other coal-owners on the railway, was made: That shortly afterwards it was intimated to the company, that, unless they would consent to carry coals for Messrs. Fletcher according to a given reduced scale, the Earl of Lonsdale was prepared to make a tram-way or railway whereby the whole of the traffic from the Clifton and Crossbarrow collieries would be withdrawn from the railway: That, after much consideration, and after a deputation of the directors had satisfied themselves by a personal interview with Lord Lonsdale that there was a bonâ fide intention on his part to construct such tram-way or railway, the board agreed with the Messrs. Fletcher to charge the following rates for every waggon of coals of 3 tons weight raised from the Clifton and Crossbarrow collieries, and conveyed by the railway to Workington Harbour, from and after the 1st of November last, viz. "If the daily average (according to the number of working days in the preceding half-year ending with the 31st of December, 1856, or, as the case may be, in the next preceding year ending with the 31st of December, 1857, or in any subsequent year) of the quantity of coals and coke conveyed during such preceding half-year, or, as the case may be, such

preceding year, be less than sixty waggon-loads of three tons each, then for all round coals and coke 3s. 4d. for every waggon-load; and for all small coals, 2s. 10d. for every waggon-load: But, if that daily average be more than sixty waggon-loads of 3 tons each, then for all round coals and coke, 2s. 10d. for every waggon-load; and for [706] all small coals, 2s. 4d. for every waggon-load: But, if that daily average shall be 121 waggon-loads or more of 3 tons each, then for all round coals and coke 2s. 6d. for every waggon-load; and for all small coals, 2s. for every waggon-load:" That the low rates charged for the carriage of coals from the Clifton and Crossbarrow pits arose solely from the competition by cart for the carriage of those coals to Workington Harbour; and that the rates offered by the Messrs. Fletcher for the carriage of the coals from Harry Gill and Lowther Pit sidings respectively were accepted and agreed to solely on account of the threatened abstraction of the whole of their coal traffic from the railway by the construction of a tram-way from the collieries to the harbour of Workington, and not from any desire or intention on the part of the company to give to the Messrs. Fletcher any undue preference or advantage whatsoever: That the quantity of coals carried by the company for the complainants from the Marron Siding to the harbour of Workington from the 1st of November last to the 23rd of May last, is 2244 waggons, equal to a daily average of 13 waggons; and that the quantity carried by the company to the same place during the same period from the Harry Gill and Lowther Pit sidings, is, 11,255 waggons, equal to a daily average of 65 waggons: That the mileage rate under the said agreement from the Lowther Pit Siding on a daily average of sixty waggons, after deducting 1s. 2d. per waggon for terminal charges and expenses is 2d. and a small fraction per ton per mile, from Harry Gill a small fraction less than 2d. per ton per mile, and a proportionate rate for coals carried to the harbour from the Marron Siding, including that siding, would be 2d. and a fraction per ton per mile: That the company's engines draw a load of 50 waggons and upwards to the harbour of Workington, and it is more profitable to take a full load than small [707] loads of 13 to 20 waggons: That the Messrs. Fletcher have during the last six months drawn a small quantity of coals from a pit called the Bridgefoot Pit, which were loaded at the Marron Siding, and they have paid for these coals the same rate per waggon as the company charge the complainants for coals conveyed by railway from their colliery at Millbanks; and that no other coals have been loaded since the 1st of November last at the Marron Siding by the Messrs. Fletcher: That the limited amount of traffic given to the line by the complainants rendered the cost to the company of working such traffic more than the cost of working the traffic from the Harry Gill and Lowther Pit sidings, where the company can always calculate upon obtaining a full train of waggons from those sidings to Workington: And that the refusal of the rates offered by the Messrs Fletcher would deprive the company of a principal source of revenue.

The affidavits shew that the rates for the carriage of coals from Millbanks and Bridgefoot pits, which are the only two that use the Marron Siding, are alike. Less is charged from Lowther and Harry Gill pits. The circumstances are different with respect to these two, as contrasted with Millbanks and Bridgefoot, as well as to distance as to the quantities of coal carried for the respective parties, which, of course, involves a difference in the cost to the company. The distances, it appears, are as follows, —from Lowther siding to Workington terminus, 4¼ miles; from Harry Gill, 4½ miles; and from Marron Siding, 4¾ miles; and Marron Siding, along which the empty waggons have to be shunted, is 475 yards. The quantities sent are, —by the complainants, 13 waggons of 3 tons each per day, and by the Messrs. Fletcher 65 waggons of 3 tons each per day. The Messrs. Fletcher, it appears, are tenants or lessees under the Earl of Lonsdale; and, the Earl having intimated [708] an intention to construct another line of railway for the use of his tenants, which would have the effect of diverting a large portion of the traffic from the defendants' railway, the company consented to diminish the rate of charge, rather than incur the risk of the line being altogether closed. The main question, therefore, will be, whether it is an "undue preference" within the act, if the proprietors of a railway constructed for the mineral-traffic of the district give parties who might send their coals to the place of shipment without using their railway such facilities in the way of a diminished charge or otherwise as will induce them to use the line; always supposing that the company are acting bonâ fide and with a view to their own interest and that of the public. It is sworn that the loss which would accrue to the company from the

withdrawal of the carriage of the Messrs. Fletchers' coals, would amount to nearly one third of their entire revenue. [Cockburn, C. J. Can that be a justifiable reason for putting Lord Lonsdale's tenants upon a better footing than the rest of the public?] The interests of the complainants themselves would suffer if Lord Lonsdale's projected tram-way were made, inasmuch as he could carry his tenants' coals at a lower rate than they are now carried by the company, and so the Messrs. Fletcher would be the better able to compete with them in the market (*a*). In putting a construction upon this act, the court will take a comprehensive view of the whole case, and of all the surrounding circumstances. [Crowder, J. The alternative you put **[709]** is not the true one; the question is, not what you would lose if deprived of the carriage of Messrs. Fletchers' coals, but what loss of revenue you would sustain if you reduced the charge to the complainants to the same rate.] Such a reduction would not meet the requirements of Lord Lonsdale's tenants: and, besides, the company would have to reduce the charge to all its customers. [Williams, J. The company have constructed a railway which admits of competition: and you buy off the chance of that result by giving to one set of persons the means of underselling another set.] The object is, not to enable the Messrs. Fletcher to undersell the complainants, but to place the former upon the same footing as the latter. [Cockburn, C. J. Your argument would deprive a man of his natural advantages. Suppose a man residing at a place equi-distant from two railways, holds out to one of them, that, unless they will give him certain advantages, he will travel by the other,—would that be a reasonable thing for the company to be influenced by? There is hardly a railway in the kingdom where this might not occur.] If it be shewn that no injustice is done, and that the act complained of is solely dictated by a fair and bonâ fide regard to the just interests of the company, and not by an intention to give an undue preference, and that there is a peculiarity and a difference in the circumstances, the court will be slow to come to the conclusion that there has been an infringement of the statute. In *Ransome's case*, ante, vol. i., p. 437, and in *Orlade's case*, ante, vol. i., p. 454, it was distinctly laid down by the court that the fair interests of the company are to be taken into the account in considering whether the circumstances under which goods are carried justify a different rate of charge in one case from another; as, for instance, where it is made to appear that the circumstances enable the company to carry for one party at a less cost to themselves **[710]** than the cost of carrying for another. If there can be a case for the application of that doctrine, it is this. *The Caterham case*, ante, vol. i. p. 410, and *Hozier* v. *The Caledonian Railway Company*, Scotch Sessions Cases, vol. 17 (N. S.), p. 302, shew, that, to constitute an undue preference within the act, by reason of an inequality of charge, the inequality must be in the charge for travelling over the same line or the same portion of the line, and the party complaining must shew some personal disadvantage to himself. Here, the difference of charge is in some measure accounted for by the increased distance over which the complainants' coals travel: and it is justified as well by the large outlay made by Lord Lonsdale in order to bring his collieries within reach of the railway, as by the consideration of expediency in order to avert the ruin which would result to the company from the threatened competition of the proposed tram-way from his lordship's pits to Workington.

Hugh Hill, Q. C., and T. Jones, were not required to support the rule.

Cockburn, C. J. I am of opinion that this rule must be made absolute. The facts to be gleaned from the affidavits are tolerably clear. The complainants are proprietors of a colliery adjoining the defendants' railway, and the Messrs. Fletcher are lessees under the Earl of Lonsdale of certain other collieries also adjacent to the railway, and the coals belonging to each are carried along the line from the points at which their respective tram or waggon-ways intersect the railway to Workington Harbour. It is admitted that the charge made by the company to the complainants for the conveyance of their coals is higher than the rate which is charged by them to the Messrs. Fletcher. Primâ facie, that shews a case of undue preference, within the

(*a*) It was sworn that the whole of the land between the pits and Workington Harbour was the property of Lord Lonsdale, except one small piece, of which Messrs. Fletcher had obtained a ninety-nine years' lease. On the other hand, it was stated that the proposed tram-way or railway would have to cross two turnpike-roads and the Whitehaven Junction Railway; and therefore an act of parliament would be necessary.

sta-[711]-tute: and the question is, whether the company have shewn any sufficient reason or justification for this difference of charge. Three grounds of justification are put forward by the company. The one is, that the colliery of the complainants is at a greater distance from the terminus than those of the Messrs. Fletcher. That ground, however, fails in point of fact; for, there is nothing to shew that the excess of charge made to the complainants over that made to the Messrs. Fletcher bears any proportion to the difference of distance of their respective collieries. Then it is said that Lord Lonsdale has been induced to desist from carrying coals from his collieries to Workington by another route, and to use the defendants' railway for that purpose, and also to make certain works to facilitate their conveyance to the railway, in consideration of an agreement by the company to carry his coals along their line at a somewhat lower rate than that which they charge to the adjoining proprietors. Further it is said, as a justification for the difference of charge, that Lord Lonsdale had threatened the company, that, unless they would agree to carry coals from his collieries at such lesser rate of charge, he would construct another line of railway for the use of his tenants. I have already said that the first ground of justification fails in point of fact: and I think the other two fail to furnish any justification in point of law for the course pursued by the company. The court has already intimated, if not absolutely decided (*a*), that a railway company is entitled, in determining the rate of tolls they will impose upon any particular traffic, to take into consideration any circumstances either of a general or a local character which may enable them to charge less in some [712] cases than in others. As, for instance, if a company were to lay down a rule, that, if a given quantity of coal or any other commodity were brought to them to be carried at one time, or at regular intervals, they would charge for it at a lower rate than they would charge for a smaller quantity, or for goods brought at uncertain times, in consideration of the difference of cost of working the line: that might be a fair and legitimate ground for a difference of charge. So also, if a company made a difference in the rate of charge between terminal and intermediate traffic, there might exist fair reasons to justify them in so doing. As to the former, there might be competition with another line, which would make it their interest to reduce the charge to the lowest possible scale, or increased traffic which would enable them to carry cheaper in proportion to the distance. But these are all cases in which the whole public is treated with perfect equality; and they differ very materially from the present case. Here, the collieries are all situate in the same locality, and the coals from all of them are carried under precisely the like circumstances; but a difference is made in the charge for carriage in favour of Lord Lonsdale's tenants, because otherwise it is feared that Lord Lonsdale or his tenants will abstain from sending their coals by the defendants' railway, and will send them by some other route, or by a railway which Lord Lonsdale would be induced to construct for that purpose. In my opinion that is not a sufficient ground for the preference so given. The company are bound to regulate their charges so as to be equally applicable to all persons similarly circumstanced. If we were to take into consideration the circumstances upon which the company rely for their justification, there is no case in which we might not be called upon to consider the circumstances which might influence a party to send his goods by a par-[713]-ticular railway: every man would be making his own bargain; and it would always be a question how far the company were justified in the particular case in departing from the general rule. I do not think it was the intention or the policy of the legislature to permit railway companies to make private bargains to give advantages to individuals which must be attended with corresponding disadvantages to others. The obvious intention was, that there should be an equal rate of charge in respect of the carriage of all goods under the like circumstances; and that, although the company may be justified in laying down special rules as applicable to particular cases, provided that they bonâ fide act with reference to their own interest and the interests of the public, they are not at liberty to make special bargains with individuals whereby one is benefited, to the prejudice of another. I think the grounds put forward by the company are not sufficient to justify the preference they have given to Lord Lonsdale's tenants over the complainants, and that the rule for an injunction must be absolute.

WILLIAMS, J. I am of the same opinion. I think Mr. Manisty has not succeeded

(*a*) See *Ransome's case*, ante, vol. i., p. 437, and *Oxlade's case*, ante, vol. i., 454.

in shewing that the present case is in substance any more than this,—that the company do in point of fact prefer the Messrs. Fletcher to the complainants, by charging lower rates for the carriage of coals for the former than they do for the latter: and the question is, whether that amounts to an "undue preference." I assume that there is no undue or improper motive; but that the company carry coals for the Messrs. Fletcher at a lower rate than they do for the complainants, simply because they are apprehensive, that, if they do not give such preference to the Messrs. Fletcher, Lord Lonsdale, who is their landlord, will construct another line of railway, and so **[714]** withdraw from the defendants' line a large portion of the traffic. The question is, whether a preference given under such influence is not undue. I think it is; and that to hold otherwise would be to introduce a principle whereby a railway company might give a preference in every case where they bonâ fide considered that it would be to their advantage to do so. For this and the other reasons pointed out by my Lord, I am of opinion that this expectation of what Lord Lonsdale will otherwise do, affords no answer to the objection of undue preference. It is further urged, on the part of the company, that expense has been incurred by Lord Lonsdale in making tram-ways for the purpose of approximating his pits to the railway, and that the company are justified in taking that into their consideration, and making an allowance to his tenants in the shape of a reduced charge. I think that is an undue preference. It must be borne in mind that the making of a railway is a violation of the common law of the land, which is permitted only in consideration of the general benefit accruing to the public. And, where a man acquires an advantage by reason of the proximity of his land to a railway, his right to the enjoyment of that advantage is one which nobody can lawfully disturb or diminish. It would be manifestly unjust if it were not so: for, the proprietor of the land may have been induced by the prospect of this advantage to withdraw or abstain from opposition to the bill for making the railway. By doing that which they have done here, the Cockermouth and Workington Railway Company are virtually depriving the complainants of the natural advantage of their position; and therefore I concur with my Lord in thinking that the second ground urged on the part of the company gives no warrant for holding this not to be an undue preference, and consequently that the rule for an injunction must be made absolute.

[715] CROWDER, J. I also think that this rule should be made absolute. In giving the reasons which have induced me to arrive at this conclusion, I do not profess to lay down a definition of the term "undue preference" which will govern every case that may be brought before us. It would be very difficult to do that: but, of this there can be no doubt, viz. that undue preference is not to be confined to the mere desire to benefit the individual. It is said here that no favour or partiality has been shewn to the Messrs. Fletcher as against the complainants, and therefore the conduct of the defendants is not brought within the statute. That, however, by no means follows. Then it is urged that it is competent to the railway company to take into their consideration circumstances which vary the position of one individual from that of another, and make a difference in their charge accordingly. I apprehend that they cannot do any such thing. If the company might do so as to goods, they might equally do so as to passenger traffic; and, inasmuch as no two cases would be precisely alike in circumstances, the result might be that no two persons would be charged alike. That, therefore, cannot be the principle upon which the company are to regulate their charges. I agree with my Brother Williams that every proprietor whose land is situate near a line of railway acquires a fair right to the natural advantages resulting from such proximity, and that he is not to be deprived of that advantage by a bargain between the company and an individual at a greater distance to approximate him by means of a diminished charge. In one of the earliest cases that came before us under this statute,—*Ransome's case*, ante, vol. i., p. 437, and in *Oxlade's case*, ante, vol. i., p. 454, we laid it down, that, in determining the propriety of varying their charges, it was fair and just to take into consideration the circumstance of the differ-**[716]**-ence of cost to the company, as, for instance, in the carriage of larger quantities at regular intervals, as compared with smaller and irregular consignments. There are many cases, as my Lord has suggested, where a comparatively lower charge may be justified for what is called through traffic, from terminus to terminus, —than for a traffic to and between intermediate stations. In the present case, the only substantial ground on which it could for a moment be contended that

there has not been an undue preference, is, that, in reference to some of the collieries, a threat has been held out to the company by a powerful individual, that, unless they will agree to carry the produce of those collieries for his tenants at a lower rate than they carry for others, he will divert a large portion of the traffic of the railway, by constructing another line over his own land. That clearly is not a sufficient ground to justify the company in thus varying their charges to the prejudice of the complainants.

WILLES, J. I am entirely of the same opinion. The fact that the Messrs. Fletcher send their coals along different portions of the railway, and less distances than the complainants, is clearly not the foundation for the difference of charge. Such difference of charge does not represent any proportionate difference in the distances which the coals of each are carried along the line. The real ground upon which the company seek to justify the imposition of a higher charge on the complainants than upon the Messrs. Fletcher is, that the latter are tenants of Lord Lonsdale, and it is suggested that Lord Lonsdale may be induced to make a railway for the use of the tenants or lessees of his collieries, and so withdraw considerable traffic from the defendants' railway, unless they consent to reduce the tolls to his tenants so as to enable them to compete with the com-[717]-plainants; in other words, to buy off a danger which might arise if Lord Lonsdale should be minded to make another railway (*a*). That, as it appears to me, is entering upon a very wide field of speculation as to what may or may not happen, and far too remote to form the ground of a decision; for, the law looks only to matters that are proximate. I think it is far safer to confine ourselves to the state of things actually existing than to speculate upon what may or may not happen at some future time. If we indulge in speculation as to the results that might flow from the execution of Lord Lonsdale's threat, we may carry it to this extent, that, as Lord Lonsdale would possibly require the sanction of the legislature for the purpose, the complainants and the rest of the public might either by the provisions of the general act, 8 & 9 Vict. c. 20, or of the local act, acquire a right to have their coals carried on that railway upon the same terms as those of Lord Lonsdale's tenants are carried thereon. This demonstrates the absurdity of indulging in speculations of the kind suggested. The result is, that the company have, without any justifiable reason, imposed a higher scale of charges upon the complainants than upon the Messrs. Fletcher, which is a thing that falls clearly within the prohibition of the statute. For these reasons, I think the rule must be made absolute.

Rule absolute.

[718] IN RE JONES AND THE EASTERN COUNTIES RAILWAY COMPANY. Jan. 27th, 1858.

[S. C. 1 Rly. & Can. Traff. Cas. 45. Not applied, *Budd* v. *London and North-Western Railway*, 1877, 4 Rly. & Can. Traff. Cas. 396; 36 L. T. 804.]

The court refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the Railway Traffic Act, 1854, to compel them to issue season-tickets between Colchester and London on the same terms as they issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester.

Pearce moved for a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, injoining them to grant to Henry Jones a season ticket to travel on their line from Colchester to London and back upon the same terms as they granted similar tickets to other persons from Harwich to London and back.

(*a*) The affidavits upon which cause was shewn disclosed the fact that the Earl of Lowther is himself a large shareholder in the Cockermouth and Workington Railway Company.

The affidavit upon which the motion was founded, stated,—that Colchester is distant from London upwards of fifty miles, and that the borough of Harwich, in the county of Essex, is distant from Colchester upwards of twenty miles, and from London upwards of seventy miles, and that there is a railway from London to Colchester, called the Eastern Counties Railway, belonging to or worked by the Eastern Counties Railway Company: that, from Colchester to Mannington in the said county is another railway or portion of a railway called the Eastern Union Railway, which said last-mentioned railway belongs to or is worked by and is under the management and control of the said Eastern Counties Railway Company: that, at Mannington aforesaid, there is another railway called the Harwich Railway, which also belongs to or is worked by, and is under the management and control of the said Eastern Counties Railway Company: that the direct route from London to Harwich is through Colchester and Manningtree: that the price of a first-class season-ticket for travelling on the said Eastern Counties Railway from Colchester to London, is 45l. per year: that the Eastern Counties Railway Company grant to divers persons **[719]** first-class season-tickets for travelling from Harwich (or from the parish of Dovercourt, which is situate within the borough of Harwich), through Colchester, over and upon their said railways to London, for 20l. per annum, which the complainant submitted was an undue or unreasonable preference or advantage to or in favour of such persons as aforesaid, and unfair, illegal, unequal, oppressive, injurious, and unjust: and that the complainant had applied to the company for a first-class season-ticket to enable him to travel from Colchester to London (which is not so far from London as Harwich is by twenty miles,) on the same terms and at the same price as the company grant such season-tickets from Harwich to London, but which the company refused to grant.

Pearce submitted that the affidavit disclosed a clear breach of the prohibition contained in the 2nd section of the 17 & 18 Vict. c. 31. [Williams, J. For anything that appears on your affidavit, there may be very good reasons for making such difference in the price. Willes, J. To bring the case within the act, you must shew, —as we held the other day in the case of *Harris and The Cockermouth and Workington Railway Company*, ante, p. 693,—that the journeys are substantially the same. Williams, J. At this moment there is active competition at Reading between the Great Western and South Western railways: the consequence is, that considerably less is charged for tickets from that place to London and vice versâ than for intermediate stations.] There is no such reason for the difference here; for, there is but one line to Harwich, and consequently no competition. [Willes, J. Who do you suggest is unduly preferred to Jones?] The undue preference complained of is, the preference of the inhabitants of Harwich over those of Colchester.

[720] Williams, J. (*a*). I am of opinion that there is no ground for the application. The bare facts stated in the affidavit upon which it is founded clearly do not constitute a case of undue preference within the act.

Willes, J., concurred.

Rule refused (*b*).

(*a*) Cockburn, C. J., and Crowder, J., being both holders of shares in the Eastern Counties Railway Company, declined to take part in the discussion. The Lord Chief Justice, on a subsequent occasion where the same difficulty occurred, stated that he should take care to remove it by disposing of his shares.

(*b*) The case of *Hozier* v. *The Caledonian Railway Company*, Scotch Sessions Cases, vol. 17 (N. S.), p. 302, is very much in point. There, the complainant, who resided at Maudslie Castle, in the vicinity of the Motherwell station of the Caledonian Railway, stated in his petition that he had frequent occasion to travel upon that railway between the Motherwell station and Edinburgh and Glasgow, the termini of the line; that the fares exacted from passengers travelling from Motherwell station to Edinburgh, being a distance of about forty-three miles, and vice versâ, were 9s. 6d. by first-class carriage, and 6s. 4d. by second-class carriage,—by parliamentary train these fares being reduced to 6s. 4d. and 3s. 7d. respectively; that, from Motherwell to Glasgow, being a distance of about sixteen miles, the fares exacted, were, for the first-class 2s. 6d., and for the second class 1s. 10d., and in the parliamentary train 1s. 10d. and 1s. respectively; that the fares exacted from passengers travelling from the intermediate stations were at the same rate in proportion to the distance as the fares

[722] JOHN BRYANT, BY ELLEN BRYANT, his next Friend, *v.* WILSON.
Feb. 1st, 1858.

In an action by an infant, the writ was sued out in person, and, one E. B. being appointed next friend: a copy of the order for that purpose was served on the defendant's attorney, indorsed "E. B., next friend, at S. N. C.'s, No. 8 Symond's Inn, Chancery Lane:" and a declaration was afterwards delivered with a notice to plead similarly signed. The plaintiff having obtained a verdict,—Held, that the above was a sufficient notice to the defendant that S. N. C. was authorized by the next friend to act as attorney; and, the Master having on taxation allowed only costs out of pocket, the court refused to set aside an order directing him to review his taxation.

This was an action for negligently driving against and injuring the plaintiff. On the 8th of October, 1857, the plaintiff, who was an infant, sued out a writ of summons against the defendant, indorsed as follows,—"This writ was issued in person by John

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between Motherwell and Edinburgh and Glasgow, while the fares exacted from passengers travelling along the same line from Edinburgh to Glasgow, or vice versâ, were 2s. by first-class carriage, and 1s. by third-class carriage; that the rates above mentioned charged to the petitioner and his family and dependents for travelling on the Caledonian Railway between Edinburgh and Motherwell and Motherwell and Glasgow respectively, as compared with the rates charged to passengers travelling through between Edinburgh and Glasgow, amounted to an undue and un-**[721]**-reasonable preference to and in favour of such through passengers over the petitioner and others travelling between Motherwell and Edinburgh or Motherwell and Glasgow, or intermediate places, and the charging of such rates as were charged to the petitioner and his family and dependents as aforesaid was, in the circumstances, in violation and contravention of the provisions of the statute; and that the petitioner was aggrieved by being charged 9s. 6d. for travelling between Motherwell and Edinburgh,—a distance of 43 miles,—while passengers travelling in the same train, and the same class of carriage, between Glasgow and Edinburgh, —a distance of 59 miles, paid only 2s. The court held that this was no violation of the statute. The Lord President M'Neil said: "I do not see that this petitioner has shewn any interest at all. I put the question whether he suffered any disadvantage by the proportional rating complained of; and the answer was, that he did not complain of any disadvantage, but that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper mode of travelling than he himself could enjoy. It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preferences to parties pari passu in the matter; but you must bring them into competition in order to give them an interest to complain. If two towns were situated on the line of railway, and the market-day of Edinburgh being Wednesday, if the railway company were to resolve to carry goods on Tuesday from the one burgh, and resolved not to carry goods at all from the other burgh till Thursday, for the same destination, that would be a competition of interest, and a well-founded ground for complaint under the statute at the instance of parties connected with the second station by residence or traffic, because in that case there would be an undue preference of one competing interest over another. But there is nothing of the sort here. No injury is done to the party complaining: and it is always to be regarded, in a matter of this kind, that a company reducing rates to all parties travelling along their line do so at their own risk, and they themselves are the parties who suffer." And Lord Curriehill said: "What is this complaint? The only case stated in the petition is, that passengers passing from Glasgow to Edinburgh, or from Edinburgh to Glasgow, are carried at a cheaper rate than **[722]** passengers from Mid Calder to either of these places. Now, that is an advantage, no doubt, to those passengers travelling between Edinburgh and Glasgow. But, is it an unfair advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now, I have read the statement in the petition, and I have listened to the argument in support of it, to find what is unreasonable in giving that advantage to through passengers. What disadvantage do Mid Calder passengers suffer by this? I think that no answer was given to this, except that there was none."

Bryant, who resides at No. 1 Crown Court, in the parish of Cripplegate, in the city of London, plaintiff in person within named." On the 24th, an order was obtained appointing Ellen Bryant the next friend of the plaintiff to prosecute the action on his behalf: and a copy of the order was served upon the defendant's attorney, indorsed with the following address, "Ellen Bryant, next friend, at S. N. Cooper's, 8 Symond's Inn, Chancery Lane," as required by the 166th rule of Hilary Term, **[723]** 1853 (*a*). On the 26th, a declaration was delivered to the defendant's attorney, with a notice to plead indorsed thereon, signed by Ellen Bryant, who gave her address "at S. N. Cooper's, 8 Symond's Inn, Chancery Lane." The issue was delivered on the 16th of November, indorsed with a notice of trial similarly signed. The cause was tried at the sittings after last Michaelmas Term, when a verdict was found for the plaintiff, with 20*l.* damages. On the 16th of January, 1858, Cooper delivered a bill of costs amounting to 96*l.*, with an appointment to tax for the 18th.

Upon attending the taxation, the defendant's attorney objected to the bill being taxed upon the same principle as an ordinary attorney's bill, inasmuch as no notice had been given that an attorney had been appointed by the next friend, but, on the contrary, all the notices which were served upon the defendant's attorney bore the signature of Ellen Bryant as next friend of the plaintiff. The master, being of opinion that there was nothing to distinguish this action from one which had been conducted by the plaintiff in person, declined to allow anything more than costs out of pocket. An order having been made by Byles, J., at Chambers, for a reveiw of the taxation,

Hawkins moved for a rule to shew cause why the order should not be set aside. The master was clearly right in refusing to allow the costs, the plaintiff appearing in person, and no attorney having been appointed by the guardian. The 166th rule of Hilary, 1853, provides, that, "in all cases where a party sues or defends in person, he shall, upon issuing any writ of summons, or other proceeding, or entering an appearance, enter in a book to be kept for that purpose at the Masters' **[724]** Office an address, within three miles from the General Post-Office, at which all pleadings, notices, summonses, orders, rules, or other proceedings, not requiring personal service, shall be left; and, if such address shall not be entered in the said book, or if such address shall be more than three miles from the General Post-Office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, or other proceedings, in the Masters' Office, without the necessity of any further service." To entitle the plaintiff to costs in the ordinary way, the proceedings should purport to have come from the attorney. Here, they purport to come from the next friend of the plaintiff. [Cockburn, C. J. The name and address of an attorney are given,—"S. N. Cooper, No. 8 Symond's Inn, Chancery Lane." What more could the next friend do?] Giving the address at No. 8 Symond's Inn, was merely in compliance with the 166th rule. That is not enough. The 167 rule provides, that, "in all cases where a plaintiff shall have sued out a writ in person, or a defendant shall have appeared in person, and either party shall by an attorney of the court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules, and other proceedings which according to the practice of the courts are to be delivered to or served upon the party on whose behalf such notice is given, shall thereafter be delivered to or served upon such attorney." [Cockburn, C. J. That rule is in favour of the party appearing by attorney, not for the other side. Is there any authority upon the subject?] None is found: but the officers of the court are unanimously of opinion, that, under the circumstances here disclosed, the plaintiff was not entitled to the costs of suing by attorney. **[725]** [Cockburn, C. J. You do not suggest that you have sustained any grievance.] No.

Griffits, who appeared to shew cause in the first instance, was stopped by the court.

Cockburn, C. J. We are all clearly of opinion that the plaintiff ought to have his costs. There will therefore be no rule.

Rule refused.

(*a*) See 13 C. B. 38.

WILLIAM TALBOT AGAR AND LOUISA AGAR *v.* THE OFFICIAL MANAGER OF THE ATHENÆUM LIFE-ASSURANCE SOCIETY. Jan. 26th, 1858.

[S. C. 27 L. J. C. P. 95; 4 Jur N. S. 211; 6 W. R. 277. Distinguished, *Athenæum Life Insurance Company* v. *Pooley*, 1858, 28 L. J. Ch. 125. See *Colonial Bank of Australasia* v. *Willan*, 1874, L. R. 5 P. C. 448.]

A departure from the formalities required by the deed of settlement of a joint-stock company does not affect the validity of a contract under its common seal.—It is no defence, therefore, to an action against a joint-stock company upon a debenture sealed with their common seal, that the borrowing of the money thereby secured was not sanctioned by a resolution of an extraordinary general meeting of the shareholders, pursuant to the provisions of their deed of settlement.—By the 12th clause of the deed of settlement of a joint-stock company, it was provided that it should be competent for any extraordinary general meeting, and no other, by a majority of at least two thirds of the shareholders, by any resolution to increase the capital stock of the company by creating new shares, and also to impower the directors to borrow money on mortgage or on such other securities as to the meeting might seem fit. The 27th clause provided that it should be lawful for the directors to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to affect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions and in such manner as the directors should think proper. The 28th provided that any policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, should be given under the hands of not less than three of the directors, and sealed with the common seal of the society. And the 35th provided that the directors should have power, with the consent of an extraordinary general meeting in the manner thereinbefore provided, to borrow, on mortgage or otherwise, such moneys as they should think expedient:—Held, that the 28th clause applied only to instruments and transactions ejusdem generis with those mentioned in the 27th, and not to debentures.—And semble,—per Williams, J.,—that a joint-stock company cannot by its deed of settlement declare that deeds given by them,—which, under the 44th and 46th sections of the 7 & 8 Vict. c. 110, are valid if signed by two of the directors,—shall not be valid unless signed by three.

This action was brought to recover the sum of 360l., being the interest claimed to be due from the Athenæum Life-Assurance Society to the plaintiffs upon **[726]** eight several debentures alleged to have been granted by the company to Louisa Agar the elder, Louisa Agar the younger, and William Talbot Agar, in manner hereinafter mentioned. Louisa Agar the elder died on the 8th of April, 1855, leaving the plaintiffs her surviving.

The Athenæum Life-Assurance Society obtained a certificate of complete registration under the 7 & 8 Vict. c. 110, on the 14th of May, 1851.

On the 17th of July, 1854, the plaintiff William Talbot Agar, on behalf of himself, Louisa Agar the elder, and Louisa Agar the younger, duly paid the sum of 4000l. to Messrs. Hopkinson & Co., the bankers of the said Athenæum Life-Assurance Society, to the account of the said society, and the same was then carried over to their credit in the books of the said bankers.

The plaintiffs then received eight several debentures of 500l. each from the office of the said society, to secure the re-payment of the said money so advanced as aforesaid. These debentures bore date on the 17th of July, 1854, and were in the following form:—

"Athenæum Life-Assurance Society.
"Debenture No. 14. Amount, 500l.

"By virtue of the deed of settlement of the Athenæum Life-Assurance Society, bearing date the 2nd of May, 1851, and registered pursuant to the acts for the registration, incorporation, and regulation of joint-stock companies, and by the direction and consent of more than two thirds of the shareholders of the said company present

at a meeting convened for the purpose, the said society, in consideration of 500l. advanced to them for the purposes of the society by Louisa Agar the elder, widow, Louisa Agar, the younger, spinster, and William Talbot Agar, Esq., of, &c., do hereby covenant with the said Louisa Agar the elder, Louisa Agar the younger, and W. T. Agar, their executors, administrators, and assigns, to repay the same to him or them, or as he or they shall direct, on the 17th of July, 1859, with in-[727]-terest thereon in the meantime at the rate of 6l. per cent. per annum, to be computed from the 17th of July, 1854, and payable half-yearly, on the 1st of January and 1st of July in each year, so long as the said sum of 500l. shall remain unpaid to the said Louisa Agar the elder, Louisa Agar the younger, and W. T. Agar, their executors, &c., by the said society, the first payment of such interest to be made on the 1st of January next: but, if at any time before the expiration of the period above mentioned any portion of the said sum of 500l. shall be repaid, then such interest shall be payable only on the portion remaining unpaid; and the covenant on the part of the said society to pay such interest is nevertheless only on condition that the stipulations following be complied with,—

"1st. The holder of this debenture is in all cases, when required by the manager, to produce the same to him for inspection:

"2nd. This debenture to be delivered up to the society on payment of the principal.

"Given under the common seal of the society, this 17th July, 1854.

"J. Bartlett, Chairman.

"H. Sutton, Manager.

"The seal was affixed in the presence of

"F. G. Tomlins, Secretary."

Common L. S. Seal.

The said debentures were sealed with the common seal of the said Athenæum Life-Assurance Society, and signed by Josiah Bartlett and Henry Sutton, as they purport to have been. At the time of the signing and sealing of the said debentures, Josiah Bartlett and Henry Sutton were directors of the said Athenæum Life-Assurance Society, and F. G. Tomlins was the secretary of the said Athenæum Life-Assurance Society.

There is the following entry of a resolution of the directors, in the directors' agenda book, under date the 14th of July, 1854,—"Resolved, that the company's [728] seal be affixed to eight several debentures for 500l. each in favour of Louisa Agar the elder, widow, Louisa Agar, jun., spinster, and W. T. Agar."

The last-mentioned resolution or entry is signed by A. B. Richmond, Henry Harris, J. Bartlett, and Henry Sutton as manager. The said A. B. Richmond, Henry Harris, J. Bartlett, and Henry Sutton, at the date of the said entry, were directors, and the said Henry Sutton was manager of the said Athenæum Life-Assurance Society. The said moneys were advanced by the plaintiffs to the said Athenæum Life-Assurance Society in good faith, and without any knowledge of any irregularity in the holding of the meeting in the said debentures mentioned; and the plaintiffs were wholly ignorant that the said directors of the said Athenæum Life-Assurance Society, in receiving the said money for the said society, or in issuing the said debentures, were guilty of any irregularity, or that they the said directors in any manner exceeded their power or authority as such directors, if in fact they were guilty of any irregularity or did exceed their powers in any manner whatsoever.

The said Athenæum Life-Assurance Society, on the 5th of January, 1855, paid half a year's interest to the 1st of January, 1855, on the said debentures, by a cheque signed by Josiah Bartlett, Joseph James Reed, and Henry Sutton, directors of the said company.

The said Athenæum Life-Assurance Society paid the interest on the said debentures to the 1st of July, 1855.

On the 22nd of February, 1856, the said Athenæum Life-Assurance Society paid 10l. on account of the interest due to the 1st of January, 1856; and, subsequently, on the 4th of April, 1856, they paid to the plaintiffs 110l. being the balance due to them for interest on the said debentures on the 1st of January 1856, by cheque, dated the 2nd of April, 1856, signed by D. Birch and A. B. Richmond, then being directors of the said society.

[729] Except as aforesaid, neither the plaintiffs nor the said Louisa Agar the

elder in her lifetime have received any part of the said sum of 4000l., or the interest thereon, but the same remains due and owing to the plaintiffs.

The plaintiffs and the said Louisa Agar the elder have at all times been ready and willing to comply with all the conditions of the insurance.

An order absolute for the dissolution and winding up of the Athenæum Life-Assurance Society was made by Vice-Chancellor Wood, in pursuance of the Winding-up Acts, 1848 and 1849, on the 12th of July, 1856.

The plaintiffs contend, that, upon these facts, they are entitled to recover from the said Athenæum Life-Assurance Society the interest due upon the said debentures; and that the said society is estopped from alleging that the moneys were not advanced, and that the covenants in the said debentures contained were not entered into, in pursuance of the powers contained in the said deed of settlement of the said society, and by the direction and consent of more than two thirds of the shareholders of the said society present at a meeting convened for that purpose.

If, however, the defendants are at liberty to go into evidence that the said debentures were not issued in pursuance of the powers given to the directors by the said deed of settlement, they rely upon the following facts as shewing that the said debentures, and the covenants therein contained, were not binding upon them:—

These facts are admitted to be true:—That the deed of settlement contains, amongst others, the following clauses,—

7. "That, in case at any general meeting, ordinary or extraordinary, fifty shareholders, holding together 500 shares, shall not be present and proceed to business within one hour after the time fixed for the meeting, [730] no business shall be done, but the meeting, if convened only on special requisition, shall stand absolutely dissolved, but, in every other case, shall stand adjourned to that day week at the same hour and place, and so on from week to week, from day to day, or hour to hour, as often as the same shall happen, until at some such meeting the required number of shareholders, holding such shares as aforesaid, shall be present and proceed to business within one hour from the time fixed for such meeting: but any such meeting as last aforesaid shall not afterwards be rendered incompetent to transact business by reason of the departure of any shareholder or shareholders after the chair shall have been taken.

9. "That not less than seven, nor more than fourteen days' notice of the time and place of holding any general meeting, ordinary or extraordinary, and of every adjournment thereof for more than seven days, and also (except in the cases of the election of directors, auditors, trustees, or other officers of the society, or of the consideration of the accounts, balance-sheets, or ordinary reports of the directors or auditors by any ordinary meeting) of the business to be transacted thereat, shall be given by letter addressed to every shareholder, and also by advertisement in some London newspaper: but the non-receipt of such notice by any shareholder shall not invalidate the proceedings of any general meeting.

11. "That (except in the cases before specified), and except as hereinafter is provided, no other business shall be transacted at any general meeting than that for which it shall have been called and of which notice shall have been given as aforesaid; and that it shall be competent for any general meeting, ordinary or extraordinary, and such meeting is hereby impowered, to elect to the office of director, auditor, or trustee, by a majority of votes of the shareholders then present, either personally or by proxy, and also, for negligence, misconduct, or incompetence, or any other cause which in [731] the judgment of two thirds of the shareholders duly qualified to vote, and who shall be present either personally or by proxy at such meeting, shall appear sufficient, by any resolution with which two thirds of such shareholders shall concur, to remove from office (immediately or prospectively) any director, manager, auditor, trustee, actuary, secretary, solicitor, or other officer or servant of the society whatsoever; and that such removal shall be binding and conclusive as against the person or persons so removed, who shall not have or be entitled to any remedy, action, or suit against the society, or any officer thereof, at law or in equity, by reason of the same or of any matter arising therefrom; and also, by resolution of the majority of votes of the shareholders then present as aforesaid, to vary the number of such directors, auditors, trustees, officers, or servants, and for that purpose to determine, either immediately or prospectively, the office of such number of directors or other officers as may be expedient, or to create new or additional officers, and make the requisite changes in the rotation of their officers, and to receive, examine, and pass or reject the accounts,

balance sheets, and reports of the directors, auditors, and (if any) of the actuary, to compel the production of any book, paper, deed, or document belonging to the society, and, generally, to control the board of directors, to authorize any act for which the sanction of a general meeting is hereby made requisite, and to discuss, and, subject to the following clause and the provisions of these presents, to determine upon any question, matter, or thing relating to the affairs of the society which shall arise in the course of the conduct or management thereof, and shall be brought before such meeting by any shareholder whatsoever: Provided that every shareholder shall be at liberty to submit to a general meeting any motion not relating to the business for which such general meeting shall have been convened, upon [732] giving fourteen days' previous notice in writing of such motion to the manager, and also, if such motion should relate to the removal of any director, manager, auditor, trustee, or other officer or servant of the society, upon sending a written notice of such motion to every shareholder, seven days at least before the day appointed for holding such meeting.

12. "That it shall be competent for any extraordinary general meeting, and no other, and such meeting, and no other, is hereby impowered, by a majority which shall consist of at least two thirds in number of the shareholders of the society for the time being, or of the holders of policies of the society for life and for not less than 500l. each on the participating scale (and on which two annual premiums at the least shall have been then paid), and also of two thirds in number of the shareholders and the said qualified holders of policies present personally or by proxy at the meeting, and which shareholders shall hold together at least two thirds of the shares in the said capital stock of the society which for the time being may have been subscribed for, by any resolution or resolutions to increase at any one time, or from time to time, the capital stock of the society, and for that purpose to create a sufficient number of new or additional shares of the same amount per share as the said present shares of 1l. each, as to such meeting shall seem fit; provided that such addition or additions to the capital of the society do not exceed in the whole the sum of 990,000l., and to make all other changes and do all other acts consequent thereon or incidental or necessary thereto; and also to impower and require the directors to borrow and take up on mortgage of the said estate or chattels real belonging to the society, or on such other securities as to such meeting may seem fit, any sum or sums of money which such meeting shall deem expedient, and which the directors for the time being are not authorized to raise [733] under the power in that behalf hereinafter contained, not exceeding in the whole the sum of 50,000l.: Provided always that no general meeting, ordinary or extraordinary, shall have power so to affect or alter the rateable division of the profits and liability to the losses of the society, as between the shareholders, as to render the shareholders entitled to such profits or liable to such losses otherwise than in proportion to the amount and number of the respective shares held or subscribed for by them in the capital stock of the society, or to affect or alter the provisions hereof for the indemnity of the officers or the dissolution of the society.

20. "That a common seal shall be provided for the society, bearing such device as the directors shall think proper; but the name of the society shall be inscribed thereon; and the directors shall have power to break and alter the same, and to provide another seal in place thereof: and such seal shall be kept in some secure place selected by the directors: and such common seal shall not be affixed to any policies or other documents of the society, except by the order of three directors, signed by them, and countersigned by the manager, or, in his absence, by such officer as the directors shall appoint."

The 27th clause provided that it should be lawful for the directors of the said society to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions, and in such manner, as the directors should think proper.

28. "That every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and be sealed with the common seal of the society: and that there [734] shall be contained therein, and in every other contract to be entered into on behalf of the society in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the

provisions hereinafter contained shall at the time at which such liability shall accrue be at the disposal of the directors in that behalf, and negativing an unconditional liability: Provided always that nothing herein or in such contract contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute.

35. "That the directors shall also have full power and authority on behalf of the society to receive and (with the consent of an extraordinary general meeting in the manner hereinbefore provided) to borrow on mortgage or otherwise, and also (at their own absolute discretion), and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest, on government securities, or on such personal or other security as they shall think fit and advantageous and they lawfully may, such moneys, or such parts of the moneys and funds of the said society as they shall think expedient."

The following entry appears in a book used by the promoters of the company prior to its formation, viz.

"At an extraordinary general meeting of the shareholders of the Athenæum Life-Assurance Society, held at the company's office on the 16th day of May, 1851,

"The Rev. J. Bartlett in the chair.

"Resolved, 1. That the capital stock of this company be increased from 10,000l. to 100,000l.

"Resolved, 2. That 1400 shares be awarded to the original promoters of the society.

[735] "Resolved, 3. That the appointment of Henry Sutton, Esq., as manager, and John Carrington Jones, Esq., as secretary to the company, be confirmed as settled by the board of directors on the 19th day of April, 1851.

"Resolved, 4. That the directors be hereby impowered to borrow any sum or sums of money not exceeding in amount the present increased capital of the company, on debenture under the common seal, or on such other security as to such directors shall seem fit.

"Resolved, 5 That a vote of thanks be given to the Rev. J. Bartlett, for his conduct in the chair. "J. BARTLETT, chairman."

The said entry is in the handwriting of, and signed by, Mr. Bartlett.

There is no entry of such meeting, or of any other meeting authorizing the borrowing of money, in the registry-book of the general meetings of the shareholders, or in any other book; and it is alleged by the defendants that no meeting at which any authority was given to the directors to borrow money was in fact held: and, in support of that contention, they rely on the statement of Mr. William Shambrook Whitehead, who states as follows,—"That he was the principal cashier, and a shareholder of the company, from the time of the formation of the company, and so continued until its dissolution; and that he was in the habit of attending the general meetings of the company; and that, to his belief, during that period, no meeting of shareholders was held at which any authority was given to the directors to borrow money on debentures or otherwise; and that, to his belief, no meeting of the shareholders was held on the 16th of May, 1851."

The following persons appear to have executed the deed of settlement of the Athenæum Life-Assurance Society previously to the 16th day of May, 1851, at the dates, and for the number of shares, set opposite to their respective names, viz.

[736]

Christian and Surname.	Occupation, rank, or usual title.	Address.	Number of Shares.	Signature.	Seal.	Date of Signature.	Attesting witness.
Henry Sutton		30 Sackville Street	100			May 2, 1851.	
Edward Curteis		Ealing, Middlesex	100			"	
James Charles Johns		Alfred Place, Thurlow Square	100			"	
John Baldwin Buckstone		6 Brompton Square	100			"	
Henry Harris		35 Howland Street	100			"	
H. and A. M. Sutton		30 Sackville Street	200			"	
H. and C. H. Sutton		30 Sackville Street	100			"	
H. and C. H. Sutton		30 Sackville Street	100			"	

Christian and Surname.	Occupation, rank, or usual title.	Address.	Number of Shares.	Signature.	Seal.	Date of Signature.	Attesting witness.
James Ashplant		Angel Terrace	200			May 2, 1851.	
John Wright Shaw		27 Upper Winchester Street	5			"	
J. Carrington Jones		Fulham	50			"	
Charles Woodward		Prince's Square	10			"	
John Robert Wylde		Walton-on-Thames	50			"	
M. Spence Baylis		10 Park Crescent	5			"	
Octavius J. Crossley		Grove, Camberwell	5			"	
Mary J. Curteis		De Beauvoir Road	10			"	
Samuel Curteis		De Beauvoir Road	20			"	
Elizabeth Batt		Ealing, Middlesex	5			"	
Susan Curteis		De Beauvoir Road	5			"	
W. Shambrook Whitehead		67 Cheapside	20			"	
John Jones		31 Arlington Street	20			"	
Joseph Kaye		15 Pelham Crescent	50			"	
Edward Moseley		75 Coleman Street	50			"	
William Curteis		1 George Yard	20			"	
James Gage Stirton		Chislehurst	300			May 5, 1851.	
Edward Curteis		Ealing, Middlesex	200			"	
Josiah Bartlett		Hatcham, Surrey	200			May 9, 1851.	
John Rees Croker		Chatham, Kent	400			May 10, 1851.	
Henry Harris		35 Howland Street	500			May 13, 1851.	

[737] The above shareholders, on the said 16th of May, held 3025 shares in the said company.

The first policy granted by the said society bears date the 8th of July, 1851, and was effected by John Syer Bristowe, junior, for the sum of 1000*l*.

The said William Shambrook Whitehead, James Ashplant, John Rees Croker, and John Baldwin Buckstone did not attend the said alleged meeting, nor was any notice of the said alleged meeting given to them. It is not known, and has not been ascertained, that notice of the said meeting was ever advertised in any London newspaper, although the following newspapers have been searched from the 1st to the 9th of May, 1851, viz. the *Times*, the *Daily News*, the *Morning Advertiser*, the *Morning Post*, the *Morning Chronicle*, the *Morning Herald*, the *Sun*, the *Globe*, the *Standard*, the *Weekly Dispatch*, the *Era*, the *Observer*, *Lloyd's Weekly Newspaper*, the *Weekly Times*, the *Sunday Times*, being the principal daily morning and evening papers and the weekly papers published in May, 1851; and no advertisement or notice of any kind whatever relating to the Athenæum Life-Assurance Company can be found in any of the aforesaid papers between the said 1st and 9th of May, 1851.

The defendants contend, that, from the facts above stated, it must be taken that the plaintiffs had constructive notice of the circumstances stated in the case with reference to the authority of the directors to borrow money: and the court was to be at liberty to draw any inference of fact which a jury might have done.

A copy of the deed of the society was to form part of the case.

The questions for the opinion of the court were,—First, whether the said Athenæum Life-Assurance Society were not estopped by the recitals of the said debentures from denying that the money was in fact **[738]** borrowed, and the covenants entered into, by virtue and in pursuance of the powers contained in the deed of settlement of the said society, and by the direction and consent of more than two thirds of the shareholders of the said company present at a meeting convened for that purpose,—Secondly, whether, subject as aforesaid, the facts in evidence constituted any defence to the action.

If the court was of opinion, that, under the circumstances, the plaintiffs were entitled to recover, judgment was to be entered for the plaintiffs, with costs of suit. If not, judgment was to be entered for the defendants, with costs of suit.

Bovill, Q. C. (with whom was Norman), for the plaintiffs (*a*). The plaintiffs rely

(*a*) The points marked for argument on the part of the plaintiffs were,—

"That the society is estopped from alleging that the debentures on which the

upon an instrument under the common seal of the company, and signed by two [739] directors. It is submitted that that is sufficient under the statute, and that the defendants are estopped from denying that that instrument was duly issued by virtue of their deed of settlement, and by the direction and consent of more than two thirds of the shareholders present at a meeting convened for the purpose. These provisions are directory only, and immaterial as regards the public and persons dealing with the company. By the 7 & 8 Vict. c. 110, s. 7, before obtaining a certificate of complete registration, there must be a deed of settlement in the form prescribed in Schedule A., which is to contain, amongst other things, a provision "for ensuring the safe custody of the seal of the company, and for regulating the authority under which it is to be used." That has been complied with here: for, the 20th clause of the deed of settlement directs "that a common seal shall be provided for the said society, and such common seal shall not be affixed to any policies or other documents of the said society except by the order of three directors, signed by them, and countersigned by the manager:" and the case finds that there was such an order. The 44th and 46th sections of the act contain provisions for the regulation of contracts by joint-stock companies. The 44th section, "for the purpose of regulating contracts entered into on behalf of any joint stock company completely registered under this act (except contracts for the purchase of any article the payment [740] or consideration for which doth not exceed the sum of 50l., or for any service the period of which doth not exceed six months and the consideration for which doth not exceed 50l., and except bills of exchange and promissory notes)," enacts "that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of 50l., or for any services the period of which doth not exceed six months and the consideration for which doth not exceed 50l., entered into on behalf of any joint-stock company completely registered under this act, may be entered into by any officer authorized by a general bye-law in that behalf; and that every such contract, whether under seal or not, shall immediately after the same shall have been entered into be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for

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action is brought were not duly issued by virtue of the deed of settlement of the society, and by the direction and consent of more than two thirds of the shareholders of the company present at a meeting convened for the purpose.

"That the court cannot infer as a fact from the circumstances stated in the special case that such meeting was not held.

"That, whether such meeting was held or not, inasmuch as the plaintiffs advanced the money in good faith, and without notice that such meeting had not been held, and inasmuch as the money was in fact actually paid to and received by the society, any irregularity in the holding of the supposed meeting cannot be set up as an answer to the claim of the plaintiffs in this action.

"That the clauses of the deed relied upon by the defendants may be binding on the directors and shareholders of the company; so that, if the directors have acted in excess of the powers therein conferred upon them, such excess of authority may have been a breach of trust on the part of the directors, but cannot affect the rights of persons dealing with the company in ignorance of such breach of trust.

"That the deed gives powers to the directors and to general meetings to borrow money and to grant annuities other than such powers as are given by the 12th clause of the deed.

"That the several clauses of the deed relied on by the defendants are either simply directory or impowering, and not restraining clauses.

"That the plaintiffs are not bound to inquire into the regularity of the issuing of the said debentures, and whether the said loan and debentures had been authorized or not by the said directors or by the society."

that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay to the company on whose behalf such contract may be made, the amount of the consideration to be paid by or on behalf of such company in respect of such contract." That section has been complied with here. The 45th **[741]** section applies to bills and notes by the company. And s. 46 enacts "that all deeds and instruments bearing the seal of the company shall be signed by two at the least of the directors of the company." The 28th clause of the deed of settlement in this case provides "that any policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society," &c. Now, if the statute had required the signatures of three directors, the omission to comply with that direction would not have rendered the transaction void: *Cole* v. *Green*, 6 M. & G. 872, 7 Scott, N. R. 682. The doctrine laid down by Lord Wensleydale, in *Ernest* v. *Nicholls*, 6 House of Lord Cases, 401, 419, which will probably be relied on by the other side, has been much discussed, and is not quite in accordance with the doctrine of this court in *Smith* v. *The Hull Glass Company*, 11 C. B. 897. Under the 91st section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the determination as to the remuneration of the secretary of a company is to be exercised only at a general meeting; but, in *Bill* v. *The Darenth Valley Railway Company*, 1 Hurlst. & N. 305, it was held that it is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the company. "These acts of parliament," says Bramwell, B., "are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders; but acts not done according to them may bind the company. If the directors, without such authority, have agreed to give the plaintiff 500l. a year, they may be guilty of a breach of trust, but that is all." The next question is, whether the defendants are not estopped from saying that there was no such meeting **[742]** duly held according to the statute and the deed of settlement. This point, it is submitted, is settled by the case of *The Royal British Bank* v. *Turquand*, 5 Ellis & B. 248, affirmed on error, 6 Ellis & B. 327. There, the plaintiffs declared against the defendants, a joint-stock company completely registered under the 7 & 8 Vict. c. 110, on a bond, signed by two directors, under the seal of the company, whereby the company acknowledged themselves to be bound to the plaintiff in 2000l. The plea set out the condition, which appeared to be for securing to the plaintiffs, who were bankers, such sum as the company should, to the amount of 1000l., owe to the plaintiff on the balance of the account current, from time to time, and for indemnifying the plaintiff to that amount from losses incurred by reason of the account between the plaintiff and the defendant: the plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages; and one clause provided that the directors might borrow on bond such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed: the plea then averred that there had been no such resolution authorizing the making of the bond. The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway: it also set out a general resolution, which, as suggested, authorized the making of the bond. On demurrers to the plea and replication, the court of Queen's Bench held, that the plaintiff was entitled to judgment, the defendants admitting on the record that the bond was the deed of the company, and no illegality appearing,—the opening such an account with a bank being presumably within the authority of **[743]** the directors and for the benefit of the company,—and it not being shewn that the obligee knew of any excess of authority, if there was any, or of any prejudice done to the shareholders, and no such prejudice being shewn in fact: and this whether or not the resolution set out in the replication authorized the making of the bond. Lord Campbell, in delivering the judgment of the court below, says: "A mere excess of authority by the directors, we think, of itself would not amount to a defence. The bond being under the seal of the company, the gist of the defence must be illegality. If the directors had exceeded their authority, to the prejudice of the shareholders, by executing the bond, and this had been known to the obligees, illegality, we think, would have been shewn.

The obligors in executing, and the obligees in accepting, the bond, might be considered as combining together to injure the shareholders: the two parties would have been in pari delicto; and the action could not have been maintained. In such circumstances, potior est conditio defendentis. But, without the scienter, and without prejudice to the shareholders or any others whatsoever, illegality is not established against the obligees. If no illegality is shewn as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders. No decision or dictum was cited on the part of the defendants for the avoidance of such a bond under such circumstances. But the case of *Hill* v. *The Manchester and Salford Water Works Company*, 2 B. & Ad. 544, is an instance of such a bond being upheld, the plea not disclosing any fraud or injury done to the shareholders of the company; and the case of *Horton* v. *The Westminster Improvement Commissioners*, 7 Exch. 780, was decided on the same principle." And in affirming the judgment the court of error say: "Parties dealing with **[744]** the directors of these joint-stock companies are bound to read the deed or statute limiting the directors' authority, but they are not bound to do more. The plaintiffs, therefore, assuming them to have read this deed, would have found, not a prohibition to borrow, but a permission to borrow on certain things being done. They have, in my opinion, a right to infer that the company which put forward their directors to issue a bond of this sort, have had such a meeting and such a resolution passed as were requisite to authorize the directors in so doing:" 25 Law J., Q. B. 318. [Cockburn, C. J. The question here is, whether the plaintiff is at liberty to infer anything, when it is found as a fact that the directors had not authority to borrow.] It is submitted that there was a sufficient execution of these debentures under the seal of the company; that the signature of two directors, as required by the statute, was sufficient; and that the clause of the deed of settlement requiring an execution by three is directory only; and that the defendants are estopped from saying that there was no meeting, and no resolution authorizing the borrowing of money on debentures. This very question (amongst others) is now pending in the court of Queen's Bench, in a case of *The Prince of Wales Assurance Society* v. *The Athenæum Assurance Society*, and the court have taken time to consider it.

Sir F. Thesiger, Q. C. (with whom was Field), contrà (*a*). **[745]** The argument on the other side assumes that the directors may utterly disregard the provisions of the act of parliament and of the deed of settlement, and yet bind the shareholders. The case of *The Prince of Wales Assurance Society* v. *The Athenæum Assurance Society* differs essentially from this: there, the policy was signed by three directors, but was not made in pursuance of an order of three directors and countersigned as required by the 20th clause; and the question was, whether the policy was void on that account (see the note at the end of the case). It appears by the special case that this company was completely registered on the 14th of May, 1851. Until registration, it could have no power to carry on business: 7 & 8 Vict. c. 110, ss. 7, 25: and then it could do so only subject to the provisions of the act and of the deed of settlement, one of the powers mentioned in s. 25, being, "to borrow or raise money within the limitations prescribed by any special authority." All who contract with joint-stock companies are bound to look to the act of parliament and the provisions of the deed. Now, what are the provisions relied on here as an answer to the liability which the plaintiffs are seeking to enforce? The 12th and 35th clauses of the deed are those which have

(*a*) The points marked for argument on the part of the defendants were,—

"1. That the debentures were made for money borrowed by the directors without the proper authority of the shareholders.

"2. That no meeting was held at which the directors were authorized to borrow the said money, as required by the provisions of the deed of settlement.

"3. That no proper notice prior to such meeting was given.

"4. That there were not the requisite number of shareholders present to give any such authority.

"5. That the debentures were not executed by three directors of the said company, as required by the said deed of settlement.

"6. That the defendant is not estopped from relying upon the objections aforesaid.

"7. That the said company are not liable upon the said debentures."

relation to the borrowing of money. The 12th clause requires this to be done under the sanction of an extraordinary general meeting; and the 35th provides that "the directors shall have full power and authority on [746] behalf of the society to receive (and, with the consent of an extraordinary general meeting in the manner thereinbefore provided), to borrow, on mortgage or otherwise," &c. Here, then, is a company completely registered, and having this limited power to borrow money. The only entry of a meeting or any authority to borrow money, is one that is found in a book which had been kept by the promoters of the company before its formation, and bearing date the 16th of May, 1851,—two days after the certificate of complete registration was obtained,—and containing the following resolutions: "1. That the capital stock of this society be increased from 10,000l. to 100,000l. 4. That the directors be hereby impowered to borrow any sum or sums of money, not exceeding in amount the present increased capital of the company, on debenture, under the common seal, or on such other security as to such directors shall seem fit." This is signed merely by the chairman; and there is no statement of any directors or shareholders being present. And at this time only twenty-nine persons had signed the deed of settlement. The authorities are numerous and clear, that the shareholders are bound only by contracts that are entered into in strict accordance with the provisions of the statute and of the deed. In *Ridley* v. *The Plymouth Grinding and Baking Company*, 2 Exch. 711, 717, Parke, B., says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint-stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors and their powers as between them and the company. Therefore, every per-[747]-son seeking to bind the company by a contract with the directors, must give some proof of their authority. I perfectly agree that the liability of the company may be shewn without producing the original deed, or a copy of it, provided it be shewn that all persons who formed the company had sanctioned any particular individuals entering into contracts to bind them: if there were any proof of such authority, no doubt the company would be bound. This case fails, because it is not shewn that the persons who entered into the contract, that is, the directors present at the board meeting, when there was some evidence of their sanctioning the agreement, were competent to bind the company." Similar language is used by Jervis, C. J., in giving judgment in *Smith* v. *The Hull Glass Company*, 11 C. B. 897, 926. "Joint-stock companies," he says, "it is now admitted, are not to be treated as ordinary trading partnerships: they are only bound by contracts made by the directors within the scope of their authority. The public have no right to complain. They know that the company is acting under the sanction and direction of an act of parliament and of a deed of settlement; and they have a ready access to that deed." And Maule, J., says: "The statute 7 & 8 Vict. c. 110, requires the deed of settlement to be registered, and that defines the purposes for which the company is incorporated, and the powers of the directors; and all persons who contract with the directors must be taken to be cognisant of the extent of the authority conferred upon them" (*a*). In giving the judgment of the court of error in *The Royal British Bank* v. *Turquand*, 25 Law J., Q. B. 317, Jervis, C. J., says it may now be taken for granted that dealing with companies of this sort is not the same thing as dealing with (ordi-[748]-nary) trading partnerships; and that persons dealing with them are bound to read the statute and the deed of settlement. In *Ernest* v. *Nicholls*, 6 House of Lords Cases, 401, 418, Lord Wensleydale gives a very lucid exposition of the law upon this subject. "It is obvious," he says, "that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. On the other hand, the crown would not be likely to give them a charter which would leave the corporate property as the only fund to satisfy the creditors. The legislature then devised the plan of incor-

(*a*) "But," he adds, "it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors."

porating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders, by requiring the co-partnership deed to be registered, certified by the directors, and made accessible to all; and, besides, including some clauses as to the management, as in the 7 & 8 Vict. c. 110, s. 7, &c. All persons, therefore, must take notice of the deed and the provisions of the act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault; and, if they give credit to any unauthorized persons, they must be contented to look to them only, and not to the company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. Those provisions which give to the directors discretionary **[749]** powers of management, do not affect strangers; and the shareholders are bound by the exercise of the discretion which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers; but they form the subject of an action against the directors for the breach of their covenants express or implied in the deed. The great body of shareholders, for whose protection these limitations of authority are provided cannot be affected unless they are complied with. They can only act and contract through their directors, and the acts of the individual shareholders have no effect whatever on the company at large. That this is the law, has been fully settled by several decisions." His Lordship then refers to *Ridley* v. *The Plymouth Grinding and Baking Company*, 2 Exch. 711, *The Kingsbridge Flour Mill Baking Company* v. *Ridley*, 2 Exch. 711, and *Smith* v. *The Hull Glass Company*, 8 C. B. 668, 11 C. B. 897 (*a*). That case conclusively establishes that all persons dealing with a joint-stock company are bound to make themselves acquainted with the powers of the directors and the provisions of the deed of settlement. The relation of the directors to the shareholders is in truth a branch of the law of principal and agent. They are agents having a limited authority. The shareholders can only act through their directors: 7 & 8 Vict. c. 110, s. 27. [Cockburn, C. J. They must act through the directors, it is true: but they need not unless they choose give them power to borrow money.] That power is conferred by s. 25. [Cockburn, C. J. It may not be necessary to borrow money: the company may choose to carry on its business with ready money.] Where a man is dealing with an agent whom he knows to be acting under a limited authority, he is bound to ascertain its extent: **[750]** Story on Agency, § 77; *Attwood* v. *Munnings*, 7 B. & C. 278, 1 M. & R. 66; *Alexander* v. *Mackenzie*, 6 C. B. 766. Knowing from the provisions of the deed of settlement that the power of the directors to borrow money was limited and fenced round by the special provisions contained in the 12th clause, it was the plaintiffs' duty to ascertain if the requirements of that clause had been complied with. It is said that these provisions are directory only: but they are the very terms upon which alone the subscribers consent that the directors shall have power to pledge their credit. [Crowder, J. You contend that they are all conditions precedent to the validity of the contract?] Yes. The construction sought to be put upon the 44th and 46th sections of the statute, is not warranted either by the general scope of the act itself or by the authorities. The 44th section was intended to apply only where there is no provision in the deed of settlement as to the mode of making contracts. This is not the contract of the company. [Crowder, J. The common seal is affixed, by the authority of three directors. Can you get rid of the effect of that, without shewing fraud?] In *Hill* v. *The Manchester and Salford Water Works Company*, 5 B. & Ad. 866, in an action against a corporation on a bond the condition of which recited that the company were by act of parliament authorized to raise money by bond, and that, at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded non est factum: and it was held, that, although the company could not under that plea shew that the bond executed by them was invalidated by collateral matter, they might shew that it was void because executed contrary to the provisions of the act of parliament. [Williams, J. The marginal note there is not quite a correct

(*a*) See the observations of Lord Cranworth, C., upon these cases, in *Circuit case*, 3 De G. McN. & G. 459, 479.

statement of the effect of the case: there, the seal was not lawfully **[751]** affixed to the instrument. Cockburn, C. J. Assuming that every individual who contracts with a joint-stock company is bound to be cognisant of the contents of the deed of settlement,—how is he to know that all its requirements have been carried out by the directors?] The public are not bound to contract with joint-stock companies. Besides, there are two parties whose interests are to be considered; the shareholders are entitled to the fair protection which the deed was designed to afford them. *Cole* v. *Green*, 6 M. & G. 872, 7 Scott, N. R. 682, has no bearing upon this case. It was not a case of principal and agent at all, but of individuals intrusted with the performance of certain duties. [Willes, J. How do you reconcile your argument with the decision in *The Royal British Bank* v. *Turquand*?] It is not, certainly, quite reconcileable with that case. But reliance is placed upon the opinion expressed by Lord Wensleydale in *Ernest* v. *Nicholls*, 6 House of Lords Cases, 401. [Crowder, J. With every possible respect for the opinion of Lord Wensleydale, we are bound by the decision of the Exchequer Chamber in *The Royal British Bank* v. *Turquand*.] To decide in favour of the plaintiff in this case, the court must declare deeds of settlement to be little better than waste-paper. The latter part of the judgment of the Exchequer Chamber in *The Royal British Bank* v. *Turquand*, is not warranted by either principle or authority. Besides, this case is distinguishable, on the ground that here there is not merely an absence of proof that the requisitions of the deed of settlement have been complied with, but positive proof, and that upon the face of the instruments themselves, that those requisitions have been wholly disregarded. [Cockburn, C. J. Reading the 28th clause in connection with the 27th, it seems doubtful whether it applies to loans of money on debentures.] The main ground upon which the argument is based is, that the **[752]** directors stand in the position of agents having only a special and limited authority; and that every person who contracts with them is bound to ascertain whether that authority has been properly complied with or not.

Bovill, in reply, was stopped by the court.

Cockburn, C. J. I am of opinion that our judgment must be for the plaintiffs. The action is brought upon certain debentures purporting to be issued under the seal of the society, and bearing the signature of two of the directors. Two objections to their validity have been urged,—first, that the directors are only impowered by the terms of their deed of settlement, executed pursuant to the provisions of the 7 & 8 Vict. c. 110, to issue these instruments under the sanction of a special general meeting of the shareholders authorizing it, and that, inasmuch as there was no such special general meeting duly convened according to the deed, there could be no valid resolution, and the resolution, whatever it was, gave the directors no authority which could be binding upon the society,—secondly, that, even if there had been such authority to borrow money as is contemplated by the deed of settlement, the 28th clause requires, not only that the instrument shall be sealed with the seal of the company, but also that it be signed by three directors, whereas the debentures in question were signed only by two. As to the first objection, I think we are bound by the decision of the Exchequer Chamber in the case of *The Royal British Bank* v. *Turquand*, 6 Ellis & B. 327. There, the power to borrow was almost identical with that here: it was, that "the board of directors might borrow on mortgage, bond, or bill, in the name of, and, if necessary, under the common seal of, the company, such sum or sums of money as should from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed;" **[753]** and the court of Queen's Bench having held (5 Ellis & B. 248) that a plea founded on the alleged fact that there had been no resolution of the company to authorize the making of the bond, was bad, their decision was upheld by the Exchequer Chamber. That case is directly in point: and therefore it is unnecessary to go into the first question, inasmuch as it is one upon which we are not at liberty to exercise any discretion. The second question seems to me to be disposed of by a more minute examination of the deed of settlement. The 28th clause of that deed appears to have reference only to the instruments which are referred to in the 27th clause. Now, the 27th provides "that it shall be lawful for the directors of the said society to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions and in such manner as the directors shall think proper." And the 28th goes on to say "that any policy, endowment, grant of annuity, or other

instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society," &c. Reading these two clauses together, it seems to me that the provision in the 28th has reference exclusively to the various transactions, and to the instruments to be executed for the purpose of carrying them out, that are mentioned in the 27th clause. According to the ordinary rule of construction, where there are general words following particular ones, they are to be read as applicable to persons or things ejusdem generis with those that have gone before (*a*). The words "other instrument" in the [754] 28th clause must therefore be read as applicable to insurances, sales or purchases of reversions, annuities, and endowments. And this is rendered more clear by the words which follow, "required in any of the transactions aforesaid:" for, there is no previous mention of any transaction relating to the borrowing of money and granting debentures, —the only provision which could be urged as so applying being the 12th clause, which provides "that it shall be competent for any extraordinary general meeting, and no other, and such meeting and no other is hereby impowered, by a majority which shall consist of at least two thirds in number of the shareholders of the society for the time being, &c., to increase the capital stock of the society, and for that purpose to create a sufficient number of new or additional shares, &c., and also to impower and require the directors to borrow or take up on mortgage of the real estate or chattels belonging to the society, or on such other securities as to such meeting may seem fit, any sum of money which such meeting may deem expedient," &c. That only provides generally that an extraordinary general meeting of the shareholders may grant power to the directors to borrow money under special and extraordinary circumstances. Seeing the long interval between that clause and the 28th, I cannot reconcile my mind to the supposition that it could be one of the "transactions" intended to be referred to in the last-mentioned clause. This renders it unnecessary to inquire whether or not the 44th and 46th sections of the 7 & 8 Vict. c. 110, apply to this case. It seems to me to be very clear that the 28th clause refers to the 27th only; and for these reasons I am of opinion that the plaintiff is entitled to succeed upon both points.

WILLIAMS, J. I am entirely of the same opinion. As to the objections which are not founded upon the [755] 28th clause of the deed of settlement, I agree with the Lord Chief Justice in thinking that it is enough to say that this case is governed by that of *The Royal British Bank* v. *Turquand*, 6 Ellis & B. 327. It is agreed that the facts shall be given in evidence under non est factum: if extended in a plea, it would be precisely in the terms of that case. As to the objection arising on the 28th clause, I should have great difficulty in coming to the conclusion contended for on the part of the defendants. In the first place, I doubt whether it was competent to the company to stipulate that a contract which the statute (ss. 44, 46) declares valid if signed by two directors, shall not be valid unless signed by three. Again, I doubt the accuracy of the law as laid down by Lord Wensleydale in *Ernest* v. *Nicholls*,—at least to the extent to which he goes. But it is unnecessary to consider these points, because I entirely concur with my Lord in thinking that the 28th clause of the deed of settlement was meant to apply only to the transactions referred to in the 27th: and that clearly will not include a transaction of this sort.

CROWDER, J. I am of the same opinion upon both points. I was party to the decision of the Exchequer Chamber in *The Royal British Bank* v. *Turquand*: and, not only do I think we are bound by it, but I am persuaded that it is a right decision, and must govern this case. There, there was an allegation in the plea, that there was no resolution authorizing the making of the bond, and the plea was held bad. Assuming that it was proved here that there was no such meeting or resolution as the deed of settlement requires, the case stands in this respect precisely on the same footing as the plea in that case. With regard to the attempted distinction on the second point, that there is enough on the face of them to nullify these debentures, inasmuch as [756] they have only the signature of two directors, whereas the 28th clause of the deed requires that of three, I incline to think with my Lord that the 28th clause applies only to the instruments and transactions referred to in the 27th. I do not, however, wish to be understood as giving a positive opinion upon that point, not having had sufficient time to consider it. But I am clearly of opinion that the want of the required number of signatures does not in the slightest degree affect the validity

(*a*) See Dwarris on Statutes, 2nd edit. 621, 657.

of the document. In any way, therefore, of construing the 28th clause,—whether as referring to the 27th clause or to the 12th,—it seems to me that it affords no answer to the argument which has been urged on the part of the plaintiffs.

WILLES, J. I am of the same opinion. As a general rule, a corporation is bound by an instrument under its seal, unless it can be shewn that its execution was obtained by fraud, or there is some illegality in the transaction. There is nothing of the sort here, and therefore nothing to take this case out of the general rule.

Judgment for the plaintiffs (*a*).

(*a*) The court of Queen's Bench gave judgment in the case of *The Prince of Wales Assurance Society* v. *The Athenæum Assurance Society*, in Easter Term, 1858, holding that a policy bonâ fide executed by three directors under the seal of the company was not void because there had been no previous order of three directors (countersigned as required by the 20th clause of the deed) for affixing the seal thereto. See 31 Law Times, 149.

Lord Campbell, in giving judgment, after stating the facts, says, —"Under these circumstances, the defendants' counsel contended that they were entitled to have the verdict entered for them on the pleas of non est factum, and that they had not granted the policies; that the previous order was a condition precedent to the power of the directors to affix the seal to the policies, so that without proving such an order a primâ facie **[757]** case could not be made out for the plaintiffs; that, for the want of previous orders signed by three directors and the manager under sect. 20 of the deed of settlement, the policies were absolute nullities, and were incapable of confirmation by the defendants, although the plaintiffs might have regularly paid and the company received the premiums upon them for twenty years, although the premiums during all that time might have increased the dividends received by the shareholders, and although the granting of the policies was within the scope of the general authority of the directors and for the benefit of the shareholders. This reasoning proceeds upon the assumption that all who deal with the company have notice, before any negotiation begins, of the deed of settlement, and are bound to make themselves masters of its contents. But, if it were established that all the world must be presumed to have notice of all the contents of all the deeds of settlement framed by all the companies under the 7 & 8 Vict. c. 110, does it follow that a policy under the seal of such a company, which is bonâ fide entered into, which is not contrary to the rules of the common law nor to any enactment in the 7 & 8 Vict. c. 110, or in any other statute, and which, when executed, may have been for the benefit of the shareholders, is absolutely void if any formality has been omitted which is prescribed by the deed of settlement? If a deed under the seal of the company contains matter contrary to the deed of settlement, of which the party dealing with the company has notice, and this works a prejudice to the shareholders, we do not doubt that the deed is illegal, and that it may be avoided by a special plea disclosing the illegality. But the simple omission of a formality, or variation from the form required by an article in the deed of settlement does not, we conceive, make a deed under the seal of the company a nullity. We consider the directions in sect. 20 of this deed of settlement to be only for the guidance of the directors, and to be intended to operate only as between them and the shareholders. If, from neglecting them, any prejudice arises to the shareholders by too many risks being taken, or in any other way, the directors may be liable to the shareholders; but this is very different from saying that a party who has bonâ fide insured a sum of money by such a deed on a life, should lose that money when the life drops, and shall lose all the premiums he has **[758]** paid upon it, although, when the policy was executed, it was an advantageous bargain for the shareholders. If a customer dealing with this company for a life-policy is bound to inspect the deed of settlement at all, he surely has done enough if he attends to sect. 28, which regulates the manner in which policies shall be framed and executed. And the policies in question are in all respects framed and executed according to the rules there laid down." "It is truly said that such regulations are introduced into the deed of settlement for the protection of the shareholders; but the shareholders have reasonable protection from them without saying that any departure from the regulations must of necessity nullify the policy, for, if they are violated by the directors, the directors are answerable for the breach of them to the shareholders; and, if there has been an illegal agreement between the directors and the party effecting the policy,

[760] PELLATT *v.* MARKWICK. Jan. 27th, 1858.

The court refused to refer an action upon bills of exchange to the master, under the compulsory clauses of the Common Law Procedure Act, 1854.

This was an action to recover 466l. 7s. for principal and interest due upon six bills of exchange drawn by the defendant upon and accepted by one Alfred Markwick.

Upon an affidavit by the plaintiff's attorney, that he was informed and believed that the acceptor of the bills had since the date thereof been adjudged a bankrupt, that a small dividend had been received by the plaintiff out of his estate in respect of the bills, and that, on being served with the copy writ of summons in this action, the defendant admitted having drawn the bills.

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to the prejudice of the shareholders, the policy would be illegal, and by a special plea it might be avoided. We must bear in mind that there are no nullifying words in the 20th section of the deed of settlement, and that they may well be considered as directory, instead of creating by implication a condition precedent, which might work such enormous injustice. Wherever the party dealing with such company knowingly combines with the directors to do any act ultrà vires, to the prejudice of the shareholders,—as, for instance, to throw upon them unlimited liability, whereas the directors are required so to frame policies as to confine the remedy of the assured to the capital and funds in the hands of the company,—the shareholders might very fairly and reasonably deny their liability on the policy: but it would be most unjust to allow them to take advantage of an irregularity of the directors (who are denominated their agents), although they cannot shew that they are in any respect prejudiced by the irregularity, and the assured cannot be charged with any fraud or impropriety. The question is, did the legislature mean that the company may avoid all their contracts unless the formalities prescribed by the statute and the deed of settlement, both in the form of the contract and in the process of making it, have been complied with? In support of the affirmative, it is said that the directors are agents with limited authority; that the contractors have notice of the limit, because the statute confers the authority subject to the provi **[759]**-sions of the act and the deed of settlement, which is registered for public inspection; that the shareholders are the principals, and that they have an unlimited power of repudiation,—although this would be an unlimited power to defraud. Conceding the impossible supposition that every contractor has read and understood all these provisions, the statute relied upon would have effect, if these provisions were held to create a duty in the directors and shareholders inter se, and thus enabling the company to avoid contracts in which some of the provisions are not complied with, if the contractor, with actual notice of the provisions has knowingly combined with the directors to omit them, to the prejudice of the shareholders, as in the case of partnership deeds."

His lordship then observes at some length upon the various provisions in the statute and in the deed, and also upon the cases of *Bailey* v. *The Plymouth Grinding and Baking Company*, 2 Exch. 744, *Ernest* v. *Nicholls*, 6 House of Lords Cases, 401, *Smith* v. *The Hull Glass Company*, 8 C. B. 668, 11 C. B. 897, *Hill* v. *The Manchester and Salford Water Works Company*, 2 B. & Ad. 554, *Horton* v. *The Westminster Improvement Commissioners*, 7 Exch. 780, *The Royal British Bank* v. *Turquand*, 5 Ellis & B. 248, 7 Ellis & B. 327, *Agar* v. *The Athenæum Life Assurance Society*, 3 C. B. (N. S.) 725, *Bill* v. *The Darenth Valley Railway Company*, 2 Hurlst. & N. 305, and *Bargate* v. *Shortridge*, 5 House of Lords Cases, 310.

Speaking of *Ernest* v. *Nicholls*, he says, "We are, of course, bound by the judgment of the House of Lords in that case, and we should all most heartily have concurred in it, the question having been 'as to a special contract to do the very unusual thing of purchasing by one company the trade of another.' But we are not bound by the extra judicial observations of any noble and learned lord delivered in that assembly, though they are, no doubt, entitled to high consideration." And he concludes this part of his judgment thus, "For these reasons and on these authorities we think, that, notwithstanding the dicta of the noble and learned lords referred to, the verdict for the plaintiffs on the pleas of non est factum, and that the defendants' company did not grant the policies, ought not to be disturbed. Our apology for entering so much at length into these comments on the statute and the authorities is, to shew our respect for the two noble and learned lords whose dicta were cited."

Aspland moved for a rule calling upon the defendant to shew cause why the case should not be referred to the Master under the 3rd section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. [Cockburn, C. J. What is there to shew that the matter in dispute here cannot conveniently be tried in the ordinary way?] The plaintiff is naturally anxious to avoid the unnecessary expense and delay of a trial, where there can be nothing in dispute. [Cockburn, C. J. The object of the statute was to relieve the court from the necessity of trying complicated questions of account.] It is the practice at Chambers to make such orders in cases of this sort.

Cockburn, C. J. The 3rd section of the 17 & 18 Vict. c. 125, provides, that, if it be made to appear to the satisfaction of the court or a judge that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordi-**[761]**-nary way it shall be lawful for the court or judge to refer it to an arbitrator or to the Master. Here, the plaintiff sues the defendant as the drawer of certain bills. It is not a matter of mere account. The clause clearly was not meant to apply to such a case.

Williams, J., and Willes, J., concurring (*a*),

Rule refused.

Helliwell *v.* Hobson and Another. Jan 28th, 1858.

The court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue.

This was an action brought by the plaintiff against the defendants for having published in a newspaper called the *Derbyshire Advertiser, and Derby, Ashbourne, Wirksworth, Belper, Uttoxeter, and North Staffordshire Journal*, the following alleged libel against him:—"Mr. and Mrs. German Reed's entertainment, and the librarian to the Mechanics' Institute (thereby meaning the plaintiff). On Friday evening last, Mr. and Mrs. German Reed gave their admirable entertainment in the Lecture Hall, Derby. The attendance was satisfactory, and the performance was extremely well received. Some of our readers may probably have remarked that this entertainment was not announced in the *Derbyshire Advertiser*; and, as the omission was equally unjust to ourselves and to Mr. and Mrs. Reed, we may with propriety mention the cause of it here. It appears (and we state the fact from a conversation with Mr. Reed himself) that Mr. Helliwell (meaning the plaintiff), the librarian to the Derby Mechanics' **[762]** Institute, received instructions from Mr. Reed to advertise the entertainment in the Derby papers, and to forward the usual free tickets to the editor of each journal. Presuming on his (meaning the plaintiff's) position, and thinking, perhaps, that he could with safety gratify a personal feeling towards this journal, Mr. Helliwell (meaning the plaintiff) disregarded these orders: the advertisement was forwarded to the *Mercury* and the *Reporter*, but neither advertisement nor ticket found its way to our office. The subject is only worth alluding to, in order to place professionals who may intend to visit Derby on their guard; so that they may not in future be defrauded of that publicity which they desire. Mr. Helliwell (meaning the plaintiff) should know, too, that he will not be allowed to pursue with impunity a similar course of conduct to that of which we have had to complain."

The plaintiff having delivered his declaration, laying the venue in Middlesex, the defendants pleaded not guilty, and a justification averring the alleged libel to be true; and now

Archibald moved for a rule nisi to change the venue to Derbyshire. The motion was founded upon an affidavit which stated, that the newspaper in which the alleged libel was published was printed and published at Derby, and that the principal circulation thereof was in Derby, and it had but a very small circulation in Middlesex; that the defendants had at least five or more material witnesses to establish their defence, the whole of whom resided in Derby or the neighbourhood, and none of whom resided in Middlesex, except Mr. Reed, who, it was believed, resided in London, but was constantly travelling about; that the defendants themselves, who would necessarily be called as witnesses, resided near Derby; that the plaintiff resided at Derby,

(*a*) Crowder, J., was absent.

and it was believed all the witnesses whom the plain[763]tiff could subpœna in support of his case resided at or near Derby, and that he had no material witness residing elsewhere, unless it were Mr. Reed, whom the defendants intended to subpœna: that, if the cause were tried in Middlesex, the expenses would be at least 80*l.* more than if it took place in Derby: that the plaintiff was in very poo circumstances, and it was extremely probable that he would not be able to pay the defendants' costs in case he failed in the action; that the deponent had read an affidavit of the plaintiff, in which he alleged his belief that he could not have a fair and impartial trial in Derby, by reason of the prejudice excited against him by the circulation of placards tending to vilify his character; that the deponent believed that the class of persons likely to sit on the jury at the assizes for Derby were not likely to be prejudiced against the plaintiff, and that the plaintiff could have as fair and impartial a trial in that county as in Middlesex. The affidavit concluded with a positive denial that the defendants or either of them were directly or indirectly concerned in the printing or circulation of the placards referred to.

CROWDER, J. I think no sufficient ground has been laid for changing the venue in this case. The plaintiff had the right to lay his venue where he chose. And, from the circumstance of the newspaper containing the libel being published in Derby, and the circulation of offensive placards there, the plaintiff might fairly apprehend that he would not have an impartial trial there. And it is not shewn what witnesses he may have. I therefore do not think the defendants have made out any case to entitle them to a rule. It should at least be made to appear that the convenience of a trial at Derby greatly preponderates.

Rule refused.

[764] DOYE *v.* ELEY, a Prisoner. Jan. 29th, 1858.

Where an application for the discharge of a prisoner, under the 43 G. 3, c. 123, on the ground that he has been detained in execution for a year for a sum under 20*l.*, is made before the expiration of the ten days' notice mentioned in the 129th rule of Hilary, 1853, a rule nisi only can be granted.

Heaton moved for the discharge of the defendant under the 48 G. 3, c. 123, he having been detained in execution at the suit of the plaintiff in this action for twelve months for less than 20*l.*, exclusive of costs. It appeared that the notice of the intended application had not been given until the 26th instant. [Willes, J., referred to the 129th rule of Hilary, 1853, which provides that "a rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." In the absence of a proper notice, you can only have a rule nisi.] The language of the rule is affirmative only: it is in the discretion of the court.

COCKBURN, C. J. We can only grant a rule nisi. The plaintiff has a right to expect that the application to the court will not be made until the eleventh day.

The rest of the court concurring,

A rule nisi was granted (see the next case).

[765] HUMPHREYS *v.* HARRIET FRANKS, a Prisoner. Feb. 1st, 1858.

A defendant who has lain in prison in execution on a judgment in ejectment for more than twelve months, is still entitled to be discharged on motion, under the 48 G. 3, c. 123, s. 1, notwithstanding the alteration in the form of the proceedings under the Common Law Procedure Act, 1852.

Pearce moved for a rule absolute under the 48 G. 3, c. 123, s. 1, to discharge the defendant from custody under an execution in an action of ejectment, she having lain in prison for more than twelve months for the costs of an action of ejectment, amounting to 90*l.* 2*s.* 4*d.* The action had been commenced since the coming into operation of the Common Law Procedure Act, 1852. The proper ten days' notice was given on the 12th of January. He referred to *Doe d. Thirlfall* v. *Ward*, 2 M. & W. 65, and *Doe d. Daffey* v. *Sinclair*, 5 Dowl. P. C. 615, to shew, that, before the late act, a defen-

dant in custody for the nominal damages and costs in an action of ejectment was entitled to be discharged under the act. The question was whether the alteration in the nature and form of the action of ejectment effected by the 168th and following sections of that act took the case out of the operation of the 48 G. 3, c. 123. [Willes, J. The question is, whether the language of the 207th section of the Common Law Procedure Act, 1852,—that "the effect of a judgment in an action of ejectment under this act, shall be the same as that of a judgment in the action of ejectment heretofore used,"—is sufficient to bring the new form of proceeding within the 48 G. 3, c. 123.]

Holl shewed cause. The 48 G. 3, c. 123, was not intended to apply to actions of this sort. The 1st section recites that "it might tend greatly to the relief of certain debtors in execution for small debts, and at the same time occasion no material prejudice to trade and public credit, if such debtors should, after a limited period of imprisonment, be allowed the benefit of a dis [766]-charge therefore, the creditors at whose suit they were so in execution being at the same time authorized to take out other writs of execution against the land and goods of such debtors, or to use other remedy for the satisfaction of their debts, as if the persons of such debtors had never been taken in execution:" and it then enacts that all persons in execution upon any judgment for any debt or damages not exceeding 20l., exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months, shall be forthwith discharged out of custody as to such execution, by the rule or order of the court. [Willes, J. Do you dispute that that statute applies to a judgment in ejectment?] The court of Queen's Bench held that it did not, in the case of *Doe* v. *Reynolds*, 10 B. & C. 481, where Lord Tenterden says: "The object of the statute was, to relieve persons in execution upon a judgment for a debt or damages. Here, the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding is, to recover the possession of the land, and not any debt or damages." [Cockburn, C. J. Ejectment has repeatedly since that time been held to be within the 48 G. 3, c. 123. Then comes the 207th section of the 15 & 16 Vict. c. 76, which says that the effect of a judgment in ejectment under this act shall be the same as that of a judgment in ejectment was before.] In *Doe d. Threlfall* v. *Ward*, 2 M. & W. 65, the court of Exchequer held themselves bound by the strict letter of the statute, though they thought the case not within its spirit. Now, it is no longer even within the words of the statute: for, no damages are recovered in ejectment, but merely the possession of the land. [Williams, J. Do you contend that the legislature, in passing the Common Law Procedure Act, 1852, intended to alter the settled law in [767] this respect?] It would hardly, perhaps, be justifiable to press the argument so far as that: but, the technical ground of the former decisions having ceased, the court will, it is submitted, cease to give a technical effect to the words of the old statue, and adopt the conclusion of Lord Tenterden in *Doe* v. *Reynolds*.

Cockburn, C. J. I am of opinion that the defendant is entitled to be discharged from custody under the execution in this action. It is admitted, on the part of the plaintiff, that, prior to the passing of the Common Law Procedure Act, 1852, a defendant who had been in custody in execution for the nominal damages and costs in an action of ejectment for more than twelve successive calendar months, was entitled to be discharged by virtue of the 48 G. 3, c. 123, s. 1. If the question had now arisen for the first time, I must confess I should have entertained considerable doubts whether the provision in that statute ought to be applied to an action of ejectment. But the law upon that subject has long since been settled; the case of *Doe* v. *Reynolds*, 10 B. & C. 481, having been distinctly over-ruled by subsequent decisions. Then comes the question whether the Common Law Procedure Act, 1852, has in any way altered the state of the matter. I am clearly of opinion that it has not. The 207th section enacts that the effect of a judgment in an action of ejectment under that act shall be the same as that of a judgment in an action of ejectment theretofore used. There being this express provision, that, although the form of the judgment in ejectment is somewhat altered, it is to have the same effect as it had before the passing of the act, I think it is impossible to say that the operation of that section is not to reserve to the defendant all the advantages which the law before allowed him, and, amongst others, the right to claim his [768] discharge under the 48 G. 3, c. 123. For these reasons, I am of opinion that this rule ought to be made absolute.

Williams, J. I am of the same opinion. Whatever was the intention of the

framers of the statute 48 G. 3, c. 123, its language was such as induced the courts, after considerable controversy, to hold that they were not at liberty to decline to apply it to the case of a defendant in execution in an action of ejectment, being of opinion that the plaintiff did in that form of action recover damages, though nominal. That being so, the question is, whether the provisions of the Common Law Procedure Act, 1852, was intended to alter, or has the effect of altering, the law in that respect. Now, seeing that the object of that statute was merely to alter the procedure, I think it would be a strong thing to hold that the effect of it was to make a substantive alteration in the law in this respect. No doubt it must have occurred to the legislature that points like this might arise; and therefore, to obviate inconvenience, the sweeping provision in s. 107 was introduced, that the effect of the judgment in ejectment in its new form shall be the same as the former judgment. Before that statute, the effect of a judgment for the plaintiff in ejectment was, to enable the plaintiff to keep the defendant in execution only for twelve months. To accede to the argument of Mr. Holl, would be to hold that the effect of the judgment is altered in a most material respect.

WILLES, J., concurred.

Rule absolute.

[769] PERRY *v.* DAVIS AND OTHERS. Jan. 13th, 1858.

Premises consisting of a wharf and dock, dwelling-house, wash-house, and court-yard, were demised under a lease containing a covenant that the lessee, his executors, &c., should not erect or build any edifice or structure whatsoever on the wharf and dock, or place goods thereon above a certain height, &c., "nor do any other matter or thing of any nature or kind which might obstruct the view of the river from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier thereof," nor carry on a certain trade thereon, "nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose;" with a proviso for re-entry for a breach: —Held, that this covenant absolutely prohibited all external alteration in any part of the demised premises, and that the qualification as to lessening "the value thereof" applied only to internal alterations in the dwelling-house. Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor.

Ejectment for a forfeiture. The defendant Davis was sub-lessee under the plaintiff (and the other two defendants under him) of premises in Duke Street, Chelsea, held under a lease of the 12th of June, 1830, which contained, amongst others, the following covenant (*a*): —

"That the said John Francis Berry, his executors, &c., should not nor would at any time or times during the said term thereby granted erect or build, or cause to be erected or built, any edifice or structure whatsoever on the said piece or parcel of land and dock, or any part thereof, thereby demised, whereon formerly stood a boat-house, or lay or cause to be laid or placed on the said land or dock any timber, coal, or any other description of merchandize or other things which should at any time or times during the said term exceed in height the highest par. thereof, or any part thereof, three feet above the level in Duke Street aforesaid, except only carts, waggons, or other carriages standing to load or unload on the said land or dock, or inclose the said land or dock at any time during the said term otherwise than with open palisadoes not exceeding in height in any part thereof six feet above the said level of Duke Street aforesaid, the same to be fixed on a dwarf wall or other foundation not to exceed the height [770] of one foot above the level of the said street, such foundation and palisadoes to be of any materials the said John Francis Berry, his executors, &c., shall think fit; nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof;

(*a*) This is taken from the sub-lease; but it was in the same terms as the lease from Perry to Davis.

nor use the said demised premises, or any part thereof, for the purpose of carrying on therein the trade or business of an undertaker and carpenter, or either of them, nor raise the roof of the wash-house belonging to the said premises above the present height thereof, nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling house, that may lessen the value thereof, without the consent in writing of the said John Davis, his executors, &c., for that purpose." And there was a proviso for re-entry if the rent should be in arrear twenty days, "or if any breach or failure should happen to be made in any or either of the covenants, &c., on the part of Berry, his executors," &c.

The cause was tried before Crowder, J., at the sittings at Westminster after last Trinity Term. The premises in question consisted of a dwelling house and offices and a small piece of land or wharf and dock abutting on the Thames, opposite a public-house called the White Hart. The alleged ground of forfeiture was, that the defendants had made alterations in the premises in contravention of the above covenant,—by raising the river wall three feet, removing the coping and iron railing therefrom, and placing thereon a piece of timber about a foot thick, and raising the level of the wharf three feet,—and had created a nuisance thereon by making the wharf a receptacle for manure. There was conflicting evidence as to the nuisance, and also as to whether or not the alterations (which consisted, amongst **[771]** others, of raising the river wall and the level of the wharf, and also the roof of the wash-house), were improvements: and these questions were disposed of by the jury finding in the negative as to the former, and in the affirmative as to the latter.

It appeared, that, whilst the alterations were going on, the plaintiff was repeatedly on the premises, near which he resided, that he read over the covenant to Davis and told him he could not without a written licence do what he was doing, but did not further complain.

This was relied on for the defendants as a waiver of the alleged forfeiture: and it was contended that the words, "that may lessen the value thereof," applied to and overrode the whole of the covenant as to the alterations, and consequently that, the jury having negatived the lessening of the value, there was no breach of the covenant.

On the other hand, it was insisted that those words of qualification applied only to the internal alterations,—that the covenant wholly interdicted the making of external alteration, and the making of such internal alterations as might lessen the value of the premises.

The learned judge was of opinion that this was the true construction of the covenant: but, the jury having found that there was a waiver, a verdict was entered for the defendants, with leave to the plaintiff to move: and leave was also reserved to the defendants to move as to the construction of the covenant.

Atherton, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff "on the ground that there was no evidence to go to the jury of the plaintiff having waived the breach of the covenant not to make external alterations in the demised premises,—the defendants to be at liberty, on **[772]** the argument of the rule, to contend that the covenant was not shewn to have been broken and therefore no forfeiture was shewn, on the ground that the terms as to alterations lessening the value applies to external alterations."

Montague Smith, Q. C., Hugh Hill, Q. C., and Cleave, shewed cause. There was no breach of the covenant in question. There is first an absolute covenant against the erection of any edifice or structure, however valuable or costly, on any part of the wharf or dock, or the doing anything to obstruct the view of the river from the White Hart public-house. [Cockburn, C. J. If "premises" includes the wharf, none of these covenants would be necessary.] Certainly not. The court will, if possible, put a consistent and harmonious construction upon the whole instrument. The covenant then goes on, "nor raise the roof of the wash-house belonging to the said premises above the present height thereof, nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house, that may lessen the value thereof, without the consent in writing of the lessor." The construction sought to be put upon this covenant on the part of the plaintiff is, that it is an absolute covenant against external alteration, and a qualified covenant against such internal alterations as may lessen the value of the premises. This, it is submitted, is not the fair and natural meaning of the covenant, which is entire and all contained in

one sentence: "thereof" refers, not to the dwelling-house only, but to the whole subject-matter of the demise. The prohibition as to the river frontage in the other part of the covenant shews that this is the true construction. [Cockburn, C. J. There cannot be "internal" alterations in the wharf.] Certain things which are absolutely prohibited are specified: **[773]** and then that which the lessee may do is to be subject to the qualification that they shall be such things as may not lessen the value of the premises. There is nothing unreasonable in this view: and, if the construction be doubtful or the language ambiguous, the court will rather lean against a forfeiture. As to the waiver,—in the absence of evidence of any substantive act done by the lessor, such as the acceptance of rent, it must be conceded that the case is not free from difficulty. There are, however, cases in equity where a landlord, having, with knowledge of the forfeiture, encouraged the tenant to lay out money on the premises, has been precluded from taking advantage of the forfeiture. Here, the evidence was, that the plaintiff, who resided on the spot, was repeatedly on the premises while the alterations (which occupied a considerable time) were going on, and said nothing. [Williams, J. Can his doing and saying nothing amount to a waiver, where his assent orally would not?] His assent given orally after the alterations had been made, would, it is submitted, have operated a waiver. In *Doe d. Shepherd* v. *Allen*, 3 Taunt. 78, where a question of this sort arose, Sir J. Mansfield says,—"It was suggested that a great deal of money had been laid out by the defendant in altering and improving these premises; that was not merely a circumstance for the consideration of a court of equity: if the plaintiff lay by and saw that laid out, it was a strong circumstance from which a jury might imply consent to the alteration." [Williams, J. The decision there was, that some positive act of waiver is necessary: and Heath, J., says: "There are a great many cases in the old books, where it is held that a mere knowledge and acquiescence in an act constituting a forfeiture, does not amount to a waiver.] In *Doe d. Knight* v. *Rowe*, R. & M. 343, which was an ejectment on a forfeiture for breach of covenant in a lease wherein **[774]** the lessee covenanted to insure in the joint names of himself and the lessor, and in two thirds of the value of the premises demised,—it appeared, that the lessee had insured in his own name only, and, as contended, to a less amount than two thirds of the value of the premises; that both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two thirds of the value of the premises; and that the lessor of the plaintiff had previously insured the premises at the same sum as the defendant had: and it was held by Abbott, C. J., that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude he was doing all that was necessary or required of him by insuring in his own name and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release from the covenant.

Atherton, Q. C., and Cook Evans, in support of the rule. The premises demised are described in the lease as "wharf, dwelling-house, wash house, and court-yard." There appears to have been a strong desire on the part of the lessor to prevent all interference with the appearance of the outside of the premises: and this may account for the redundant expressions found in the covenant. It begins with an absolute and unqualified prohibition to erect any edifice or structure whatsoever on the piece of ground on which the boat house formerly stood. Then we come to that part which forbids even a temporary incumbrance or interference with the outside of the premises, "or lay or cause to be laid or placed on the said land or dock any timber, coal, or any other description of merchandize or other things **[775]** which should at any time during the term exceed in height three feet above the level in Duke Street," except carts, &c., standing to load or unload; "or inclose the said land or dock at any time during the term otherwise than with open palisadoes not exceeding in height six feet above the level of Duke Street," &c. Having thus particularly specified what was more immediately within their minds, the parties then go on with more general words, which might of themselves have covered all that the former portions of the covenant pointed at, "nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof." Then comes that part of the covenant upon which the question more immediately arises, "nor raise the roof of the wash house belonging to the said premises above the present height

thereof, nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling house that may lessen the value thereof, without the consent in writing of the lessors for that purpose." The fair construction of that covenant manifestly is, that no external alterations shall be made, whatever may be their effect upon the value of the premises; and no internal alterations in the dwelling-house, that might lessen its value, without the consent in writing of the lessor. This, it is submitted, is giving to the word "whatsoever" its legal and proper signification,—kind and consequences; reading the covenant thus "nor make any external alteration in the premises of any kind or whatever its consequences, nor any internal alterations in the dwelling-house that may lessen the value thereof, without the consent in writing of the lessor." [Cockburn, C. J. Must we not read "external" in opposition to "internal?" It can only apply to something which has an **[776]** outside and an inside. Williams, J. It would have been quite clear, if the latter part of the sentence had been put first.] As to the alleged waiver, there clearly was no evidence to sustain that. [Cockburn, C. J. You need not trouble yourself as to that.]

COCKBURN, C. J. I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute. The covenant is drawn in language so ambiguous and confused as to render it a matter of great difficulty to know what construction to put upon it. But, upon the whole, I think a forfeiture has been established, on this ground:—I do not agree that the alterations which shall not diminish the value were intended to apply to external alterations: for, according to the ordinary rule of grammatical construction, the word "thereof" must apply to the last antecedent, which would confine it to internal alterations in the dwelling-house. It seems to me that the language of the entire covenant is more consistent with that construction than the other: there shall be no external alteration whatsoever in the premises (whether it may lessen or increase their value), and no internal alterations in the dwelling-house that may lessen its value, without the consent in writing of the lessor. My only doubt arises from the difficulty of giving any sensible construction to the words external and internal as applicable to a thing which is not susceptible of internal alterations. "The premises," properly speaking, are the demised premises, which includes the whole. I do not, however, think it right to stand out against the opinions of my learned Brothers, and therefore I think the rule should be made absolute.

WILLIAMS, J. I am of the same opinion. I must confess I have entertained considerable doubt during the course of the argument: but, upon the whole, I think the alterations here were external within the meaning **[777]** of the covenant. At first I was inclined to think that this part of the covenant was intended to apply to that portion of the premises which had an outside and an inside. But I have come to the conclusion that the word "external" was meant to apply to everything external to the house, or, as it is popularly called, "out of doors." Then arises the second question, whether the words "that may lessen the value thereof" were intended as a qualification of the former part of the covenant. I think they were not. External alterations are absolutely prohibited by the word "whatsoever:" but that word is not applied to the internal alterations, and therefore they were not meant to be in the same category. What, then, are they to be? Such as do not lessen the value of the dwelling-house. If so, the expression is, so to say, exhausted, and cannot be applied to the preceding part of the sentence. The evident intention of the parties was, that the outside of the premises should be left as it was. As to the alleged waiver,—mere lying by will not do; there must be some positive act of waiver.

CROWDER, J. I also think the covenant has been broken, and therefore that there has been a forfeiture. The first view thrown out was, that the word "external" was apparently used in contradistinction to "internal." I think, however, upon consideration that it clearly means external to the building which is let as part of the premises,—all that is outside the house is external. I therefore think there would have been a breach as to that. Any alteration in the said premises, must be in the demised premises,—the whole of the premises comprised in the lease. The main question is, whether, to constitute a breach, the alteration must be one that lessens the value of the premises: and that depends upon the proper construction of the words of the covenant. The language is no **[778]** doubt very loose. Assuming my former construction to be correct, that external means all that is not within the four walls of the house, all the earlier prohibitions would be covered by the words "nor make any

external alteration whatsoever." But, after those particular prohibitions, there came these general words,—"nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public-house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof." Then comes a prohibition to carry on particular trades; and then follow these words,—"nor raise the roof of the wash-house belonging to the said premises above the present height thereof; nor make any external alterations whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose." To insure the absolute prohibition of every alteration external to the house, the very strong expression "whatsoever," is used. According to the strict grammatical construction of the sentence, the word thereof in the latter part of the last covenant can only apply to the last antecedent. Upon the best consideration, therefore, that I can bring to the matter, it seems to me that all external alterations are absolutely and entirely prohibited, and that, to make such alterations a breach of the covenant, it is not necessary that they should diminish the value of the premises. As to the waiver, there clearly is no ground for suggesting that what was done by the plaintiff amounted to a waiver.

WILLES, J. I did not hear the whole of the argument: but, as far as I have been able to form an opinion from what I have heard, I entirely agree with the rest of the court.

Rule absolute.

[779] JONASSOHN v. RANSOME AND ANOTHER. Feb. 1st, 1858.

In an action upon a contract for the supply of a certain quantity of coals during a period of six months, two breaches were assigned,—first, that the defendants refused to take the stipulated quantity of coals,—secondly, that they omitted to pay for those which they had received in the manner provided for by the agreement, viz. by bills at three months from the 1st and 14th of each month.—The defendants having obtained a judge's order allowing them to add two pleas, to the following effect,—"1. On equitable grounds, that, during the said six months, a dispute arose between the plaintiff and the defendants, and, after the lapse of the said six months, it was agreed that such dispute should be settled, and that defendants should take as many cargoes as remained untaken, and that plaintiff should allow defendants for any quantity of small coals in such cargoes exceeding six per cent., and that the agreement in this plea mentioned should be accepted in satisfaction of the said breach of contract, and that defendants were always ready and willing to perform the said agreement. 2. On equitable grounds, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and on such accounting a sum was agreed upon as the sum to be paid to the plaintiff after deducting the sums due from the plaintiff to defendants, and that plaintiff should take bills of exchange for the amounts so agreed upon, and that defendants delivered bills of exchange, and paid the bills so given,"—The court, on motion, varied the order, by allowing the defendants to plead the first of the two pleas, striking out "on equitable grounds,"—and to plead another plea in the same form on equitable grounds, omitting the allegation as to the acceptance in satisfaction, and directing that the second plea on equitable grounds should remain,—the plaintiff to be at liberty to reply or demur.

This was an action upon a special agreement.

The first count of the declaration stated that the defendants, on the 1st of October, 1855, in consideration that the plaintiff would appoint them sole agents of the plaintiff for the sale of coals at the ports of Aldborough, Woodbridge, Harwich, Manningtree or Mistley, Ipswich, Colchester, and Maldon, and upon all coals the plaintiff might supply to any vessels coming to either of the above-named ports the plaintiff would allow the defendants a commission of 1s. 6d. per chaldron, and that the plaintiff would supply the defendants with such coals as the defendants required within the then present month of October, at 24s. per chaldron, and for such coals as the defendants might require during the six months then next following, that is, from the 1st of November, 1855, to the 30th of April, 1856, and would charge the defendants

24s. 6d. per chaldron, the coals to be Montague Walls End, shipped in good condition, and the ingrain warranted six per cent., —the defendants undertook and promised the plaintiff, that, during the said time, they the defendants would take upon an average not [780] less than two cargoes of coals per week from the plaintiff, and that they would not bind the plaintiff to supply more than four cargoes per week; and that they the defendants would pay, by their acceptance at three months from the 1st and 14th of each month, for all cargoes shipped at such dates: Averment, that the plaintiff did all things necessary on his part to entitle him to have the promise and agreement performed by the defendants on their part and behalf, and was ready and willing to deliver to the defendants the said coals according to the terms of the agreement: Yet the defendants, not regarding their said promise and agreement, did not nor would take upon an average two cargoes of coals per week from the plaintiff, from the 1st of November, 1855, to the 30th of April, 1856, but wholly omitted, neglected, and refused to do so; whereby and by means whereof the plaintiff lost the sale of a large quantity of coal, to wit, forty cargoes, which he might and would have otherwise sold and disposed of at a greater profit, and was also deprived, prevented, and hindered from receiving and having of and from the defendants the price and value of the said cargoes of coals, and by means of the said several premises the plaintiff had lost and been deprived of great gains and profits which he otherwise would have had and received, and had been put to great costs, charges, and expenses in raising and getting the coals for the defendants, which coals the defendants had omitted and refused to take and receive, and thereby the plaintiff had lost such costs, charges, and expenses, and the plaintiff had by means of the premises lost the sale of the coals: And for a further breach of the said agreement, the plaintiff averred, that, although he the plaintiff shipped four cargoes of coals according to the terms of the said agreement for the defendants, and although the time for payment for the said four cargoes of coals had elapsed [781] and passed before the commencement of the suit, and although the plaintiff was ready and willing to accept and take the defendants' said acceptance at three months for the said cargoes of coal, yet the defendants wholly omitted, neglected, and refused to give the plaintiff their acceptance at three months in payment of the said cargoes of coals according to their said agreement.

There were also counts for goods sold, money paid, and money found due on accounts stated.

The defendants pleaded,—first (to the first count), that they did not promise as alleged,—secondly (to the first count), that, after the making the contract and promise in the first count mentioned, and before any breach or non-performance thereof by the defendants, and before the commencement of the suit, it was mutually agreed by and between the plaintiff and the defendants that the said contract and promise should then be, and the same then was, wholly rescinded and abandoned accordingly,—thirdly (to the first breach), that the plaintiff was not ready and willing to deliver to the defendants the said coals according to the terms of the said agreement, as alleged, —fourthly, a traverse of the first breach,—fifthly (to the second breach), that the plaintiff did not ship the said four cargoes of coals, or any part thereof, according to the terms of the said agreement, for the defendants, as alleged, —sixthly (to the second breach), that they did from time to time and at all times pay, by their acceptance at three months from the 1st and 14th of each month, for all cargoes of coals shipped at such dates by the plaintiff, according to their said agreement,—seventhly, (as to the indebitatus counts), except as to 68l. 8s. 2d., parcel of the moneys claimed, never indebted,—eighthly, except as in the seventh plea excepted, payment before action, —ninthly, payment into court of 68l. 8s. 2d.

Issue having been joined and taken upon these pleas, [782] the cause went down for trial at the last Summer Assizes at Durham, the commission day being the 21st of July. On the 22nd, the plaintiff's attorney was served with a summons calling upon the plaintiff to shew cause why the defendants should not be at liberty to amend by adding the pleas stated in the accompanying abstract. The abstract referred to was as follows:—

"1. Plea on equitable grounds, —defendants say, that, during the said six months, a dispute arose between the plaintiff and the defendants, and after the lapse of the said six months it was agreed that such dispute should be settled, and that the defendants should take as many cargoes as remained untaken, and that plaintiff should allow defendants for any quantity of small coal in such cargoes exceeding six per cent.,

and that the agreement in this plea mentioned should be accepted in satisfaction of such breach of contract, and that defendants were always ready and willing to perform the said agreement.

"2. Second plea on equitable grounds, defendants say, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and on such accounting a sum was agreed upon as the sum to be paid to plaintiff after deducting the sums due from the plaintiff to the defendants, and that plaintiff should take bills of exchange for the amounts so agreed upon, and that defendants delivered bills of exchange, and paid the bills so given."

This summons was attended by counsel before Channell, B., at Durham, when he directed the application to be renewed at the trial. The cause was ultimately made a remanet.

On the 12th of September, a second summons was taken out, calling on the plaintiff to shew cause why the defendants should not be at liberty to amend, by adding the pleas before proposed, and also a third to [783] the effect that the agreement was an agreement for the sale of coals by measure, contrary to the statute 5 & 6 W. 4, c. 63.

The learned Baron refused to allow the defendants to plead the last proposed plea, unless they would plead it alone; and ultimately he made an order for the other two pleas to be added, and also a third, increasing the amount of money paid into court. The order, which was dated the 2nd of December last, was as follows:—

"Upon hearing counsel on both sides, I do order that the defendants be at liberty to amend the pleas herein, by adding those specified in the abstract or statement annexed, the plaintiff being at liberty, if he shall think fit, to reply and demur to each of the added pleas; that the defendants be at liberty to pay money into court; and, should he do so, the plaintiff may take same out of court in settlement of the action, in which case the plaintiff to be entitled to all costs up to paying the additional money into court. Counsel's fees to be allowed in costs."

Hugh Hill, on a former day in this term, moved for a rule calling upon the defendants to shew cause why the above order should not be rescinded or varied. The first of the proposed pleas is clearly a bad one. [Williams, J. As a legal plea, it is clearly bad, as being an accord without satisfaction.] It is equally bad as an equitable plea: it is evidently designed to embarrass the plaintiff. An equitable defence under the 17 & 18 Vict. c. 125, s. 83, is admissible only where it sets up matter in respect of which a court of equity would have granted relief unconditionally: *Mines Royal Societies* v. *Magnay*, 10 Exch. 489; *Steele* v. *Haddock*, 10 Exch. 643; *Teede* v. *Johnson*, 11 Exch. 840; *Wodehouse* v. *Farebrother*, 5 Ellis & B. 277; *Wood* v. *The Copper-Miners Company*, 17 C. B. 561; *Corley* v. [784] *Barrett*, ante, vol. i., p. 225; *Flight* v. *Gray*, ante, 320. If the defendants here had applied to a court of equity for an absolute perpetual injunction, the court would not have granted it without compelling them to perform their agreement. [Cockburn, C. J. What is the objection to the second of the proposed pleas?] It sets up no ground of defence in equity: if good at all, it could only be as a legal defence. Then, the order makes no provision for the costs. [Crowder, J. That is a mere accidental omission.]

Manisty, Q. C., and T. Jones, now shewed cause, submitting that the proposed pleas raised fair and bonâ fide defences, and were such as the defendants ought not to be precluded from putting on the record.

Hugh Hill, Q. C., and Unthank, in support of the rule. The defendants should, as to the first plea, be put to their election to strike out either the words "on equitable grounds," and so make it a plea of accord and satisfaction at law, or to strike out the words "that the agreement in this plea mentioned should be accepted in satisfaction of such breach of contract." [Crowder, J. How is the plaintiff prejudiced by the words "on equitable grounds" being left?] If the new agreement was accepted in satisfaction of the breach, there can be no necessity for those words: and, if they remain, it will be said that the accord is no part of the equitable defence, and therefore need not be proved, inasmuch as it is enough to shew an executory accord. If the plea is good as a legal plea, the terms of the order allowing the plaintiff to demur are idle: a good legal defence is stated. Willes, J. Is that so clear? Will you undertake not to object in any stage of the proceedings that the plea is not a good legal plea? Williams, J. If you undertake that, I agree that the words "on equitable [785] grounds" are idle.] Why should the defendants be in a better position than they would have been in if this had been pleaded in two pleas, one as a legal, the

other as an equitable defence? [Williams, J. That was done in *The General Steam-Navigation Company* v. *Rolt*.] That undoubtedly would have been the proper course here.

Williams, J. I do not see any objection to that. Let the order be varied, by allowing the defendants to plead the first of the two proposed pleas in the form in which it now stands, striking out the words "on equitable grounds," and to plead another plea in the same form on equitable grounds, omitting the allegation as to the acceptance of the new agreement in satisfaction of the breach of contract: the second proposed plea on equitable grounds to remain: the plaintiff being at liberty to reply or demur, —the costs of and occasioned by the amendment, and of the application to the court, to abide the event of the cause.

The rest of the court concurring,

Rule accordingly.

[786] Edwards and Others *v.* The Kilkenny and Great Southern and Western Railway Company. In re Roberts. Jan. 30th, 1858.

The affidavits upon a motion for a scire facias against a shareholder in a railway company are properly intituled in the original action.

Brewer, on a former day in this term, obtained a rule calling upon one Roberts to shew cause why a writ of scire facias on the judgment obtained by the plaintiffs in this cause should not be issued against him as a shareholder in the company, to enable the plaintiffs to have execution upon the said judgment, to satisfy the plaintiffs in the sum of 3361l. 15s. 10d., the balance of the debt, and 3l. 8s. the costs respectively recovered by the said judgment, and still unpaid, to the extent of his (Robert's) shares in the capital of the company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). The affidavits upon which the motion was founded were intituled "Between Francis Edwards, John Alexander Radcliffe, and Reginald Stevenson Davies, plaintiffs, and the Kilkenny and Great Southern and Western Railway Company, defendants."

Quain, for Roberts, objected, that, inasmuch as this was an application for leave to commence an action, the affidavits were improperly intituled in the original action.

Crowder, J. It is an application which is made in the course of the original action.

Williams, J. The practice always has been to intitule the affidavits as they are intituled here. The scire facias, though in form a fresh action, is substan-[787]-tially in the nature of a proceeding in the original cause.

Rule absolute (*a*).

Edwards and Others *v.* The Kilkenny and Great Southern and Western Railway Company. In re Colls. Jan. 30th, 1858.

The affidavits upon a motion for a scire facias against a shareholder in a railway company are properly intituled in the original action.—It is not necessary that the affidavits should in express terms state that the judgment remains unsatisfied: it is enough if that fact can be fairly inferred from that which is stated and not contradicted.—And it is no answer to the application, that the works have not been completed within the period limited by the special act, and that therefore the powers granted to the company "for making the railway, or otherwise in relation thereto," are at an end.

Brewer, on a former day in this term, obtained a rule similar to that in the last case, upon affidavits similarly intituled, against one Colls. It was sworn that the plaintiffs, on the 18th of December, 1854, recovered final judgment in an action against the company for 4413l. 15s. 10d., and 3l. 8s. costs; that 1052l. had been received by the plaintiffs since the said judgment was recovered, and that the defendants were justly and truly indebted to the plaintiffs in the sum of 3361l. 15s. 10d. for work and labour as attorneys, and in 3l. 8s. for costs; that, on the 29th of December, 1854, a writ of fi. fa. was issued, directed to the sheriffs of London, commanding them to

(*a*) See the next case.

levy the amount recovered in the action on the goods and chattels of the defendants, but the sheriffs returned that they had no goods, &c.; and that the defendants had not at the date of the judgment, or at any time since, any lands, chattels, goods, or effects in England or Ireland whereon the plaintiffs could levy the amount of the said judgment, or any part thereof. It was also sworn that Colls was the holder of thirty shares of 20l. each, upon which 1l. 10s. each share had been paid, and that three calls of 10s. each were now due thereon, &c.

[788] T. Jones, for Colls, objected that the affidavits upon which the rule was obtained did not in terms state that the judgment remained unsatisfied. [Crowder, J. It is sufficiently alleged to call for a contradiction, if the fact were not so.] He then objected that the affidavits were improperly intituled in the original action; whereas this is a new action, and not a proceeding in the old one. [Williams, J. There is nothing in that objection (*a*).] He then referred to the 29th section of the company's original act of incorporation, 8 & 9 Vict. c. lxxxvii., which enacted "that the railways shall be completed within seven years from the passing of this act, and, on the expiration of such period, the powers by this or the recited acts (*b*) granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the railway as shall then be completed."

Williams, J. That can hardly be tortured into an excuse for the non-payment by the company of its debts. The rule must be absolute.

The rest of the court concurring,

Rule absolute.

[789] Holmes *v.* Mackrell. Jan. 13th, 1858.

The defendant being called upon by a creditor (the holder of two promissory notes for 510l., more than six months overdue,) for a statement of his affairs, made out an account in which the notes were inserted as a debt for which he was liable:—Held, a sufficient acknowledgment within the 9 G. 4, c. 14, s. 8, to take the case out of the statute of limitations.—Held also, that, the whole document being in the handwriting of the defendant, his name written at the top was a sufficient signature to bind him.—To take a case of the statute of limitations, the following indorsement on the back of a promissory note was offered in evidence,—"This note is renewed by the re-signing of the parties as under, this 7th of March, 1855:"—Quære, whether it was admissible?

This was an action against the defendant as one of the makers of two joint and several promissory notes for 250l. and 260l. respectively; to which the defendant pleaded, amongst other pleas, the statute of limitations.

At the trial, before Cresswell, J., it appeared that the plaintiff was the manager of the Hull Banking Company, and that the defendant had had various pecuniary transactions as well with the bank as with the plaintiff in his personal capacity. The notes in question had originally been given to the bank, but the plaintiff stated that he had subsequently taken them upon himself. The notes were payable on demand: and, in order to take the case out of the statute, the plaintiff in the first instance relied on the following indorsement upon each of them, signed by the defendant and the other parties before the expiration of six years from their date: "This note is renewed by the re-signing of the parties as under, this 7th of March, 1855."

On the part of the defendant, it was objected that this indorsement was not admissible, on the ground that it amounted to a promissory note or nothing, and was unstamped: and *Jones* v. *Ryder*, 4 M. & W. 32, was relied on, where it was held that a promissory note improperly stamped is not admissible as a memorandum to take the case out of the statute of limitations, under the 9 G. 4, c. 14, s. 8, that section only applying to instruments which might be stamped with an agreement stamp.

Two other documents were then put in, for the same purpose. These were accounts which the defendant had furnished at the plaintiff's request, as shewing the [790] state

(*a*) See the preceding case.

(*b*) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

of his affairs at that time, viz. March, 1855. The first of these mentioned a promissory note for 510l. as outstanding, but it was not signed. The other, which had no signature at the end, but had "J. Mackrell" at the head of it, and was all in the defendant's handwriting,—had an entry on the debit side of "two notes for 500l." which it was assumed alluded to the two notes declared on.

For the defendant, it was insisted that these were not admissible, the first on the ground of the total absence of signature by the party, and the latter on the ground that the signature was not sufficient within the statute.

A verdict having been, under the direction of the learned judge, entered for the plaintiff for the amount of the notes and interest,

S. Temple, Q. C., pursuant to leave, moved for a rule to enter a nonsuit or a verdict for the defendant. *Jones* v. *Ryder*, 4 M. & W. 32, is a distinct authority to shew that the indorsement was not admissible for any purpose. Alderson, B., there says: "The Stamp Act, 31 G. 3, c. 25, s. 19, says, that 'no promissory note shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the same be duly stamped.' This is clearly a promissory note; it follows that it cannot be received at all: and, if so, there is nothing to take the case out of the statute." [Crowder, J. In *Matheson* v. *Ross*, 2 House of Lords Cases, 268, in an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68l. 9s. 4d., and at the end was an acknowledgment of the payment of that sum: it was offered by the defendant, not for the purpose of proving that the sum of 68l. 9s. 4d. had been paid, for that was not in **[791]** contest between the parties, but in order to shew what was the admitted state of accounts at a particular time: and it was held, reversing an interlocutor of the court of session,—that it was admissible for that purpose. Lord Cottenham, C., who goes very fully into the question, says: "Where the document purports to be on the face of it a receipt, and indeed is so, but also purports to be something else, or in cases where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance, whether that balance was paid in money or only settled in account, if the object of the parties is, not to prove the fact of that particular balance having been paid, but merely to shew that the parties to the account acknowledged the state of the account to have been such and such at a particular moment, the paper may be produced for this purpose, whether the money has been paid or not. Suppose that the account stood without any receipt or payment, that the balance existed but had not been paid, and the parties had merely agreed to ascertain how the account stood, or was to be rendered, at a particular time, and suppose that the items of the account thus rendered exactly balanced each other, then there would be no payment; for, though there might be the signature of the parties to the documents, there would be nothing like a receipt, and consequently nothing to require a stamp. That is exactly the present case, except that here we have something added, which purports to be a receipt for the balance. But I cannot find any argument for warranting the conclusion, that, because a paper which purports to be a receipt cannot be used without a stamp, that paper cannot be used for another object, the purport of which is equally apparent on the face of it, and for which no stamp is necessary. I cannot find this conclusion warranted by **[792]** any language in the stamp acts or by any authority in the decided cases" (*a*). That was the case of a receipt-stamp. Then, to satisfy the statute, the signature must be at the foot of the document. [Crowder, J. Is it the less the signature of the party, because he writes his name at the top of it?] In the case of a will, it is true, the signature under the 29 Car. 2, c. 3, s. 5, might be in any part of it: but, even there, it must have been made with the design of authenticating the instrument (*b*). Besides, in the case of a will, the testator has to declare it to be his last will in the presence of witnesses. [Williams, J. Unless the statute uses the word "subscribed," or some expression tantamount to it, I do not see why it should not be a signature, wherever

(*a*) See Lord Cottenham's remarks upon that case, in the subsequent case of *Evans* v. *Prothero*, 2 M'N. & G. 319, where it was held that a receipt not having a proper stamp cannot be used as evidence of a matter collateral to the payment of the money, —as, where it was sought to prove an agreement for purchase, by means of a receipt for the purchase-money.

(*b*) See Jarman on Wills, vol. ii., p. 66, 2nd edit.

placed.] Since the decision of the Exchequer Chamber in *Smith* v. *Thorne*, 18 Q. B. 134, it is settled that the same rule as to the construction of acknowledgments since the 9 G. 4, c. 14, prevails as before. Parke, B., there says: "There has been no question since *Tanner* v. *Smart*, 6 B. & C. 603, 9 D. & R. 549, that an acknowledgment of a debt must, in order to take it out of the operation of the statute of limitations, be sufficient to support the promise laid in the declaration, viz. to pay on request. By stat. 9 G. 4, c. 14, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by shewing on the face of it an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified." **[793]** The document in question was not an account stated at all, but a mere statement by the defendant of his affairs, for the purpose of satisfying the bank as to his solvency. [Crowder, J. How is it the less an account stated, because it contains something else?] In *Rackham* v. *Marriott*, 2 Hurlst. & N. 196, in answer to an application for payment of a debt, the debtor wrote as follows,—"I do not wish to avail myself of the statute of limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance," and it was held by the Exchequer Chamber,—affirming the judgment of the Court of Exchequer (1 Hurlst. & N. 234),—that the letter contained no sufficient acknowledgment or promise to take the case out of the statute of limitations. *Tanner* v. *Smart* and *Smith* v. *Thorne* were there referred to; and Cockburn, C. J., in giving judgment, says: "An acknowledgment without a promise is not sufficient to take a case out of the statute of limitations. Looking to the current of authorities, and more especially to the last case on the subject, *Smith* v. *Thorne*, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request, or at a future period, or on a condition. Here, there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment coupled with a promise to pay." Here, the paper was given by the defendant, not as an acknowledgment at all, but merely to satisfy the bank as to his position. [Williams, J., referred to *Sidwell* v. *Mason*, 2 Hurlst. & N. 306, where Bramwell, B., says: "The word 'acknowledgment' is used, not as meaning **[794]** something different from 'promise,' but as applicable to actions of debt. That construction was put upon the word by the court in *Smith* v. *Thorne*. It is enough, however, if there is an acknowledgment unaccompanied by expressions which control its effect. It is a mistake to suppose, that, because a man expresses a hope to pay when he acknowledges the debt, that therefore the acknowledgment is to be taken as the mere expression of a hope to pay. If a man says 'The bill is due, I hope to be able to pay next month,' that is an acknowledgment; the hope expressed is not inconsistent with a promise to pay immediately. The letter in the present case contains no express promise in words: but a man, in acknowledging that a debt is due, does not ordinarily promise to pay it; and the expression of an intention to pay if the bill is correct, is not inconsistent with the obligation to pay immediately."]

Cockburn, C. J. I am of opinion that there should be no rule in this case. It appears that the defendant was called upon by the plaintiff to furnish a statement of his existing liabilities; and that, among his existing liabilities, he stated the two notes declared on as being notes upon which he was then liable. The ordinary legal effect of that acknowledgment is, that it raises a promise on his part to pay the amount. The only question that remains is, whether there is a sufficient signature. The defendant does not, it is true, put his name at the bottom of the document But the whole is in his handwriting, and he has affixed his name at the top. I entertain no doubt that that is a sufficient signature for this purpose.

Williams, J. I am entirely of the same opinion. This was clearly a sufficient acknowledgment in writing within Lord Tenterden's act, from which a promise to pay may and ought to be implied. As to the objection **[795]** to the sufficiency of the signature, the authorities shew that there clearly is nothing in that. In *Lobb* v. *Stanley*, 5 Q. B. 574, D. & M. 635, on an issue whether the defendant, an uncertificated bankrupt, had given a written promise signed by him after his bankruptcy, so as, under the statute 6 G. 4, c. 16, s. 131, to revive a claim barred by the certificate, the

following letter was produced, written by him,—"Mr. Stanley begs to inform" the plaintiffs "that he will take an early opportunity of settling their account: but Mr. Stanley objects to give his bill. Mr. Stanley regrets that he has been prevented from answering" the plaintiffs' "letter before. Crescent, Saturday." Evidence of the amount due was given. And it was held that the letter was sufficiently signed. Patteson, J., there says: "I cannot see why a different construction should be put on stat. 6 G. 4, c. 16, s. 131, from that which is put on the statute of limitations and the statute of frauds. The object of all the statutes is merely to authenticate the genuineness of the document: and that is done here as much as if the defendant had said 'I promise,' and had subscribed his full name. It is true that the word 'signed' occurs in the statute: and, if this had been the first time that we were called upon to put a construction on that word, and if the decisions on the statute of frauds had not occurred, I should perhaps be slow to say that this was a signature: but I cannot see how there can be different constructions in the two cases." It was taken for granted both by the bench and at the bar that the same principle of construction applied to the statute of limitations.

CROWDER, J. I am of the same opinion. As to the first point,—whether the indorsement on the notes was admissible,—it is unnecessary to pronounce any judgment. As to the other, after the decisions upon the statute of frauds and the bankrupt act, I cannot see why the same construction should not be put upon the **[796]** statute of limitations. In the case of a note written in the third person, the name at the commencement serves to authenticate the document just as well as a formal signature at the foot of it. If, then, the signature is sufficient, what does the defendant say here? In effect he says,—"I have given two promissory notes for 510l., and I am now liable upon them." That is a plain and deliberate and unconditional acknowledgment of a debt: and it is clear from the case of *Tanner* v. *Smart*, 6 B. & C. 603, 9 D. R. 549, and the authorities which have followed it, that, where there is an absolute and unconditional acknowledgment of an existing debt, a promise to pay is to be inferred. It seems to me that the acknowledgment here is one from which a promise to pay must necessarily be inferred.

WILLES, J., was absent.

Rule refused.

CATTLIN *v.* KERNOT. Jan. 30th, 1858.

[S. C. 27 L. J. C. P. 186; 4 Jur. N. S. 281.]

The discharge of a defendant from custody under a ca. sa. operates in law as an absolute satisfaction of the judgment. The defendant being in execution on a ca. sa. at the suit of the plaintiff, the latter consented to his discharge upon the former withdrawing a notice he had given to dispute a fiat which had issued against him. The defendant afterwards procured the fiat to be superseded. The plaintiff having registered the judgment,—the court made absolute a rule to enter satisfaction on the roll.

The defendant, in person, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why a memorandum of satisfaction should not be entered as to the judgment signed in this cause on the 21st of January, 1847, for 546l. 16s. 1d. debt, and 5l. 14s. costs, and registered pursuant to the statute (1 & 2 Vict. c. 110), charging the estate of the defendant,—the debt and costs having been satisfied.

The circumstances out of which the application arose **[797]** were as follows:—Mr. Cattlin in and prior to the year 1846, had acted as solicitor for Mr. Kernot in a suit in Chancery against one Peacock. In 1847, Kernot's bill against Peacock was dismissed by Vice-Chancellor Shadwell. Kernot appealed to the Lord Chancellor, who dismissed his appeal with costs. In the mean time, Mr. Cattlin obtained from Kernot a promissory note for 546l. 16s. 1d., for his bill of costs, and afterwards sued him thereon, and on the 21st of January, 1847, obtained judgment. In the beginning of the year 1848, Kernot being then in prison at the suit of Peacock for the costs of the Chancery proceedings, Mr. Cattlin lodged a detainer against him on his judgment.

Whilst Kernot was so in custody, a fiat in bankruptcy issued against him at the

suit of Mr. Cattlin, founded on a debt not included in the judgment. Kernot thereupon applied for and obtained a rule nisi for his discharge from custody, and an arrangement was come to between Mr. Cattlin and Kernot, that, in consideration of the latter withdrawing a notice he had given to dispute the fiat, and allowing the fiat to be gazetted, and an adjudication of bankruptcy to take place, the former would consent to his discharge from custody without incurring the expense of making the rule absolute. And upon these terms Kernot was accordingly discharged from execution as to this suit.

Mr. Cattlin's affidavit in answer stated, that, on Kernot's attorney serving him with the rule nisi for his discharge from custody, he (Cattlin) told him, that, as he must discharge Kernot before he could prove his judgment debt under the fiat, if Kernot would withdraw all opposition to his bankruptcy, and consent to the same being gazetted, and do nothing directly or indirectly to oppose the same, but permit such bankruptcy to proceed, so that there might be an equal dis-[798]-tribution of his property, whereby he (Cattlin) should obtain his fair dividend with the rest of the creditors, he would consent to Kernot's immediate discharge; and that thereupon Kernot's attorney procured his signature to the following notice:—

"In the court of Bankruptcy.

"In the matter of C. M. Kernot, of, &c., chemist and druggist, dealer and chapman, against whom a fiat in bankruptcy hath been issued.

"Take notice that the above-named C. M. Kernot withdraws the notice of his intention to dispute the adjudication in the said fiat, and does not intend to dispute such adjudication, and hereby abandons the notice served on you and each of you on the 26th of January, instant. Dated this 28th January, 1848."

"To T. M. Cattlin, of, &c., and to T. H. Abrahall, Esq., deputy registrar of the said court."

It further appeared, that, upon receiving this notice, Mr. Cattlin signed and delivered to Kernot's attorney an authority for his discharge from custody at his suit; that the fiat was gazetted, an adjudication took place, and Mr. Cattlin proved his debt thereunder; and that afterwards, on the 28th of June, 1848, Kernot caused a petition to be presented to the court of Review to annul the bankruptcy, whereupon the fiat was ultimately annulled and superseded.

Badeley now shewed cause. The question is, whether the discharge of the defendant under the circumstances operated as a satisfaction of the judgment debt. In *Blunfield's case*, 5 Co. Rep. 86 b. it is distinctly laid down that execution of the body is no satisfaction, but a gage for the debt. The like doctrine is laid down by Lord Hobart in *Foster* v. *Jackson*, Hob. 52, 59, and by Lord Ellenborough in *Taylor* v. *Waters*, 5 M. & Selw. 103; and *Simpson* v. *Hanley*, 1 M. & Selw. 696 and *Tanner* [799] v. *Hague*, 7 T. R. 420, proceeded upon the same principal. [Crowder, J. Do you insist that an absolute and unconditional discharge of a defendant from custody under a ca. sa. is not satisfaction?] Yes. His body or his goods, it may be, cannot be taken under another writ. [Crowder, J. Then, what becomes of the debt?] It is enough to say that it is not satisfied. [Williams, J. In *Tanner* v. *Hague*, 7 T. R. 420, it was distinctly held, that, if a plaintiff consent to the defendant's being discharged out of execution, on his undertaking to pay at a future day, he cannot afterwards sue out any execution on that judgment, in the event of the defendant's not fulfilling his undertaking. And on *Vigers* v. *Aldrich*, 4 Burr. 2482, *Jacques* v. *Whitby*, 1 T. R. 557, and *Clark* v. *Clement*, 6 T. R. 525, being cited, the court said those cases were founded on this ground, "that it was considered that the plaintiff received a satisfaction in law by having his debtor once in custody in execution." On that ground it is, that, if a plaintiff takes one of several joint debtors in execution, and discharges him, he cannot afterwards take the others. If you think the case arguable, by all means proceed.] That the judgment is still for some purposes a subsisting judgment, is clear. In *Simpson* v. *Hanley*, the defendant was allowed, upon the authority of *Peacock* v. *Jeffery*, 1 Taunt. 426, to enter satisfaction on the roll upon a judgment obtained against him in the Queen's Bench, on his acknowledging satisfaction for the amount upon a judgment obtained by him in the Common Pleas against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment, which, it was contended, in law satisfied it. And the court of Queen's Bench allowed the same thing to be done in this very case: Kernot having obtained a judgment against Mr. Cattlin in an action of trover for some documents which were in his

hands. At all events, this applica-[800]-tion is answered by the fact of Kernot's discharge having been obtained by means of fraud and trickery: it was obtained upon condition of his withdrawing the notice to dispute the fiat which had issued against him, so that the fiat might be worked out, and the plaintiff obtain his fair share of the assets. In this respect, the case differs very little from that of *Baker* v. *Ridgway*, 2 Bingh. 41, 9 J. B. Moore, 114. There, a commission of bankrupt having been sued out against the defendant, in custody under a ca. sa., the plaintiff, in order to prove his debt, discharged the defendant from the execution. The commission having afterwards been superseded, the plaintiff took the defendant in execution again. And the court suspecting from the affidavits that the commission and supersedeas had been fraudulently concerted, refused to discharge the defendant on motion. [Crowder, J. In *Tanner* v. *Hague*, the defendant obtained his discharge upon a condition which he did not perform; and the court held that he could not be taken again.] Here, the defendant was guilty of fraud in procuring the fiat to be superseded, in defiance of his undertaking. [Crowder, J. You charge merely a wilful breach of a contract which the party had entered into.] In *Ward* v. *Bromhead*, 21 Law J., Exch. 216, the plaintiff, having obtained judgment against the defendants, took them in execution under two writs of ca. sa., from which they were afterwards discharged on paying a portion of the debt. The plaintiff afterwards seized the defendant's goods under a fi. fa. for the balance of the debt, which execution was afterwards set aside by the court, on the report of the master that the plaintiff had ratified the discharge of the defendant under the ca. sa. The plaintiff having afterwards brought an action against the defendant upon the original judgment, the court refused, on affidavits of the above facts, to allow satisfaction to be entered on the [801] roll. [Williams, J. *Lambert* v. *Parnell*, 15 Law J., Q. B. 55, 10 Jurist, 31, except as to the condition, is exactly in point. There, a judgment-debtor, taken in execution, was, after a month's imprisonment, released from prison by the judgment-creditor, who, three years afterwards, registered the judgment pursuant to the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11: and the court made absolute a rule to enter up satisfaction of the judgment, or to strike out the entry on the register, the debtor paying the expenses of whichever alternative he adopted.] The principle of that case is totally different from this: a purchaser may well be entitled to insist upon having an incumbrance removed from the title.

Milward, in support of the rule. Where the records of the court are improperly made use of for the purpose of perpetuating a judgment which is in law satisfied and discharged, it is matter of right to come to the court and ask to have the entry expunged. That the arrest and discharge of the defendant operated in law a complete satisfaction of the judgment for all purposes, is clear. This was so as long ago as the 21 Jac. 1, c. 24: and the decisions founded upon that statute are uniform. *Clark* v. *Clement*, 6 T. R. 525, is as strong an authority as can be It was there held, that, if the plaintiff consent to the discharge of one of several defendants taken on a joint ca. sa., he cannot afterwards retake him, or take any of the others. That case goes the whole length of annihilating the argument on the other side. In *Baker* v. *Ridgway*, Best, C. J., says: "I have looked through all the cases on execution against the person, from the earliest period down to the present time, and I am aware of the great jealousy of the law on the subject of personal restraint. I am aware, that, where a party had been discharged on account of privilege of parliament, it was doubted whether he could be [802] re-taken after that privilege expired, and the interference of the legislature became necessary to sanction such a proceeding: so, where he died in confinement, it was doubted whether the creditor, having resorted to the highest remedy the law afforded, could have any further means for the recovery of his debt, though the debtor left property behind him: that doubt was also set at rest by the authority of the legislature. I am therefore clear, that, where a commission of bankrupt is sued out against a party in execution, he not being privy thereto, if the plaintiff abandons his execution, and proceeds against the effects of the party by proving his debt under the commission, he has taken his chance, and, though there should be no assets forthcoming, the defendant is secure in his discharge." Even if the discharge was procured by fraud, it would be no answer to the application. But there clearly was no fraud here: at the most, the affidavits of Mr. Cattlin disclose only a breach of a condition subsequent. *Lambert* v. *Parnell*, 15 Law J., Q. B. 55, 10 Jurist, 31, is a distinct authority to shew that it is a matter of right in a case like

this to come and ask to have satisfaction entered upon the roll. [Williams, J. Except as to the condition, *Lambert* v. *Parnell* is precisely in point.]

Williams, J. (*a*)[1]. The only doubt that I have entertained in this case is, whether it is compulsory on the court to enter satisfaction on the judgment roll. It may be taken, upon the affidavits, that Mr. Cattlin consented to the discharge of Mr. Kernot upon an agreement, that, if he would so consent, Mr. Kernot would abstain from controverting the proceedings under the fiat against him; and that, notwithstanding he made the agreement, Mr. Kernot did contest the fiat, and [803] ultimately procured it to be superseded. The question is, whether, under these circumstances, the discharge of Mr. Kernot from custody operated a satisfaction of the judgment-debt. It seems to me to be impossible, upon the authorities, to entertain a doubt. And I think it is impossible to get over the case of *Lambert* v. *Parnell*, 15 Law J., Q. B. 55, 10 Jurist, 31, where the court of Queen's Bench ordered satisfaction to be entered in a case precisely like this. There, the plaintiff, after having consented to the defendant's discharge, registered his judgment under the statute: and, according to the report in the Jurist, the court ordered satisfaction to be entered. That undoubtedly is in accordance with all the authorities, and in point here, with this exception, that it does not appear that the discharge was obtained upon a condition which was afterwards broken. The only remaining question is, whether that makes any difference. Upon that I think the authorities also are clear. In *Tanner* v. *Hague*, 7 T. R. 420, the defendant was discharged on a condition, viz. on his undertaking to pay at a future day, and it was insisted on the part of the plaintiff, that his discharge under such circumstances was no satisfaction of the judgment: but the court of Queen's Bench held otherwise. Again, in *Blackburn* v. *Stupart*, 2 East, 243, it was held that a defendant cannot be taken in execution a second time on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express understanding that he should be liable to be taken in execution again if he failed to comply with the terms agreed on. It seems to me, therefore, to be clear, that, unless a case of fraud (*a*)[2] is made out, [804] the circumstance of the discharge being given upon an agreement which is afterwards broken can make no difference, and that the condition can have no operation against the general rule of law, that, the judgment-debt being once satisfied by the imprisonment of the debtor, it can be no longer used against him for any purpose. Here, there is no fraud in the sense in which that expression is used in a matter of this kind. The non performance by the defendant of the undertaking he entered into may have been the breach of a condition subsequent, for which, according to *Tanner* v. *Hague*, the plaintiff may have a remedy against him; but it clearly does not alter the effect of the discharge. This brings us to the question whether or not it is a matter of right for the defendant to come to the court and ask to have satisfaction entered. I find it so treated in Tidd's Practice, vol. 11, p. 1041. I cannot help thinking that Mr. Cattlin has been somewhat roughly used, in having by the course pursued lost both securities for his debt. Still, in the absence of fraud, the judgment being in law satisfied, I think the defendant is clearly entitled to have satisfaction entered (*a*)[3].

(*a*)[1] Cockburn, C. J., was absent.

(*a*)[2] A case occurred some years ago in the court of Queen's Bench which does not appear to have found its way into the books. The circumstances were these: A. (a barrister), being in custody in execution at the suit of B., sent for his creditor, and persuaded him, in the absence of his attorney, to sign an authority for his discharge, upon his promising to pay the debt in a given time; representing to B. that this step would not prejudice his right to take him again if he (A.) failed in the performance of his promise. The debt not being paid,—the court allowed B. to issue a second execution against A., on the ground that his discharge had been procured by fraud. The transaction being afterwards brought before the Benchers of the Inn of which A. was a member, he was disbarred.

(*a*)[3] For this purpose, of course, the roll would have to be carried in. This rule would not per se authorize any interference with the entry in the register of judgments kept by the senior master, which was the ultimate object of the application. That could only be effected (under the authority of a judge's order) where, by operation of this rule, the judgment ceased to be upon the roll of the court as an unsatisfied judgment.

CROWDER, J. I also am of opinion that this rule must be made absolute. I have always taken it to be clear law, that, where a creditor has his debtor in execution [805] under a ca. sa., and then authorizes his discharge, there is an end altogether of the judgment debt, and the debtor is entitled to have satisfaction entered upon the roll. That this was so where there was no condition and no fraud, does not seem ever to have been doubted. Upon the present occasion, the consent to the defendant's discharge was given subject to something of a condition which it is alleged the defendant failed to perform. I had some doubt at first as to whether that did not make a difference. But the authorities on that are conclusive. *Tanner* v. *Hague*, 7 T. R. 420, shews that the same principle applies whether the discharge was subject to a condition or not. It is said that here a kind of fraud has been practised upon Mr. Cattlin. I find, upon the affidavits, that it was Mr. Cattlin himself who originally made the proposition (*a*). Kernot having had a fiat issued against him, Cattlin wished to prove his debt, and accordingly he proposed that, if Kernot would withdraw a notice he had given to dispute the fiat, he would consent to his discharge from custody. That is the arrangement, and the only one which Mr. Cattlin sets up. The notice to dispute was withdrawn, and Cattlin's debt proved: and subsequently,—at the instigation, it is said, of Kernot,—the fiat was superseded. It is therefore said, that the ordinary operation of the discharge is prevented by the conduct pursued by the debtor. No authority, however, has been cited to support that proposition. The case relied on by Mr. [806] Badeley, *Baker* v. *Ridgway*, 2 Bingh. 41, 9 J. B. Moore, 114, —was one where the release had been procured by fraud. Here, there is no pretence for charging fraud. It seems to me to be perfectly clear that the discharge of the defendant did operate a complete satisfaction of the judgment. That being so, it is clear matter of right to have satisfaction entered upon the roll.

WILLES, J. I am of the same opinion. There is, it seems, a judgment upon the rolls of the court, which cannot be executed against the defendant, and which ought not to be used against him in any way, because he has once been in custody under a ca. sa. issued upon it, and discharged. I do not at present say what ought to be done if a case of fraud were made out. Fraud generally vitiates every transaction which is based upon it. But here no fraud is established. The only answer attempted to be set up against the defendant's claim to have satisfaction entered, is, that the defendant promised the plaintiff, that, if he would consent to his discharge, he would abstain from doing some act in future. That might give the plaintiff a very good ground of action, if the promise was a legal one, and any damage resulted to him from the breach of it: but it clearly affords no reason why a satisfied judgment should be allowed to appear on the rolls of the court as an unsatisfied judgment. The only effect of permitting it so to remain would be to enable some person to raise an objection to the title to any land the defendant might be desirous of selling, or to enable the executor to treat it as a subsisting judgment. It is clear, that, if the plaintiff had issued a second ca. sa. against the defendant, and taken him under it, his broken promise would have afforded no answer to an application for his discharge: nor do I think that it can afford any answer to the present application. It may be that an [807] action will lie against him for the non-performance of the condition upon which his discharge was obtained: but it cannot prevent his right to call upon the court to put an entry on the roll which will prevent his being prejudiced by another entry which has been improperly placed there.

Rule absolute.

PLANK AND ANOTHER *v.* GAVILA. Jan. 14th, 1858.

[S. C. 6 W. R. 210.]

The defendant, a merchant in Spain, agreed to consign to the plaintiffs, agents in London, all the raisins which should be shipped by him for this country, to sell for him for a certain commission on the "invoice price." In an action to recover the amount of commission on two shipments consigned by the defendant, in breach of his agreement, to third persons, -Held, that it was competent to the plaintiffs to

(*a*) This was sworn by the defendant's attorney, but denied by Mr. Cattlin.

shew the proximate value of the consignments upon which they claimed commission, without producing the invoices. Quære, as to the meaning of "invoice price?"

The defendant, a merchant in Spain, agreed with the plaintiffs, merchants in London, to consign to them for sale as his agents all the fruit he should ship for this country, for a certain commission upon the amount of the "invoice prices." In an action upon this agreement, the first breach assigned in the declaration was, that the defendant had consigned certain raisins to other persons; the second, non-payment of the commission on sales.

At the trial, before Cresswell, J., at the sittings in London after last Michaelmas Term, it appeared that the defendant had, in breach of his contract, consigned to other merchants in London two parcels of raisins, the one by a vessel called the "Symetry," the other by the "Vigilant," in execution of orders received by them. To shew the amount of damages they were entitled to on this account, the plaintiffs called one Leask, a broker, who proved that the value of these two parcels of fruit was a sum which would have yielded to the plaintiffs for commission 126*l*.

On the part of the defendant, it was insisted, that **[808]** inasmuch as the plaintiffs were by the agreement to receive a commission upon the "invoice price" of the goods, the production of the invoices was necessary to shew the measure of damages.

The objection was over-ruled; and, the jury having found for the plaintiffs, damages 728*l*., leave was reserved to the defendant to move to reduce them by 126*l*. if the court should be of opinion that the invoices should have been produced.

Honyman now moved accordingly. It was for the plaintiffs to enable the jury to measure the damages which they were entitled to recover by reason of the breach of the agreement. To do this, the invoices of the raisins by the "Symetry" and "Vigilant" were necessary, and their production was a condition precedent. [Willes, J. Why should not the market value be proved by other means?] The commission was not payable on the market value, which means the selling price here, but upon the "invoice price," which is the price charged by the shipper to the consignee. It is as if the contract had stipulated that the plaintiffs should receive such amount of commission as should be fixed by A. B. [Cockburn, C. J. The market value must be presumed to be a close approximation to the invoice price. The amount does not seem to have been disputed at the trial, but merely the media of proof.] The question is whether the evidence which was laid before the jury really gave them the means they ought to have had for measuring the compensation the plaintiffs were entitled to for the breach of contract.

Cockburn, C. J. I am of opinion that there should be no rule in this case. The action is brought for the breach of a contract whereby the defendant engaged to pay the plaintiffs a certain commission on orders for **[809]** fruit procured by them for him. It appears that two orders were procured by the plaintiffs, which were executed by the defendant. There cannot be any dispute that the defendant is liable to pay commission upon these orders: but, inasmuch as the agreement says that the commission is to be regulated by the invoice price of the raisins, and the invoices were not produced at the trial, it is contended that the plaintiffs have failed to comply with that which is a condition precedent to their right to damages. If the agreement had stipulated that the plaintiffs should be paid a given amount of commission "upon production of the invoices," that might have been a different thing. But here evidence was given of the value of the shipments; and I think it was open to the jury to draw an inference from that of the amount of the invoice price. It is not denied that some commission is due: and it is not contended that the amount found by the jury is excessive. I see no reason, therefore, why their decision should be quarrelled with.

Williams, J. I also am of opinion that there should be no rule in this case. No complaint is made here as to the amount of the verdict. If there had been, probably I should have taken a different view of the matter. But what we are asked to do, in effect, is, to reduce the damages to 1*s*. There would be manifest injustice in doing so: the bargain between the parties would not be executed. I agree, that, if, as Mr. Honyman suggested, the amount of commission was to be such as A. B. should fix, the plaintiff's title to recover any commission would be dependant on the ascertainment of the amount by the person indicated. But here it is manifest that much more than nominal damages were due. The proper course, I apprehend, would have been, to have told the jury that the evidence of amount **[810]** was unsatisfactory,

and that they were at liberty to reduce it. That would be serving the plaintiffs right for presenting their case so imperfectly: but, to say that they are therefore to be punished by having their claim reduced to 1s. would be doing them gross injustice.

CROWDER, J. I also am of opinion that there is no ground for reducing the verdict as prayed. The argument of Mr. Honyman proceeds upon the assumption that the production of the invoices was a condition precedent to the plaintiffs' right to recover any commission. That, however, is a fallacy. By the terms of the agreement, the plaintiffs are to have a certain commission upon the invoice price of the shipments. That is a mere description of the mode of regulating or ascertaining the amount of the commission. Evidence was clearly admissible to shew what the invoice price was. It was competent to the defendant to contend before the jury that the evidence given was insufficient. But that was not the ground taken. It would be doing the grossest injustice to say that the plaintiffs were only entitled to 1s., because they failed to produce the best possible evidence of amount.

WILLES, J. I am of the same opinion. This application rests upon the ground that the plaintiffs have not given any evidence to entitle them to the commission they claim, or any part of it. By the terms of the contract, they are to receive a certain commission, say 3 per cent. upon the "invoice price." If "invoice price" necessarily meant the amount appearing upon the face of the invoice sent by the defendant, I should probably have thought that Mr. Honyman's argument was well founded. But that clearly is not so; for, if invoices were not sent, or they fraudulently represented an amount less than the real value of the goods, it could **[811]** hardly be contended that the plaintiffs would be precluded from recovering any commission, or would be bound to take it upon such diminished amount. It appears to me that the "invoice price" here means the amount at which the goods are invoiced to the purchaser. Now, what was the evidence? That about 100 tons of raisins were sent by the "Symetry" and the "Vigilant," consigned to two strangers, and that they would fetch in the market here a certain sum. Of course, if the matter proceeded regularly, the amount would appear from the invoices. If the production of the invoices was a condition precedent, the persons who made out the invoices would be the proper persons to call. It seems to me that was not the necessary course. There might be great difficulty in proving the invoices in such a way as to bind the defendant: and it would be throwing an intolerable burthen on the plaintiffs. This very much aids the construction that "invoice price" means the amount which ought to go into an invoice. I think the jury were properly directed to find the invoice price from the evidence of the market value. It is not pretended that 126l. represents more than the proper amount of the plaintiffs' commission.

Rule refused.

[812] RISBOURG *v.* BRUCKNER AND ANOTHER. Jan. 16th, 1858.

[S. C. 27 L. J. C. P. 90; 6 W. R. 215.]

A., acting for B., a foreign principal, but in his own name, bought of C., in London, a cargo of wheat on board a certain vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, and the bill was duly paid. B. afterwards came to London, saw the contract, and ratified all that A. had done. It turned out that the cargo had been fraudulently disposed of by the captain prior to the date of the contract of sale by C. to A.:—Held, that B. could not maintain an action against A. to recover back the money paid, as upon a failure of consideration: but that his only remedy,—whether in his own name or in that of A.,—was against C., the seller.

The first count of the declaration stated that the defendants theretofore, and before the commencement of the suit, wrongfully intending and contriving to deceive the plaintiff in that behalf, falsely and fraudulently represented to the plaintiff that a certain vessel called the "Gesina Bertha," then alleged to be on a certain voyage, to wit, from Galatz to the United Kingdom, had before the time of making the said representation, and before the purchase of wheat by the plaintiff thereinafter men-

tioned, passed a certain place called Constantinople, in Turkey, in parts beyond seas, on the said voyage, and by such false and fraudulent representation induced and procured the plaintiff to purchase, and the plaintiff, relying upon the said representation of the defendants, did purchase, a certain cargo of wheat alleged to be loaded upon the said vessel so as aforesaid represented to have passed the said place on the said voyage, for a large sum of money which the plaintiff then paid for the said wheat; whereas in truth and in fact the said vessel had not at the time of the making of the said representation by the defendants, or at the time of the said purchase, passed the said place called Constantinople aforesaid on the said voyage, as the defendants at the time of making the said representation and at all times thenceforth well knew; and by reason of such false and fraudulent representation of the defendants the plaintiff wholly lost and was deprived of the said sum so paid for the said wheat, and the gains and profits that he would otherwise have derived, and ought to have derived, from the said purchase, and was otherwise greatly injured and damnified.

There was also a count for money paid, money received, and money found due on accounts stated.

[813] The defendants pleaded, to the first count, not guilty, and, as to the residue of the declaration, never indebted.

The cause was tried before Cockburn, C. J., at the sittings in London after last Trinity Term, when the facts which appeared in evidence were as follows:—The plaintiff was a merchant residing in the north of France. The defendants were commission merchants in London. In December, 1853, the defendants, having a cargo of wheat from Galatz to dispose of, wrote to the plaintiff as follows:—

"London, 2nd December, 1853.

"Herewith we send you sample of a small cargo (620 qrs.) new wheat from Galatz, per 'Gesina Bertha.' We had this cargo firm in hand to-day for sale to the continent at 67s. If you can offer us that price, freight and insurance (done in London) to Dunkirk included, we hope to be able still to succeed on receipt of your answer: and, if there be a chance of buying at a fraction lower than that, you can rest assured we shall be glad to study economy in your interest, which in that case would be ours. Our commission would be 2 per cent. on the gross amount, as usual; for, we presume we shall have to draw on bankers in Paris or Antwerp. If, however, you prefer paying us the amount of invoice here in London against bill of lading, we will only charge 1 per cent. commission. Cash payments are customary here for all floating cargoes. The wheat per 'Gesina Bertha' has been shipped at the weight of 61½ to 62 lbs., say 77 78 kilos. to the hectolitre. The shippers are very respectable; and we lately sold one of their cargoes at 68s. for Antwerp. The vessel having left Galatz the 12th October, and having passed Constantinople, may be expected on the English coast within a month."

Having received instructions from the plaintiff to make the purchase for him on the best terms they could, the defendants wrote again on the 6th, stating that they **[814]** had purchased at 66s. The contract between the defendants and the sellers was as follows:—

"London, 6th December, 1853.

"Sold Messrs. Brückner & Co. the cargo of fine Galatz wheat, quality equal to the sealed sample in their possession, due allowance to be made for brandling, when shipped at Galatz in good and merchantable condition, per 'Gesina Bertha,' Wever, master, and consisting of 450 kilos, as per bill of lading dated 13th October, N. S., at the price of 66s. (say sixty six shillings) per quarter free on board at Galatz, and including freight and policies of insurance to any safe port in the United Kingdom or continent between Havre and Hamburg, both these ports included: the vessel calling at either Cork or Falmouth for orders. Computation of measures, 100 kilos. equal to 143 quarters. No charge for dunnage. Payment, cash, in exchange for shipping documents, deducting interest for the unexpired time of three months from date of bill of lading, at the rate of 5 per cent. per annum; the same to be taken up on or before the 13th instant. Sellers to hand buyers policies of insurance effected with approved underwriters in London, but for whose solvency sellers are not responsible. Sellers pay buyers a commission of 1 per cent. on the gross amount of invoices."

(Signed) "Barker & Black."

The invoice delivered by Barker & Black treated the transaction as a sale to Brückner & Co., and the amount, less 1 per cent. commission, being 1757*l.* 9s. 10d., was paid in cash by Brückner & Co. to Barker & Black: and Brückner & Co. drew upon the plaintiff at two months for the invoice amount and their commission and brokerage, amounting to 1833*l.* 9s. The invoice sent by the defendants to the plaintiff was headed as follows: "Invoice of a cargo of Galatz wheat afloat, per 'Gesina Bertha,' Captain R. F. Wever, bought by order and for account of M. Risbourg at Bouchain."

[815] On the 18th of January, 1854, intelligence reached London, that, prior to the 6th of December, 1853, the cargo of the "Gesina Bertha" had been discharged and sold at Constantinople, and that the proceeds (300*l.*) were held by the Dutch consul at that place on behalf of the shippers.

The plaintiff having paid the bills (and Barker & Black having failed), sought to recover back the amount from the defendants, on the ground that, having made the contract in their own names with Barker & Black, they thereby precluded him from having recourse to Barker & Black for the return of the money received as the price of a non-existing cargo. The case of *Couturier* v. *Hastie*, 5 House of Lords Cases, 673, was referred to.

The first count of the declaration was abandoned: it being admitted that the defendants, in representing the vessel and cargo to have passed Constantinople, acted bonâ fide, and spoke according to their belief. The following admissions were made between the counsel, and it was agreed that the question of the defendants' liability should be referred to the court:—"That the defendants entered into and executed the contract of sale as the agents of and on behalf of the plaintiff, but executed the contract in their own names, without disclosing in it the name of any principal, or that they were acting for any principal, though they verbally informed the sellers' brokers that they were buying for a foreign purchaser: that, at the time the contract of sale was entered into, the cargo had ceased to exist, but the defendants acted bonâ fide in making the contract. The admission that the defendants bought as the agents of the plaintiff is not to preclude the plaintiff from contending that the defendants, in executing this contract, departed from the authority conferred by the correspondence, and are therefore liable to the plaintiff, if in this form of action any such point should be open to the plaintiff."

[816] It was further admitted by the counsel for the plaintiff, that the plaintiff, having come to England in March, saw the contract, and ratified all that the defendants had done. But he insisted that the defendants had no authority to buy in their own names, nor to buy for cash, nor to stipulate for commission: with reference, however, to the last point, he admitted that it was the usage of the London corn trade, that the broker of a foreign buyer may receive a commission from the seller, and that the taking such commission in this case was bonâ fide, and that the commission had nothing to do with the price.

A verdict having been taken for the defendants,

Bovill, Q. C., in Michaelmas Term last, pursuant to leave, obtained a rule nisi to enter a verdict for the plaintiff for 1796*l.* 9s. with interest at the rate of 5*l.* per cent. per annum from the 10th of February, 1854, "on the ground that the defendants were liable to return the money paid for the cargo, and that plaintiff was not bound to resort to Barker & Black."

J. Wilde, Q. C., Honyman, and Yorke, now shewed cause. The ground upon which the plaintiff seeks to recover back the money paid for the cargo in question is, that, the contract being for the sale of a specific cargo, and the subject-matter of the contract having no existence at the time, the money was paid without consideration. The case of *Couturier* v. *Hastie* is distinguishable on this ground, that there the captain had sold the cargo under circumstances which rendered the sale justifiable, and the purchaser had a good title: whereas, here, the sale was improper and fraudulent on the part of the captain. Assuming, however, that the cargo did not exist at the time of the contract, and that, according to the authority of *Couturier* v. *Hastie*, **[817]** the plaintiff is entitled to recover back the money from somebody, the question is whether he can recover it from the defendants. In the first place, it is admitted the defendants made the contract as agent for the plaintiff. As between themselves and the plaintiff, they were agents throughout: and they did not cease to be his agents because they had so conducted themselves as to become liable as principals to the

parties with whom they contracted. Besides, with full knowledge of all that had been done, the plaintiff, after the payment of the money, ratified the defendants' acts.

The court called on

Bovill, Q. C., and J. Kay, to support the rule. It is clear, according to the case of *Couturier* v. *Hastie*, 5 House of Lords Cases, 673, that, where the subject of the sale is non existing at the time the contract is entered into, the purchaser is entitled to recover back the money he has paid upon the faith of there being an existing something to be sold and bought, and capable of transfer. [Cockburn, C. J. Assume that this was a non existing cargo.] In that case the plaintiff would clearly be entitled to recover back his money from some one. The question is, from whom? It is said that he is bound to have recourse to Barker & Black. That raises another question, —who was interested in the cargo? The defendants purchased in their own names, the contract not disclosing the fact that they purchased as agents. [Cockburn, C. J. That does not prevent the principal from adopting the contract as his own. In Smith's Mercantile Law, 5th edit., by Dowdeswell, 162. it is laid down, that, "if an agent acting for an undisclosed principal have made a contract in his own name, the principal may sue upon it."] In *Pownall* v. *Alexander*, 3 Ellis & B. 283, the defendants, merchants resident in Ireland, wrote to S. A., a merchant resident in London, authorizing him [818] "to take for us two cargoes" of Ibraila corn, 1000 to 1500 quarters, at 24s. to 24s. 3d., "payment by our acceptance at two or three months," and in a postcript added, "You may go to 24s. 6d., if you find you cannot do the work at 24s. or 24s. 3d." S. A. made a bargain with R., a merchant resident in London, for a cargo by the "C.," and sent him a note commencing "Sold by order and for account of R to our principals the cargo" of Bulgarian corn per "C.," at 24s. 6d. per quarter, cost, freight, and insurance; "Sellers to pay a commission of 2 per cent. Payment in cash" in one week after receipt of documents. On the same day, R. in his books debited S. A. with the price of the cargo, and sent S. A. the shipping documents with the bill of lading indorsed, and an invoice headed "S. A. bought of R." On the same day, S. A. wrote to defendants "to advise having purchased for your account the cargo of Bulgarian corn per 'C.,' at 24s. 9d. per quarter, C. F. & I. (cost, freight, and insurance), which is 3d. per quarter over your limit for Ibraila, but proportionately cheaper." In this letter were inclosed the shipping documents of the "C." (including the indorsed bill of lading), and an invoice headed "Invoice of a cargo, &c., bought by order and for account and risk" of defendants, and a draft for the price at 24s. 9d., drawn by S. A. on the defendants The defendants returned the draft accepted, stating in the letter, "We note purchase of corn per 'C.' at 24s. 9d. We would much rather have had Ibraila at 24s. or 24s. 3d." After this, whilst the bill was still current, and before the arrival of the "C.," S. A. failed. R. stopped the cargo of the "C.," treating S. A. as the purchaser, and claiming to be an unpaid vendor to him. The defendants, on receiving an indemnity from R. against the bill, paid him the price, less discount, at the rate of 24s. 6d., being less than the sum for which the bill was accepted, which was at the rate of 24s. 9d. The assignees of S. A., who [819] had become bankrupt, sued the defendants on the bill. R. defended the action for them, on the ground that the consideration for the bill had failed. A case was stated for the court of Queen's Bench, in which the correspondence, containing as above stated, was set out, and the court had power to draw inference of fact: and it was held, that, on the above documents, it must be taken that, notwithstanding the form of the contract note and the defendants' order to S. A., the transaction was a sale from R. to S. A., and a sale from S. A. to the defendants, and not a sale from R. to the defendants through S. A.: and this without reference to the fact of the defendants' residence in Ireland. [Willes, J. That is an exceptional case. Ashlin could not say he acted as agent of Alexander & Co., for, he bought at 24s. 6d., and returned 24s. 9d. If he had been their agent in buying the corn, Alexander & Co.'s payment to Ralli & Co. would have been an answer to the action by Ashlin's assignees.] That the agent is to be considered as the seller of the goods to the foreign correspondent is not a new doctrine: *Fenn* v. *Wray*, 3 East, 93; *Schuster* v. *M'Kellar*, 26 Law J., Q. B. 281. In *Jones* v. *Littledale*, 6 Ad. & E. 486, 1 N. & P. 677, L. & Co., brokers at Liverpool, sold hemp by auction at their rooms, and gave an invoice describing the goods as "bought of L. & Co." and received part of the price, but failed to deliver the goods. An action being brought against them by the purchaser for the non delivery, and for money had and received, it was held that L. & Co. had made themselves responsible as sellers by the invoice, and could not

defend themselves by evidence tending to shew that they sold as agents, and had intimated that fact before and at the time of the sale, and that, the principals being indebted to L. & Co., the invoice had been made out in their names, according to a custom of brokers in Liverpool, to secure the passing of the purchase-money [820] through their hands. Lord Denman there says: "It is clear, that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." That was followed by *Higgins* v. *Senior*, 8 M. & W. 834, and other cases. In *Smyth* v. *Anderson*, 7 C. B. 24, 33, Maule, J., on the authority of *Thomson* v. *Davenport*, 9 B. & C. 78, 4 M. & R. 110, 2 Smith's Leading Cases (4th edit.), 286, says: "It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal." And that is followed by *Green* v. *Kopke*, 18 C. B. 549, where Dr. Story's suggestion is controverted by the court, and Chancellor Kent's adopted. [Williams, J. Do you mean to contend, that, if the money had not been paid here, the vendors could not have sued the present plaintiff?] Yes. A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit, as purchasers, for what he buys in the home market on their account: *Poirier* v. *Morris*, 2 Ellis & B. 89. Crompton, J., during the argument of that case, says,—"There are very many mercantile cases in which a person is employed as agent to buy, but without any authority to pledge his principal's credit. In the ordinary case of a Liverpool merchant purchasing cotton at New Orleans, the constant custom is, to write to his correspondents there to buy cotton for him on commission. The New Orleans house buy as the Liverpool merchant's agents: they charge him the cost price, and a commission for buying the cotton for him: but they cannot pledge his credit for the cotton: they must buy it on their own credit, or pay for it out of their own funds." In the case of a foreign principal, to make [821] him responsible to the sellers, there must be an express authority in the agent to pledge his credit. Here, the plaintiff never knew who the sellers were, until after the completion of the transaction. [Cockburn, C. J. The general rule of law undoubtedly is, that an undisclosed principal may sue upon a contract made by an agent. But it is said that rule does not apply where the principal is a foreigner.] The contract was made by Brückner & Co. as principals. The plaintiff's remedy cannot be against Barker & Black: for, the sum he paid was 1833*l.* 9*s.*, whereas the amount which they received was only 1757*l.* 9*s.* 10*d.*

Cockburn, C. J. This appears to me to be so clear a case that I almost doubt the propriety of the course I adopted at the trial, in reserving the plaintiff leave to move. The facts are simple. The plaintiff employed the defendants as his agents to purchase a cargo of corn for him. They bought of Barker & Black: but, though they informed Barker & Black that they were buying for a foreign principal, they did not disclose his name, and they made the contract in their own names. It was afterwards discovered that the cargo had, previously to the date of the contract, been fraudulently disposed of by the captain at Constantinople, in order to enable him to obtain a more advantageous freight. The defendants had paid the price of the cargo to Barker & Black, and had drawn for the amount upon the plaintiff: and the latter, having paid the bills, now seeks to recover back the money from the defendants, his agents. It is of every-day occurrence that persons acting as brokers or agents make contracts in their own names, without disclosing the names of the persons for whom they are acting. It is said that the plaintiff in this case cannot have recourse to the sellers of the cargo to recover back the price paid in respect of a consideration which has [822] wholly failed. But, in the first place, that is contrary to the established rule of law, that, where an agent makes a contract for a principal, though his name is not disclosed, the principal may, if he thinks proper, enforce it against the other contracting party. It is true, that, here, the principal is a foreigner, and that there is another rule of law, equally indisputable, that, where a man contracts as agent for a foreign principal, the contract is considered as having been entered into with the agent. It may be doubtful how far that rule applies where the foreign principal is seeking to enforce the contract (*a*). But, be that as it may, it would have been the same if the defendants had made the contract in the name of the foreign principal. I do not think that part of the argument

(*a*) See *Peterson* v. *Ayre*, 13 C. B. 353, and the cases there cited.

touches at all the gist of the case. The question is, whether the defendants had the authority of the plaintiff for entering into the contract. It is clear from the correspondence that they had; and it is admitted, that, after the contract had been entered into, the plaintiff ratified all the defendants had done. The contract was entered into by them with Barker & Black as agents, and the money was paid by them in discharge of their principal's liability; and the principal was bound to repay them. Having paid the money, he cannot be permitted now to turn round upon his agents, and say that they are bound to return the money, because they made the contract in their own names. The defendants are clearly entitled to retain their verdict.

WILLIAMS, J. I am entirely of the same opinion. The defendants, acting as agents for the plaintiff, buy of Barker & Black a cargo of wheat, contracting with them in their own names, and without disclosing the name of their principal; and they pay for it, and are [823] reimbursed by their principal. Barker & Black never deliver the wheat, so that there is a total failure of consideration for the payment. The question is, to whom is the principal to resort to recover back his money,—the persons who received it, or the agents? I am clearly of opinion that his only remedy is against the former; and that it makes no difference, that, by the form of the contract into which they entered, the agents had made themselves personally liable to the sellers in the first instance. If we were to hold the contrary, we should be altogether changing the character of agents, who have a right to look to their principals for indemnity, and making them a sort of intermediate contractor, buying from the one party and selling to the other on their own account.

CROWDER, J. I also think the plaintiff has failed to make out any right to maintain this action. The price of the cargo in question was paid by the defendants as agents for the plaintiff, and by his express desire, and in discharge of his liability; and now he seeks to recover it back from them on the ground that he gave them no authority to buy in their own names. It is admitted that the defendants were employed by the plaintiff to make the purchase as his agents, that they made the purchase informing him that they had done so, and that the principal afterwards came to England, and, having seen the contract, ratified all that the defendants had done. What possible ground of complaint, therefore, can the plaintiff have against the defendants for doing that which, if not previously authorized by him, was afterwards ratified by him? It was at one time a question whether, the contract being for cash on delivery of the shipping documents, the plaintiff should furnish the defendants with the money or give them bills: and he elected the latter course. The payment, [824] therefore, was made at his express request. I cannot see any pretence for calling upon them to refund the money. It is said that the plaintiff could not, upon the failure of the consideration, sue Barker & Black. I must confess I do not see why not. One ground alleged is, that the principal's name being undisclosed, and he being a foreigner, there is no privity between him and Barker & Black. It may be that the contract is entered into with the agents only: but that is a question of fact. In *Heald* v. *Kenworthy*, 10 Exch. 739, 743, Parke, B., says: "Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact, and not of law." It seems to me that the question does not arise here. We must take this as the ordinary case of a principal authorizing an agent to make a payment for him. The money having been paid in pursuance of the authority, and the agent having been reimbursed by his principal, the latter cannot recover it back.

WILLES, J. I am of the same opinion. It appears to have been assumed in the argument on the part of the plaintiff, that, when once it was made out that Risbourg would not have been liable on the contract to Barker & Black, it would follow that the transaction between the plaintiff and the defendants would cease to be a transaction as between principal and agent. That is clearly a mistake. Suppose, though I am clearly of the contrary opinion, the contract for the sale of the cargo of the "Gesina Bertha" was only binding as between the defendants and Barker & Black, it would have made no difference: the plaintiff, as principal, would still have been bound to indemnify the defendants from the consequences that might result [825] from the bargain, and would have to bear the loss, if any loss happened. It appears, that, through the fraud or misconduct of the captain, the cargo had been sold at Constantinople before the 6th of December, and consequently the subject matter of the contract

no longer existed. But the price had been paid by the defendants to Barker & Black in discharge of a liability which they had incurred at Risbourg's request. The defendants might have maintained an action against him for the money so paid: and it is impossible that Risbourg could have any right of action against them because he had fulfilled his contract of indemnity. It may be that the money could only be recovered back from Barker & Black in the names of the defendants: but any inconvenience that might arise from that would be brought upon the plaintiff by his own act. Upon the state of circumstances here appearing, the contract being one in which the ordinary relation of principal and agent subsisted, the ordinary rule must be applied that he who would derive the profit, if profit were made, must bear the loss, if loss is sustained. The rule must be discharged.

Rule discharged.

[826] HOLLAND *v.* JUDD. Jan. 27th, 1858.

A cause in which the defendant had pleaded never indebted, the statute of limitations, payment, set-off, and accord and satisfaction, was referred to a county-court judge under the compulsory clauses of the Common Law Procedure Act, 1854; the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator. The county-court judge having certified "that the defendant was not at the time of the commencement of the action indebted to the plaintiff, and having found a general verdict for the defendant, and directed that the plaintiff should pay the costs of the reference,—the court sent the certificate back to be amended by stating the manner in which the several issues were found.

This was an action for the hire of horses, carriages, and other vehicles by the plaintiff let to hire to the defendant; with a count for goods sold and delivered, and the usual money counts.

The defendant pleaded,—first, never indebted,—secondly, the statute of limitations,—thirdly, payment,—fourthly, set-off,—fifthly, accord and satisfaction.

The cause was by a judge's order under the compulsory clauses of the Common Law Procedure Act, 1854, referred to the judge of the county-court of Warwickshire holden at Birmingham—the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator.

After hearing the parties, the county-court judge, on the 9th of December last, gave the following certificate: "I do hereby certify that the said defendant was not at the time of the commencement of this action indebted to the plaintiff. I find a verdict for the said defendant, and I direct that the costs of the said reference shall be paid and borne by the plaintiff."

Honyman, on a former day in this term, moved to set aside the certificate, on the ground that it did not decide the issues. He referred to *Bourke* v. *Lloyd*, 2 Dowl. N. S. 452, where it was held, that, where a cause is referred to arbitration, and the costs of the cause are to abide the event of the award, the arbitrator must find specifically upon each issue He submitted that the court might probably think it right to send the matter back to the county-court judge under the 8th section. [Crowder, J. Does that section apply to these compulsory references?] The words are general.

[827] The rule was granted in the alternative,—to shew cause why the certificate should not be set aside, on the ground that it was not final, and that the judge had not decided the various issues joined in the cause, so as to enable the master to tax the costs thereof,—unless the defendant would consent to the certificate being referred back to the county-court judge for re-consideration and amendment.

Bittlestone shewed cause. Substantially, the judge has found all the issues for the defendant. There is no inconsistency. [Cockburn, C. J. Is there no inconsistency in saying, "I never owed you 5*l*.," and "I paid you the money?"] In *Cooper* v. *Langdon*, 9 M. & W. 60, 65, Parke, B. said, "The arbitrator directs a general verdict to be entered for the defendant. Then comes the question whether the issues may not all consistently be found for the defendant. I have no doubt they may. Suppose the plaintiff to fail in proving the agreement, as, for instance, for want of a stamp, and that the defendant were to prove the other issues, there would be no inconsistency in finding them all for him." That was confirmed by *Humphreys*

v. *Pearce*, 7 Exch. 696, where it was held, that, where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of all the issues (*a*)[1]. [828] [Cockburn, C. J. Independently of the finding of the arbitrator, how would the issues have been entered at nisi prius?] Substantially, all for the defendant.

Honyman, in support of his rule, was stopped by the court.

COCKBURN, C. J. The matter must go back to the arbitrator to be re-considered. He has clearly made a mistake; but it might have been set right without the expense of coming here. He must state in his certificate how he disposes of the several issues. But there must be no costs.

Rule absolute, to refer back the certificate to the county-court judge for re-consideration and amendment as to the manner in which the several issues were found, each party to pay his own costs of and occasioned by this application.

[829] SMITH *v.* HARNOR. Jan. 16th, 1858.

A. sued B. for an assault, with a count for slander, and obtained a verdict on the first count for 5*l.*, but failed to establish a cause of action on the second count:—Held, that he was entitled to no costs.—Semble, that a question as to the taxation of costs will not in general be entertained at Chambers.

The first count of the declaration charged the defendant with having assaulted the plaintiff, the second was for slander.

At the trial the plaintiff obtained a verdict upon the first count, with 5*l.* damages; but he failed on the second count, proving mere terms of abuse, such as thief, swindler, &c.

Needham moved that the master (who had declined to do so) might be directed to tax and allow to the plaintiff his ordinary costs. [Crowder, J. Have you been to Chambers?] No. [Willes, J. I invariably decline to go into a question of taxation at Chambers.] The master conceived that the plaintiff was precluded from recovering any costs by the 11th section of the County Court Act, 13 & 14 Vict. c. 61, he having obtained a verdict for 5*l.* only, and there being no certificate under s. 12, or judge's order under s. 13 (*a*)[2]. The 11th section, however, it is submitted, applies only where the action is brought for that in respect of which the verdict is obtained, and that only; and does not apply where it is bonâ fide brought for something else besides. [Crowder, J. See what absurdity that would lead to. If a plaintiff sues for slander, and fails, he pay costs: if he brings an action for an assault, and obtains no more than 5*l.* damages, he gets no costs: but, according to your view, if he brought his action for the two, and altogether failed as to the one, and obtained less than 5*l.* damages on the other, he would be entitled to the costs of the cause!] The plaintiff is enabled by the 41st section of the Common Law Procedure Act, 1852, to join the two causes of action.

(*a*)[1] In that case, the pleas were,—first, except as to 42*l.*, never indebted,—secondly, except as to 42*l.*, a set off,—thirdly, except as to 42*l.*, payment,—fourthly, as to 42*l.*, payment of 42*l.* 1*s.* into court. The arbitrator awarded as follows:—"I do award and order that the said J. Pearce (the defendant) shall and do pay or cause to be paid to the said R. Humphreys the sum of 84*l.* 14*s.* 2*d.* over and above the sum of 42*l.* paid into court by the said J. Pearce, which I do adjudge and award to be due from the said J. Pearce to the said R. Humphreys for and upon the matters in difference to me referred." And Parke, B., said: "In this case, by necessary intendment there is a finding upon every issue: for, the arbitrator awards that 84*l.* 14*s.* 2*d.* is due in respect of the matters referred, over and above the 42*l.* paid into court. That disposes of the issues on the pleas of payment and set off: for, if the defendant had proved a set-off and payment beyond the 42*l.*, the arbitrator could not have found that 84*l.* 14*s.* 2*d.* was due. The set off is only material as a matter in difference in the cause: and the question whether the defendant had a set off will depend upon the sum which is awarded to the plaintiffs: therefore, the arbitrator must have found both the pleas in the negative, for otherwise the plaintiffs could not be entitled to 84*l.* 14*s.* 2*d.* beyond the sum paid into court."

(*a*)[2] See 15 & 16 Vict. c. 54, s. 4, and 19 & 20 Vict. c. 108, s. 30.

[830] COCKBURN, C. J. The case is too clear for argument. There will be no rule.

WILLIAMS, J. This is not the less an action of trespass in which the plaintiff has failed to obtain damages exceeding 5l. because an unfounded charge of slander is attached to it.

The rest of the court concurring,

Rule refused.

MOOR *v.* ROBERTS AND ANOTHER. Jan. 12th, 1858.

In consideration that the plaintiff would advance 1200l. to a third person upon mortgage of certain leasehold premises, the defendants promised, that, if, after any sale of the said premises duly made under the power of sale to be contained in the mortgage-deed, the purchase-money should not be sufficient to satisfy the principal sum and all interest, costs, charges, and expenses which might be then due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency, whether the same should be occasioned by any defect in the title to the premises otherwise howsoever.—The premises having been put up to auction under the power of sale, were knocked down to one W. for 650l., and W. paid a deposit of 100l. and signed the usual contract: but he afterwards declined to complete the purchase, on the ground of the vendor's inability to produce certain receipts for ground-rent: and the plaintiff brought an action against him to recover damages for his alleged breach of contract, which action was still pending:—Held, that, under these circumstances, a concurrent action against the defendants upon their guarantee was premature,—the word "sale" in that instrument meaning a sale completed, so that the deficiency which was to be made good by the defendants could be ascertained.

This was an action upon a guarantee. The declaration stated that one William Kirby was desirous of borrowing the sum of 1200l. upon mortgage of certain land, with the houses, messuages, and buildings, thereon erected, and known as numbers 12, 13, 14, and 15, Russell Terrace, Holland Road, in the county of Surrey, and it was proposed and intended that interest should be payable on the said principal sum of 1200l., at the rate of, to wit, 5l. per cent. per annum, and that the mortgage-deed to be executed should express that such **[831]** interest should be payable, and should also contain all necessary and usual powers of sale upon default: That thereupon, in consideration that the plaintiff and one George Mallows, since deceased, at the request of the defendants, would advance to the said William Kirby, the said sum of 1200l. upon such mortgage as aforesaid, the defendants undertook and promised the plaintiff and the said George Mallows, that, if, after any sale of the said premises so to be mortgaged, duly made under the said power of sale to be contained in the said mortgage-deed, the purchase-money should not be sufficient to satisfy the aforesaid sum of 1200l. and all interest, costs, charges, and expenses which might be then due in respect of the said mortgage, they would immediately thereafter make good and pay to the plaintiff and the said George Mallows such deficiency, whether the same should be occasioned by any defect in the title to the said premises or otherwise howsoever: Averment, that the plaintiff and the said George Mallows did accordingly advance to the said William Kirby the said sum of 1200l. as aforesaid on mortgage of the said premises, and that a mortgage-deed containing, among other things, a provision as to the payment of such interest as aforesaid, and also such power of sale as aforesaid, was duly executed and delivered by the said William Kirby to him the plaintiff and the said George Mallows; and that afterwards default was made by the said William Kirby, to wit, in not paying the said principal sum and interest according to the terms of the said mortgage-deed, whereby the said powers of sale became exercisable, and were thereupon duly exercised by the plaintiff (who had survived the said George Mallows) accordingly, and the said premises included in the said mortgage and powers of sale were duly and properly sold in virtue thereof; and the plaintiff said, that, upon the said sale, the purchase-money of **[832]** the said property was not sufficient to satisfy the said sum of 1200l. and a further sum amounting to 250l. then due in respect of the said mortgage for interest, costs, charges, and expenses, and

that there was a deficiency thereon to the amount of 800l.; and that the plaintiff and the said George Mallows before his death, and the plaintiff since the death of the said George Mallows, respectively, did all things, and all things were done and happened, to entitle him the plaintiff to have the said sum of 800l. made good and paid to him as the survivor of the said George Mallows; but that the defendants had not paid the same, &c.

The defendants pleaded,—first, that they did not undertake or promise as in the declaration alleged, secondly, that it was not proposed and intended as in the declaration alleged, thirdly, that the plaintiff and George Mallows did not advance to Kirby the said sum of 1200l. as in the declaration alleged,—fourthly, that a mortgage-deed was not executed and delivered as in the declaration alleged, fifthly, that the said powers of sale did not become exercisable, nor were they exercised, as in the declaration alleged, sixthly, that the said premises were not sold as alleged, —seventhly, that there was not any deficiency upon the said sale, as in the declaration alleged. Issue thereon.

The cause was tried before Cresswell, J., at the sittings in London after last Trinity Term. It appeared that one Kirby, a builder, being desirous of obtaining 1200l. upon mortgage of four leasehold houses in Russell Terrace, Holland Road, in the county of Surrey, had applied to the plaintiff and Mallows to advance him that sum; that, after some negotiation, they consented to advance the money upon the defendants giving them by way of collateral security to the guarantee set forth in the declaration; that the mortgagor, Kirby, having made default, and the interest being considerably in [833] arrear, the plaintiff (Mallows having in the mean time died) caused the premises to be put up to auction on the 20th of January, 1857, when they were knocked down to a Mrs. Savage for 900l.; and that, Mrs. Savage failing to pay the deposit and sign a contract, the premises were again put up on the 23rd of February, when one Watson became the purchaser at 650l., paid a deposit of 100l., and signed the usual contract.

The conditions under which the property was put up to sale were as follows:—

"1. The highest bidder shall be the purchaser; and, if any dispute shall arise between two or more bidders, the property shall be put up again and re-sold; and no person shall advance less than 10l. at each bidding, nor retract his or her bidding.

"2. The purchaser shall, immediately after the sale, pay into the hands of the auctioneers a deposit of 20l. per cent. in part of the purchase-money, and sign an agreement to pay, at the office of the vendor's solicitors, Messrs. C. & H., the remainder of the purchase-money on or before the 25th of March, 1857, from which time the purchaser will be entitled to the rents and profits of the property, subject to the payment of the rents and performance of the covenants in the leases under which the property is held, and up to which time all outgoings will be cleared by the vendor, but, in case the purchase shall, from any cause whatever, not be completed by the time above limited, the purchaser shall pay interest after the rate of 5l. per cent. per annum on his or her unpaid purchase-money, from that time up to the day of the completion of the purchase. But this provision shall not prevent the vendor from requiring the completion of the purchase on the day appointed.

"3. The vendor will deliver an abstract of her title to the purchaser, or to his or her solicitor, and all objections (if any) to the title shall be stated in writing, and [834] delivered to the said Messrs. C. & H. within seven days of the delivery of such abstract, and all objections and requisitions not so made within such time shall be deemed to have been waived, and the purchaser shall be precluded from making any subsequent objection or objections to the title; and, in case any objection or requisition shall be made or raised on the part of the purchaser, which the vendor may be unable or unwilling to remove or comply with, the vendor shall be at liberty at any time to rescind the contract and put an end to the sale, upon re-paying to the purchaser his or her deposit-money, without any interest, costs, damages, or expenses (notwithstanding any negotiation relative to such objection or objections that may have been carried on).

"4. The title shall commence with four several indentures of lease granted by Mr. John Roberts to Mr. W. Kirby in August, 1856, and the vendor shall not be required to prove or produce, nor shall the purchaser be entitled to investigate, or make any objection in respect of, any earlier or other title than the said leases; and

the production of the receipt for ground-rent up to the 25th of December, 1856, shall be and be deemed sufficient and conclusive evidence of the performance, up to the time of completion of the purchase, of all the covenants in the lease to which the same refers. Any written agreement or agreements which any tenant or tenants may have entered into, and which may not be stamped, shall not be required to be stamped, and no objection or requisition shall be taken or made with reference to such agreements being unstamped.

"5. On payment of the remainder of the purchase-money, and all interest due thereon, the purchaser shall be entitled to have executed to him or her, at his or her own expense, a proper conveyance, but the vendor, being only a mortgagee with a power of sale, shall not be re-[835]-quired to enter into any covenant other than a covenant that she has done no act to incumber.

"6. If any error or omission shall have been made in the description of the property, such error or mistake shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require, such compensation or equivalent to be settled by two referees, or their umpire, to be appointed within seven days after the discovery of such error or omission, in the usual way.

"Lastly. If the purchaser shall neglect or fail to comply with the above conditions, or any of them, his or her purchase-money * shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the property, either by public auction or private sale, with or without notice to such purchaser at the first sale, and the deficiency (if any) at such second sale, and all costs, charges, and expenses attending the same, shall, immediately thereafter, be made good to the vendor by the defaulter at this present sale, and, in case of non-payment thereof, the whole thereof shall be recoverable by the vendor as and for liquidated damages in an action at law, and it shall not be necessary first to tender any assignment to the purchaser; and the profit (if any) arising after † such second sale shall belong to the vendor."

The vendor not being able to produce the receipt for the ground-rent up to the 25th of December, 1856, which by the 4th condition was to be "sufficient and conclusive evidence of the performance of all the covenants in the lease," the purchaser (Watson) declined to complete the purchase; and, at the time this action was commenced, an action had been brought, and was still pending, against Watson, to recover damages for such non-completion.

On the part of the defendants, it was submitted that the action was prematurely brought, inasmuch as there [836] had been no "sale" within the meaning of the guarantee, and consequently no ascertained deficiency.

The learned judge directed a verdict for the plaintiff for the sum claimed, 789l. 17s. 10d., reserving leave to the defendants to move to enter a verdict for them if the court should be of opinion that there had been no sale: and he stayed execution until the fourth day of the following term, on the defendants bringing into court within fourteen days 500l. to abide the event.

Lush, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendants, "on the ground that no sale of the property had been completed, and the event upon which the defendants were to be liable had not happened," and that the 500l. paid into court should be paid out to the defendants.

Collier, Q. C., and Griffits, now shewed cause. There was a sale, within the fair meaning of the guarantee, when there was a valid contract of sale. [Cockburn, C. J. It is an ambiguous term: it may mean either the proceeding which takes place at the auction, or the complete and final transfer of the property: it seems to me to be used in the latter sense here.] A vendor may recover the purchase-money, even though no conveyance has been tendered. Thus, in *Hattock* v. *Kinglake*, 10 Ad. & E. 50, 2 P. & D. 343, on an agreement for the sale of lands, the defendant covenanted to pay the purchase-money on a day certain, for and as the consideration of such sale and purchase, with interest from a day certain to the time of "the completion of the purchase;" and it was held that the covenant of the defendant was an independent covenant, and that the vendor might recover the purchase-money without tendering a conveyance. [Willes, J. There is no doubt about that. Cock [837] burn, C. J. You had two courses open to you,—to enforce performance of the contract by the vendee, or to bring your action for the breach of it. You chose the latter course.

* "Deposit?" † "Upon?"

What is to prevent your putting up the property to sale again?] Equity would prevent that. In the action against the vendee, the plaintiff might recover the stipulated purchase-money; and then he would be bound to convey. [Williams, J. If the purchaser refuses to complete the purchase, equity will not restrain the vendor from selling again.] There is no absolute refusal here. [Cockburn, C. J. Surely your action is prematurely brought: you may peradventure hereafter sell the property for the full amount for which it is charged.] The contract of sale in equity operates a complete change in the property. In Addison on Contracts, 4th edit. 159, it is said, —"The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by livery and seisin, or delivery of possession of the lands to the purchaser, does not, since the passing of the transfer of property act, transfer to the latter the estate or interest agreed to be sold. The written contract, if it amounts to a grant of the fee, would be a feoffment, and would be avoided by the section of the act which enacts that 'a feoffment (other than a feoffment made under a custom by an infant) shall be void, unless evidenced by deed.' A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. In equity, however, the contract operates as an immediate transfer of the estate itself. 'The effect of the contract is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee (until a formal conveyance has been executed). In equity, the estate, from the signing of the contract, becomes the real property of the vendee. It is vendible **[838]** as his, chargeable as his, capable of being incumbered as his, devised as his; it may be assets, and will descend to his heir (*a*).'" [Cockburn, C. J. Does that apply where the purchaser repudiates the contract?] The purchaser does not repudiate the contract: he declines to complete until a certain requisition is complied with. He insists upon the production of the receipts for ground-rent: he is not entitled to that. [Crowder, J. Still the question is, what is the meaning of the guarantee. It must necessarily mean a perfected sale, otherwise there is no ascertained deficiency.] The plaintiff cannot recover more than the 650*l.* from the vendee. Besides, in equity there has been a perfected sale, and that satisfies the terms of this guarantee. In *Baldwin* v. *Belcher*, 1 Jones & Latouche, 18, 26, Lord Chancellor Sugden says, that, "though the purchaser [before the conveyance] has neither a legal nor an equitable right, as against the seller, until he pays the purchase-money, yet, for all purposes of disposition, the equitable estate which he obtained under the contract of sale is subject to his control:" and he adds, —"There is no doubt as to that point: it is a land-mark of the court, and ought not to have been questioned." Again, in Addison, p. 180: "Before the vendor can maintain an action for the recovery of damages by reason of the neglect of the purchaser to tender and accept a conveyance of the estate, and pay the purchase-money, he must produce and establish a good title to the estate agreed to be sold, and it must appear that he was ready and willing to execute a conveyance thereof to the purchaser, on receiving payment of the purchase-money." "So long as a conveyance under seal has not been executed, and a legal transfer of the property from the vendor to the purchaser effected at common law, the vendor cannot **[839]** sue for the purchase money, for he cannot have both the estate and the money: but he is entitled to recover all the damages he has sustained by the breach of contract, and all the costs, charges, and expenses he has incurred." Again, at p. 1141, it is said: "If an estate agreed to be sold has been actually conveyed by the vendor to the purchaser, and has become the property of the latter, and the vendor sues for the non-payment of the purchase money, the measure of damages is obviously the price agreed to be paid, with interest; but, if no conveyance has been executed, and the estate still remains the property of the vendor, the measure of damages is, the difference between the price agreed to be paid and the marketable value of the property, for, the vendor cannot be permitted to have both the estate and the purchase money." For this *Laird* v. *Pim*, 7 M. & W. 474, is referred to. [Williams, J. In the argument of that case it is said that "Sir E. Sugden, 1 V. & P. 10th edit. 374, appears to consider that a vendor may recover the purchase money without having executed a conveyance, where the purchaser has discharged him from so doing."

(*a*) Per Lord Eldon, *Seton* v. *Slade*, 7 Ves. 274.

Lord St. Leonards alludes to that in his 13th edition, 201, n. (*t*) (*a*), where he seems to deny the inference there drawn from his work: he says,—"The passage in the text was not intended to refer to the amount to be recovered."] In *Laird* v. *Pim*, the conveyance of the estate and the payment of the purchase-money were to be simultaneous acts. *Wilks* v. *Smith*, 10 M. & W. 355, is somewhat at variance with the case last cited. There, the declaration alleged, that, by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120*l.*, which the defendant agreed to pay the plaintiff on or before **[840]** the expiration of four years, with interest at 5*l.* per cent. half-yearly, until paid: and it averred that the four years had not expired, that the 120*l.* had not been paid, and that 12*l.* had become due for interest: and it was held that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready and willing to convey it. Here, the purchase-money was to be paid on a given day, which had passed. The case is in that respect very like that of *Dicker* v. *Jackson*, 6 C. B. 103. There, the declaration stated, that, on the 2nd of September, 1844, the plaintiff entered into certain articles of agreement with the defendant for the sale of a piece of land, whereby the plaintiff agreed that he would, within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of his title to the said premises, and deduce a clear title thereto, and that the defendant did thereby agree that he would pay the purchase-money as follows,—the sum of 548*l.* 18*s.* 10*d.* on the signing of the contract, and the residue or sum of 4940*l.* 10*s.* on or before the 2nd day of September, 1848, together with interest, &c. The declaration,—after alleging that the plaintiff did, before the commencement of the suit, and within one month from being required so to do, deliver to the defendant such an abstract of his title to the said premises, and deduce such a clear title thereto, as in and by the said articles in that behalf specified and required,—alleged for breach the non-payment by the defendant of the residue of the purchase-money. The defendant pleaded, that the plaintiff did not deliver to the defendant an abstract of title to the said premises, and deduce such a clear title thereto, as in and by the said agreement specified and required, modo et forma, &c. And the plea was held bad, inasmuch as the performance by the plaintiff of the contract with respect to **[841]** delivering an abstract, &c., was not a condition-precedent to his right to maintain an action for the non-payment of the purchase-money, and consequently that the allegation in the declaration of such performance was immaterial and not traversable. It is plain that there has here been such a sale as to entitle the plaintiff to recover the difference upon the defendants' guarantee.

Lush, Q. C., and R. Clark, contrà, were not called upon.

Cockburn, C. J. I am of opinion that this rule should be made absolute. The case appears to me to be a very clear one. The action is brought upon a guarantee given by the defendants, whereby they undertook, that, if after any sale of certain property referred to, the purchase-money should not be sufficient to satisfy a sum of 1200*l.* which had been advanced on mortgage thereof, and all interest, costs, charges, and expenses which might be due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency. The question turns upon the construction of the word "sale" in that instrument. I am clearly of opinion, that, taken in conjunction with the rest of the document, it means a completed sale. If not, it is obvious that the plaintiff might treat the sale as incomplete (as, indeed, he has done), and bring an action against the vendee, and, having recovered damages against him for his breach of contract, put the property up to sale again, and perhaps realize more than the amount of the charge upon it: or, he might compromise with the vendee, and re-sell. The amount of the deficiency which the defendants were to make good could only be ascertained by a complete sale and realization of the price. It is said that there was a sufficient sale within the meaning of the guarantee, because there **[842]** was a contract which a court of equity would enforce. It is unnecessary, however, to enter into that. The plaintiff has not resorted to a court of equity. The plain meaning of the guarantee being as I have stated, we need not speculate upon what a court of equity would do. It is enough to say that the contract has not been carried out, and consequently that the action is not at present maintainable.

(*a*) The same observation occurred in the 12th edition, p. 171, n. (*y*).

WILLIAMS, J. I am entirely of the same opinion. The word "sale" in the guarantee must mean such a sale as that the proceeds shall be realized, otherwise there are no means of measuring the damages the plaintiff is entitled to recover against the present defendants. They may be larger or smaller according to the fortune of a re-sale. It is said that the plaintiff would be estopped from demanding more than the 650l. from the purchaser in the action against him. But that does not exclude the other contingency. It may be that the contract may never be performed, and a re-sale may be more advantageous to the defendants. The plaintiff has no right to exclude them from that chance. As to whether, in the action against the vendee, the full amount of the stipulated purchase-money may be recovered, I cannot entertain a doubt. *Laird* v. *Pim*, 7 M. & W. 474, is in point. But I do not see that that is decisive of this matter. The action against the purchaser may be defeated, and there may be a bill in equity to enforce performance of the contract. And it may be that a re-sale might produce more, and so the damages recoverable against the present defendants might be materially lessened. What the effect of the contract is in equity, has nothing to do with the present question.

CROWDER, J. The question is, what is the meaning of the term "sale" in this guarantee. Looking at all the **[843]** circumstances, and at the consequences of a different construction, I can arrive at no other conclusion than my Lord and my Brother Williams have arrived at. It seems to me to be impossible that the construction contended for by Mr. Collier can be that which the parties intended. The property was about to be mortgaged, and the defendants, in consideration of the plaintiff agreeing to advance 1200l. thereon, bound themselves to make good any deficiency that might arise on a sale. It never could have been intended that it should rest on the mere contract. Many circumstances might arise which would enable the plaintiff to realize much more, or cause him to realize less, than the contract gave him. I think the parties clearly contemplated such a sale as should realize the amount of the purchase-money, and shew definitively the balance for which the defendants were to be liable. The plaintiff assumes that the purchaser has committed a breach of his contract, and brings an action for that breach. Now he says he is entitled to specific performance. That is blowing hot and cold. Suppose the contract should for any fair reason be altered or rescinded, why are not the defendants to have the value ascertained by another sale? It might turn out for their benefit. It may be that the purchaser is unable to pay, and that the sale is rescinded on that account. How is the amount of the defendants' liability to be ascertained until there has been a re-sale!

WILLES, J. I am entirely of the same opinion. The sale mentioned in the guarantee must be understood to mean a sale by which it is ascertained that the mortgagee can get nothing more out of the land. Until the result of the action against the vendee is known, and the contract with him either carried out or rescinded, and the property sold again, I cannot say that the time **[844]** has arrived when the security has become exhausted: and, until that has happened, the surety cannot be called upon. In *Hallen* v. *Runder*, 1 C. M. & R. 266, 271, 3 Tyrwh. 959, it being said in argument that "it has been the practice, where the possession of land sold has been given, to insert a count for land bargained and sold," Parke, B., said: "There you must shew an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the indebitatus count. In point of practice, such a count seldom occurs, and it generally could not be sustained, because the deed of conveyance which must be shewn to pass the interest in the land, generally contains a release of the purchase-money." I think this rule must be made absolute.

Rule absolute.

Collier prayed that the rule might be made absolute to enter a nonsuit, instead of a verdict for the defendants.

To this the court assented, and the rule was accordingly drawn up to set aside the verdict and enter a nonsuit, and for the payment of the 500l. out of court to the defendants' attorney.

Feb. 1st.—A verdict was found for the plaintiff at the sittings after Trinity Term, 1857: in Michaelmas Term, a rule nisi was obtained to enter a verdict for the defendants: this rule was made absolute to enter a nonsuit, in Hilary Term, 1858:—The plaintiff having died on the 14th of December, 1857, the court allowed judgment

to be entered nunc pro tunc as of Michaelmas Term.—No will of the deceased having been proved, nor any letter of administration granted, the rule was drawn up calling upon the legal representatives (if any), upon notice of the rule to be given to them or to the attorney in the cause of the late plaintiff.

On a subsequent day in this term (Jan. 27), upon **[845]** affidavits stating that the defendants and their attorney had been informed since the above rule was made absolute, that the plaintiff had died on the 14th of December last, and that due search had been made at "the principal registry of Her Majesty's court of Probate in Doctors' Commons," but that no probate of the will or letters of administration had been granted of the estate and effects of George Moor, the plaintiff,

R. Clarke moved for a rule to shew cause why the rule of the 12th should not be amended by entering a verdict for the defendants instead of a nonsuit. He referred to the 139th section of the Common Law Procedure Act, 1852, which enacts that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict;" and he submitted that the corresponding provision in the 17 Car. 2, c. 8, having been held not to apply to nonsuits (*a*), the defendants were, by the indulgence granted to the plaintiff in varying the form of the rule, deprived of the power of entering their judgment and proceeding thereon by scire facias. [Williams, J. Why should you not enter your judgment as of the term after the trial, nunc pro tunc? The delay was the act of the court.] In *Blewett* v. *Tregonning*, 4 Ad. & E. 1002, under the rules of Hilary, 4 W. 4, General Rules and Regulations, 3 (*b*), it was held, that, where the plaintiff has obtained a verdict, but the defendant had obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the mean time the defendant has died, the court will order judgment to be entered nunc pro tunc, though more than two terms have elapsed since the discharge of the rule, if it appear that the delay was occasioned by the **[846]** taxation of costs, and no fault be specially imputed to the plaintiff. [Cockburn, C. J. Upon whom will you serve the rule? Who are you to call upon?] Upon the personal representatives. [Cockburn, C. J. But you say there are none.]

The Clerk of the Rules having informed the court that a similar difficulty had arisen in a case of *Deraux* v. *Connolly*, in the year 1850, and that the court had then ordered the rule to be drawn up calling upon the legal representatives of the plaintiff (if any), upon notice of the rule to be given to them or to the attorney in the cause of the late plaintiff, they directed the same form to be adopted here.

Griffits now shewed cause, instructed by the late plaintiff's attorney. He submitted that the court had no power to make the rule absolute, inasmuch as there were no existing legal representatives of the late plaintiff; and, if there was a will unproved, it would be premature to make absolute a rule which would bind them, when they had never been in a position to be heard in opposition to it. Besides, there is already a judgment of nonsuit upon the record, and this rule does not seek to set that aside. [Williams, J. That judgment amounts to nothing.] Whatever its value, there it remains. [Willes, J. The rule we are about to pronounce will if necessary remove it.] A judgment of nonsuit is no more within the 139th section of the Common Law Procedure Act, 1852, than it was within the statute of Charles. [Williams, J. This application is not founded upon the Common Law Procedure Act, 1852. If it were, no motion would be necessary. The record will run from the time of the trial. The plaintiff, being called, did not come.]

[847] R. Clarke, in support of his rule, was stopped by the court.

Cockburn, C. J. I am of opinion that this rule must be made absolute. The court is now called upon to rectify what was done at the trial, acting nunc pro tunc. The executors will not be in any respect prejudiced. This is not a fresh proceeding taken after the death of the plaintiff. It is a proceeding, not under the statute, but under the ordinary inherent jurisdiction of the court. The whole is to be taken to have been done at the time of the trial. As to the circumstance of a judgment of nonsuit being already entered, that makes no difference. If it is wished, it may be made a part of this rule that that judgment be set aside.

(*a*) See Tidd's Practice, 9th edit. p. 933.
(*b*) See rule 56 Hilary, 1853, 13 C. B. 16.

WILLIAMS, J. I am of the same opinion. When it is agreed at nisi prius that leave should be reserved to the defendants to move to enter a nonsuit, it amounts to this, that a nonsuit is to be entered if the court so think fit; but it is treated as if there had been a formal nonsuit at the trial. If that had taken place here, the defendants would have been entitled to enter their judgment before the death of the plaintiff. By the act of the court, the entry of the judgment has been delayed until after the plaintiff's death. By entering the judgment nunc pro tunc, the parties will be precisely in the same situation as if there had been immediate judgment. The fact of the will not having been yet proved can make no difference. It will be perfectly competent to the executors, when they have proved the will, to come and ask the court to set aside the judgment, if they can shew any reasonable and substantial ground for so doing But I must confess I do not see what grounds they can have.

[848] CROWDER, J. I am of the same opinion. I see no reason why the arrangement that was made at the trial should not be carried out. The defendants are not to be prejudiced by the delay which has arisen from the act of the court.

WILLES, J., concurring,

Rule absolute.

End of Hilary Term.

MEMORANDUM.

In the course of this Term, viz. on the 15th of January, the Hon. Sir William Maule, formerly one of the judges of this court, died, in his 70th year.

COMMON BENCH REPORTS. New Series. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, and in the EXCHEQUER CHAMBER, from Hilary Vacation, 1857, to Trinity Term, 1858. By JOHN SCOTT, Esq., of the Inner Temple, Barrister-at-Law. Vol. IV. London, 1859.

[1] CASES ARGUED AND DECIDED IN THE COURT OF COMMON PLEAS, IN HILARY VACATION, IN THE TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco at these sittings were,—Williams, J., Crowder, J., Willes, J., and Byles, J.

TABOR AND OTHERS *v.* EDWARDS. Feb. 10th, 1858.

[S. C. 27 L. J. Ch. 183; 4 Jur. N. S. 339. See *Corner* v. *Sweet*, 1866, L. R. 1 C. P. 463.]

To a scire facias suggesting a further breach of a bond, the defendant pleaded,—secondly, that, after the commencement of the action, and before the issuing of the scire facias, he was a trader, &c, and indebted, &c, and suspended payment; and that thereupon "a certain memorandum of arrangement within the meaning and according to the provisions of the said statute" (12 & 13 Vict. c. 106) was made between him and the several persons whose names were thereunto subscribed, being creditors, &c.; that "all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument within the terms of the said statute upon all the creditors of the defendant:" that the plaintiffs were creditors, and, after the said suspension of payment, and after the said memorandum of arrangement had been so signed, and before the issuing of the scire facias, had notice; and that the defendant and the parties of the other part had at all times since the making of the memorandum of arrangement well and truly observed the agreements, &c. therein; and that, by reason of the premises, and by force of the statute, the said memorandum of arrangement became and was and is obligatory on the plaintiffs as if they had signed the same.—The third plea set up a judge's order, made by consent, whereby the proceedings were ordered to be stayed on payment of costs, and averred that the costs were duly paid.—Held, that the second plea was bad, inasmuch as it disclosed nothing to shew that the memorandum of agreement was a bar to the action.—Semble, that such a deed must, to satisfy the 224th section of the 12 & 13 Vict. c 106, contain an absolute assignment of all the debtor's property for distribution amongst his creditors; and semble, that the plea should have alleged that such a notice was given as is required by s. 225.—Held, also, that the third plea was bad.

This was a scire facias quare executionem non.

The writ recited that whereas William Tabor, David Lloyd, and James Lyne Hancock, on the 14th of No-**[2]**-vember, 1856, in our court of Common Pleas at Westminster, by the judgment of the same court recovered against you the said

Henry Edwards 507l. 19s. 2d., whereof you the said H. Edwards are convicted; which said judgment was obtained upon a bond dated the 21st of January, 1856, and sealed with the seal of you the said H. Edwards, whereby you the said H. Edwards became held and firmly bound to the said W. Tabor, D. Lloyd, and J. L. Hancock, in the penal sum of 500l., to be paid to the said W. Tabor, D. Lloyd, and J. L. Hancock, with and under a condition to the said bond subscribed, of which condition a breach had been committed by you the said H. Edwards before the commencement of the said action in which the said judgment was obtained as aforesaid; which said condition was and is in the words and figures and of the tenor and effect as follows, that is to say,—"Whereas the above-bounden John Amey hath agreed to effect a policy of assurance with the said society, upon the life of himself, in the sum of 900l., at the annual premium of 32l. 14s. 9d.; and whereas, upon the request of the above-bounden obligors, the obligees in the above-written bond lately agreed to lend to the said John Amey, out of moneys in their hands in trust for the Gresham Life-Assurance Society, the sum of 300l., upon the terms that the re-payment thereof, with interest for the same at the rate of 5l. for every 100l. for a year, should be secured to the said obligees, their executors, [3] administrators, and assigns, by the joint and several bond of the said John Amey and of the above-mentioned Charles Barber and Henry Edwards as his sureties, and by a deposit of the said recited policy, and by the provisions hereinafter contained; and whereas the said obligees have, immediately before the execution of the above-written bond, paid the said sum to the said John Amey, as he doth hereby admit, and the said policy hath been deposited accordingly: Now, the condition of the above-written bond is such, that, if the said obligors, or some or one of them, do and shall pay or cause to be paid unto the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, the full sum of 300l. of lawful money of Great Britain, with interest, by the instalments and in manner following, that is to say, the said principal sum by six consecutive instalments of 50l. each, to be respectively paid at the chief office for the time being of the said society on the 21st of July and the 21st of January in every year until the whole of the said principal sum shall be fully repaid, —the first of such payments to be made on the 21st of July now next ensuing, —and do and shall on the said several days of payment pay or cause to be paid to the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, at the office aforesaid, interest after the rate of 5l. for every 100l. by the year for the said principal sum, or for so much thereof as from time to time shall remain unpaid,—such interest to commence from the day of the date of the above-written bond; and if in the mean time the premiums on the said policy shall be duly paid, and the said policy shall in all respects be duly maintained and kept in force and available, and no one of them the said obligors shall in the mean time die or go to reside out of Eng-[4]-land, or make or attempt to make any arrangement to depart from the united kingdom, or become bankrupt, or be declared insolvent, or be imprisoned for debt or outlawed, or compound or attempt to compound with his creditors, or take or attempt to take the benefit of any act or acts now or hereafter to be in force for the protection, relief or discharge of insolvent debtors, or of any act or acts now or hereafter to be in force for facilitating arrangements between debtor and creditor, or accept or take the benefit of any letter of licence or deed of arrangement with all or any of his creditors, or obtain or attempt to obtain any extension of time for payment in whole or in part of any debt or debts due, owing, or payable, or to become due or owing or payable from him, or make or execute any bill of sale or warrant of attorney as a security for or in satisfaction of any such debt or debts, or suffer judgment by default or otherwise in any action or proceeding for the recovery of any such debt or debts, or give or consent to any order of a judge for payment of such debt or debts,—then and in such case, and after such payments as aforesaid, the above-written bond shall be void, or else shall remain in full force: Provided always, that, if default shall be made in payment of the said instalments and interest, or any of them, or any part or parts thereof respectively, for the space of twenty-one days after the day or days hereinbefore appointed for the payment thereof, or if, whilst any money shall remain on the security of the above-written bond, the premiums necessary for keeping on foot the said policy shall not be duly paid by the said obligors, or some or one of them, or if the said policy shall for any other cause become void or voidable, or if, before the 21st of January, 1859,

any one or more of the said obligors shall die or go to reside out of England, or make or attempt to make any arrangement to depart from the united kingdom, [5] or become bankrupt, or be declared insolvent, or be imprisoned for debt, or outlawed, or compound or attempt to compound with his or their creditors, or take or attempt to take the benefit of any act or acts now or to be hereafter in force for the protection, relief, or discharge of insolvent debtors, or of any act or acts now or to be hereafter in force for facilitating arrangements between debtor and creditor, or accept or take the benefit of any letter of licence or deed of arrangement with all or any of his or their creditors, or obtain or attempt to obtain any extension of time for payment in whole or in part of any debt or debts due, owing, or payable, or to become due or owing or payable from him or them, or make or execute any bill of sale or warrant of attorney as a security for or in satisfaction of any such debt or debts, or suffer judgment by default or otherwise in any action or proceeding for the recovery of any such debt or debts, or give or consent to any order of a judge for payment of any such debt or debts,—then and in any such case, and at any time or times thereafter, the above-written bond shall be a security for, and may be put in force for obtaining and enforcing, immediate payment by the said obligors, or any or either of them, their, any or either of their, or his, heirs, executors, or administrators, unto the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, of the said principal sum of 300*l.*, with interest for the same after the rate and to be computed as aforesaid, or so much of the same principal sum and interest as shall not have been paid, and also for obtaining and enforcing the payment by the said obligors, or any or either of them, or any or either of their or his heirs, executors, or administrators, unto the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, of all and every the premiums and premium, sums and sum of money for which [6] the said obligees or any of them shall have obtained an acknowledgment of credit or receipt in writing from the said Gresham Life-Assurance Society for the purpose of keeping on foot or renewing the said policy against the said company, notwithstanding that default shall have been made by the said obligors and every of them in making the payments necessary for keeping the said policy on foot, or that any breach of the conditions or stipulations contained in or indorsed on the said policy shall have occurred, together with interest for such premiums or premium, sums or sum of money for which such credit or receipt shall have been given as aforesaid,—such interest to be computed on the respective premiums or sums, after the rate aforesaid, from the time or times from which such credit or receipt shall have been given for the same; and further for obtaining and enforcing from the said obligors, or any or either of them, their or any or either of their, or his, heirs, executors, or administrators, the payment to the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, of all costs, charges, and expenses to be paid or incurred by them or any of them in or about the enforcing or attempting to enforce the above-written bond against the said obligors, their heirs, executors, administrators, or assigns, or any one or more of them, or otherwise incident to or consequent upon any breach or default of the foregoing conditions, or any of them: Provided always that nothing herein contained shall extend or be deemed to extend as imposing any obligation upon the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, or upon the said Gresham Life-Assurance Society, to renew or cause or procure to be renewed the policy in cases of non-payment of any such premium or premiums as aforesaid, or in case of breach or non-[7]-observance of any of the provisos, conditions, or stipulations contained in or indorsed upon the said policy: Provided further, that, if default shall be made in payment of any of the instalments of the said principal sum, or in payment of the interest thereon, or of any premium or premiums upon the said policy, contrary to the conditions aforesaid, and the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, shall have waived any such default, and shall have accepted payment of any of the said instalments and interest, or have permitted the renewal of the said policy (if the said Gresham Life-Assurance Society shall choose to renew the same) without enforcing full payment of the said principal sum, and the interest thereof, or so much thereof as shall then remain unpaid, such waiver and acceptance or renewal shall in no wise prejudice or defeat the right of the said obligees, or the survivors or survivor of them, or their executors, administrators, or assigns, to proceed

upon the above-written bond, on the happening of any subsequent breach or breaches of the foregoing condition, or any part thereof, and so from time to time: Provided further, that the giving time to the said John Amey, or the having any other dealings with him by the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, or any of them, shall not affect, release, or discharge the said sureties, or either of them, or their or either of their heirs, executors, or administrators, from liability under the above-written bond, but that such liability shall continue until all moneys intended to be secured by the above-written bond shall be fully paid:" And whereas we are now also informed on behalf of the said W. Tabor, D. Lloyd, and J. L. Hancock, in our said court, that, after the commencement of the said action wherein the said judgment was recovered as aforesaid, you the said [8] H. Edwards compounded with your creditors within the meaning of and contrary to the said condition, and that, at the time when you so compounded with your creditors as aforesaid, a large part of the said principal sum of 300l. and interest in the said condition mentioned, to wit, in all, the sum of 260l., was and remained unpaid, and thereby and by virtue of the said condition, upon such compounding as aforesaid, became and was payable to the said W. Tabor, D. Lloyd, and J. L. Hancock, and that the said sum of 260l. still is and remains in arrear and unpaid to the said W. Tabor, D. Lloyd, and J. L. Hancock,—for which said breach, being another and further breach, since the said judgment, of the said condition, the said W. Tabor, D. Lloyd, and J. L. Hancock have humbly besought us to provide them a proper remedy: And we, being willing that what is just in this behalf should be done, do, according to the statute in that behalf made and provided, command you, that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of Common Pleas at Westminster to shew cause why execution should not be had and awarded against you upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned breach of which we are now informed as aforesaid, if it shall seem expedient for the said W. Tabor, D. Lloyd, and J. L. Hancock, and further to do and receive what our said court shall then and there consider of you in this behalf: And take notice, that, in default of your so doing, the said W. Tabor, D. Lloyd, and J. L. Hancock may proceed to execution. Witness, &c. And the said H. Edwards has appeared to the said writ; and the said W. Tabor, D. Lloyd, and J. L. Hancock prayed that execution might be adjudged to them against the said H. Edwards upon the said judgment so obtained for the damages to be assessed by [9] reason of the said last-mentioned breach of the said condition of the said bond, according to the form and effect of the said recovery, &c.

The defendant pleaded,—first, that he did not, after the commencement of the said action, compound with his creditors, within the meaning of or contrary to the said condition, as alleged.

Secondly, that, after the commencement of the said action, and before the issuing of the scire facias herein, he, the defendant, was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the Bankrupt Law Consolidation Act, 1849, and, before and at the time of the making of the memorandum of arrangement thereinafter mentioned, was indebted to the parties of the other part of the said memorandum of arrangement, and to divers other persons, in divers sums, and was unable to pay the same in full: That the defendant, before the time of making the said memorandum of arrangement, and after the passing and coming into operation of the said statute, suspended payment; and thereupon a certain memorandum of arrangement, within the meaning and according to the provisions of the said statute, was made between the defendant of the first part, and the several persons whose names were thereunto subscribed (being respectively creditors of the defendant, or the authorized agents of such creditors) of the other part: That all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument within the terms of the said statute upon all the creditors of the defendant: That the plaintiffs were at the time of the making of the said memorandum of arrangement creditors of the defendant in respect of the causes of action in the declaration mentioned, within the provisions of the said act; and that, after the said suspension of payment by the de-[10] fendant as aforesaid, and after the said memorandum of arrangement had been so signed as aforesaid, and before the issuing of the said scire facias, the plaintiffs had notice; and that he the defendant and the said parties of the other part had at all times since the making of the said

memorandum of arrangement well and truly observed and performed in all respects the premises and agreements in the said memorandum of arrangement contained on their parts to be fulfilled and performed; and that, by reason of the premises, and by force of the said statute, the said memorandum of arrangement became and was and is obligatory on the plaintiffs as if they had duly signed the same.

Thirdly, that, after the commencement of the same action, the defendant compounded with his creditors, and that, after such compounding, by a certain order of Martin, B., made in the said action, upon hearing the attorneys or agents on both sides, it was ordered that the plaintiffs should be at liberty to sign judgment in the said action, with costs, to be taxed, and that the proceedings should be stayed on the costs being paid; that the said costs were afterwards, on the 18th of November, 1856, taxed by one of the masters at the sum of 7l. 19s. 2d.: that the defendant thereupon, and before the issuing of the said writ of scire facias, paid to the plaintiffs the said sum of 7l. 19s. 2d. for such costs; and that, except as in that plea before mentioned, he the defendant had not, after the commencement of the said action, compounded with his creditors within the meaning of or contrary to the said condition.

The plaintiffs joined issue on the several pleas.

They also demurred to the second plea, the ground stated in the margin being "that the second plea does not set forth or shew the existence of any memorandum of arrangement operating as a bar to the scire facias."

And, for a second replication to the third plea, the **[11]** plaintiffs said that the said order in that plea mentioned was and is in the words and figures and of the tenor and effect as follows, that is to say,—"*Tabor and Others* v. *Edwards*." Upon hearing the attorneys or agents on both sides, I do order that the plaintiffs be at liberty to sign judgment in this action for 500l., with costs, to be taxed, and that the proceedings be stayed upon costs being paid; and that the plaintiffs had not, nor had the said judge, at the time of the said order, knowledge or notice of the said compounding by the defendant with his creditors in the third plea mentioned.

The plaintiffs also demurred to the third plea, the ground stated in the margin being "that the said order in the third plea mentioned is no bar to the scire facias."

The defendant joined in demurrer, and demurred to the second replication to the third plea, the ground alleged being "that the said order in the third plea mentioned is a bar to the scire facias, whether Sir S. Martin at the time of the order had notice or not." Joinder.

Archibald, for the plaintiffs (*a*). The second plea is bad. **[12]** It is meant for a plea under the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) **[13]** be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memo-

(*a*) The points marked for argument on the part of the plaintiffs, were—

"As to the second plea,—that the defendant's second plea does not set forth or shew any memorandum of arrangement which operates in any manner as a bar to the scire facias.

"That the allegation in the second plea, that a certain memorandum of arrangement was made within the meaning and according to the provisions of the Bankrupt Law Consolidation Act, 1849, without any further statement of the contents, substance, or effect of the said instrument, is wholly unmeaning; and that the provisions of the said deed ought to have been set forth in the said plea.

"That the said second plea is bad, inasmuch as it does not shew that the said memorandum of arrangement was under seal, or contained any valid release of any of the debts or causes of action mentioned or referred to in the said plea; and that, unless under seal, such memorandum of arrangement would not be pleadable in bar.

"That the said second plea does not shew that the said memorandum of arrangement was duly signed, according to the provisions of the said act, by six sevenths in number and value of the creditors of the defendant, or that three months had elapsed

randum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section enacts "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement,—unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid: and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application: and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby." Here, the second plea merely states that a certain memorandum of arrangement within the meaning and according to the provisions of the statute was made between the defendant and the several per-**[14]**-sons whose names were thereunto subscribed, being creditors of the defendant,—not that it was a memorandum touching the defendant's liabilities, and his release therefrom, and the distribution, &c. of his estate; nor is there anything to shew that it was a memorandum within the above sections, except the general averment "that all things were performed and done as required by the said statute, to make the said memorandum of arrangement an obligatory instrument, within the terms of the said statute, upon all the creditors of the defendant." If a form of plea had been given in the statute, that would have been intelligible enough: but, as it stands, the plea cannot be good unless it sets out the provisions of the deed, so that the court may see that it is a deed within the act. [Crowder, J. Might you not, if the facts would warrant it, have negatived the deed being in accordance with the statute?] It is for the defendant to make out a good defence to the plaintiff's claim. [Crowder, J. The plea does state that it is a deed of arrangement within the act.] It does not point to these sections: and there are other provisions in the act to which it might have been intended to apply: it might have been an arrangement made with the sanction of the court, under the 211th and subsequent sections. Whatever the effect of the general averment, it clearly cannot be held to amount to an averment that the period of notice had expired. In *Bloomer* v. *Darke*, 2 C. B. (N. S.) 165, it was held that a plea of arrangement under s. 224 is not good, unless it shews on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of all the creditors; and that the want of such specific averments in the plea is not supplied by the general allegation found in this plea. In the course of the argument in that case, Cresswell, J., observes, "The general words, 'that all matters and **[15]** things were done and happened,' &c.,

after notice to the plaintiffs of the defendant's suspension of payment, or that the plaintiffs ever had any such notice or knowledge of any application for a certificate of the due signature of the said memorandum, or that any such certificate was granted.

"And that the alleged memorandum of arrangement, being the breach of the condition of the said bond alleged in the declaration, cannot be set up by way of defence thereto."

As to the third plea,—"That the third plea is bad, inasmuch as a judge's order to stay proceedings in an action cannot be pleaded in bar of such action: and that it appears by the order as set forth, that it was not and could not have been meant to stay proceedings in respect of the breach now alleged."

As to the second replication to the third plea,—"That the second replication to the third plea is a sufficient answer thereto, and shews that the said order was only intended to apply to any breach of the said condition which had occurred prior to the issuing of the writ of summons in the said action, and had no application whatever to the breach now alleged."

cannot surely be read 'all words were inserted in the deed necessary to make it a compliance with the act.'" [Williams, J. The plea is certainly very loose.] Even in *Bloomer* v. *Darke* the plea was much fuller than that in the present case. [Willes, J. The plea in that case did not shew that the deed relied upon was a deed within the meaning of the act.] It has always been the practice to set out the terms of the deed. [Willes, J. It certainly was not so before the middle of the year 1855. The House of Lords in *Larpent* v. *Bibby*, 5 House of Lords Cases, 481, decided that you must not look to the 224th section only, but that it must be made appear that the deed provides for the distribution of the debtor's property amongst all his creditors. That is stated here, by the general averment.] There was a general averment in *Bloomer* v. *Darke*. [Willes, J. Not that the deed was in accordance with the provisions of the statute; but that "all matters and things were done and happened according to the said act, to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same." It may be that the deed is conditional on the estate proving sufficient to pay all the creditors 20s. in the pound; or it may not contain a release. [Willes, J. That is a better point: it might be only a letter of licence for two years.] Exactly so. [Crowder, J. If it is a deed under the 224th section of the 12 & 13 Vict. c. 106, it must contain a release: if not, should you not have replied it?] To constitute a defence to the action, the deed must amount to a release or a bar, and that should appear by the plea. The third plea sets up a stay of proceedings by judge's order. No action lies for disobedience of a judge's order: the remedy is by attachment: *Dent* v. **[16]** *Basham*, 9 Exch. 469,—even though the order be made by consent: *Hookpayton* v. *Bussell*, 10 Exch. 24. The converse is equally true, viz. that it cannot be used as a defence to an action. The second replication to the third plea is unexceptionable.

Malcolm, contrà (*a*)[1]. The second plea sets out that which, if proved, affords a complete answer to the action. A "memorandum of arrangement" under the statute need not be by deed. [Willes, J. If the plea had gone on to say, "and whereby it was agreed that the defendant should be released and discharged from all his debts," &c., the difficulty now suggested could not have arisen. If you will not put in an averment of that sort, we cannot help thinking that the deed is no release.] The plea does so allege in general terms. It could **[17]** not have been a statutory suspension of the right of action for a limited time; for, that would not be a "memorandum of arrangement" within the statute at all (*a*)[2], which the plea expressly avers this deed to have been. [Williams, J. Would a letter of licence for two years be a bar?] That would not be within the 224th section. The allegation here is altogether inconsistent with anything short of a deed or memorandum under that section. The ordinary deed of inspection is not the thing there contemplated. [Williams, J. It is much to be regretted that we do not know what the deed really is. Archibald intimated that he had ascertained that there was nothing in the deed which could make the plea any

(*a*)[1] The points marked for argument on the part of the defendant were as follows: –

"That the declaration shews no cause of action; the stipulation in the contract, that the defendant should not compound or attempt to compound with his creditors, being illegal and contrary to the policy of the bankrupt laws:

"That the second plea does set forth and shew a memorandum of arrangement which operates as a bar to the scire facias:

"That the allegation in the second plea, that a certain memorandum of arrangement was made within the meaning and according to the provisions of the Bankrupt Law Consolidation Act, 1849, without any further statement of the contents, substance, or effect of the said instrument, is sufficient; and that, if the plaintiffs contended that the contents, substance, or effect of the said instrument were not in accordance with the provisions of the said act, they ought to have set out the said instrument in terms, and demurred thereto:

"And that the Bankrupt Law Consolidation Act, 1849, does not require a memorandum of arrangement to be made by deed, or under seal, and a memorandum of arrangement under the said act is pleadable in bar, though not under seal."

(*a*)[2] See *Tetley* v. *Taylor*, 1 Ellis & B. 529, *Larpent* v. *Bibby*, 5 House of Lords Cases, 481.

better.] As to the third plea, the instrument there referred to is something more than a mere judge's order: it amounts to an accord and satisfaction, sanctioned by the judge.

Archibald, in reply. No answer has been given to the objection, that, for anything that appears upon the face of the second plea, the deed may not have contained an absolute release. In a case now pending in the Exchequer, —*Irving* v. *Gray*, —that court treated a deed of inspection as being within the 224th section. [Crowder, J. How do they deal with *Tetley* v. *Taylor*, 1 Ellis & B. 529?] No judgment has yet been delivered (*b*).

Williams, J. We entertain no doubt as to the third plea being a bad one. The second, however, raises an [18] important question, as to which it is desirable that we should take time to consider.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court:—

Upon the argument of this demurrer, the court entertained some doubt as to the construction of the 224th section of the 12 & 13 Vict. c. 106, with reference to the decisions as to whether, in cases of arrangements within that section, there must be an express assignment on the part of the insolvent of all his estate and effects. But we think it unnecessary to consider that question, because we are of opinion, that, assuming it to be requisite to the validity of the deed or memorandum of arrangement under that section that there should be an assignment by the debtor of all his pro-[19]-perty, such a deed or memorandum might be valid notwithstanding that it should not operate as a bar to an action by a creditor. It is therefore quite consistent with the allegation in the third plea that the deed or memorandum of arrangement therein referred to contains nothing which can operate as a bar to the action; and, consequently, the plea is no answer. As there is nothing in the plea to inform us what are the contents of the deed, we cannot hold it to be a bar to the action. In addition to this, the court are by no means satisfied,—though it is unnecessary to give any decided opinion upon the point, that the plea is not bad, on the ground that it fails to satisfy the requirements of the 224th section, in this, that it does not allege that the notice was given as required by that section, for, it is at the best extremely doubtful whether the general averment is not consistent with the thing not having been done within the time prescribed by the 224th section.

For these reasons, we are of opinion that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

(*b*) *Irving* v. *Gray* has since been reported in 3 Hurlst. & N. 34. The way in which the court, in giving judgment, deal with *Tetley* v. *Taylor*, is as follows (p. 90): "We agree that the trusts of the deed must be such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors. This court, in *Drew* v. *Collins*, 6 Exch. 670, and the court of Common Pleas in *Bell* v. *Fisher*, 12 C. B. 363, decided that a deed of arrangement must provide for a distribution of all the trader's estate amongst all his creditors. The court of Exchequer Chamber in the case of *Tetley* v. *Taylor*, 1 Ellis & B. 529, on a writ of error brought upon a decision of the court of Queen's Bench, decided the same. This question was much discussed in the House of Lords, in the case of *Larpent* v. *Bibby*, 5 House of Lords Cases, 481. It was not, however, then determined. The judges who heard the argument were not altogether agreed upon this point, and the case was decided on another ground. The court of Common Pleas has, since the case of *Larpent* v. *Bibby*, viz. in the case of *Bloomer* v. *Darke*, 2 C. B. (N. S.) 165, held that a plea of arrangement under the 224th section is not good unless it shews on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of the whole of the creditors. No part of the trader's property is in terms, or, as we think, by necessary implication, excluded from the operation of the present deed, as was the case in *Drew* v. *Collins* and *Tetley* v. *Taylor*."

[20] POPPLETON *v.* BUCHANAN. BUCHANAN *v.* POPPLETON. Feb. 10th, 1858.

[S. C. 27 L. J. C. P. 210; 4 Jur. N. S. 414; 6 W. R. 372.]

By the particulars on a sale by auction of freehold land, the property was described as "land-tax redeemed." The only evidence of that fact was a statement in the witnessing part of a conveyance (dated in 1844,—twelve years before the date of the sale) from one Mears to one Humphreys (from whom the property came by various mesne assignments to the vendor), in which the then vendor acknowledged to have received the amount of the purchase-money for the purchase of the premises "and the fee-simple and inheritance thereof in possession, free from land-tax and all other incumbrances," and a statutory declaration by Mears, to the effect, that, to the best of his knowledge and belief, no land-tax had ever been paid for or in respect of the land "subsequently to the purchase or redemption thereof in or about the year 1799:"—Held, that this was not such evidence of the fact of the land-tax having been redeemed, as to entitle the vendor to insist upon a completion of the purchase, —notwithstanding a condition which provided that "every deed and entry on or copy of court roll dated more than ten years ago shall be conclusive evidence of everything recited or stated therein:" for, that this was not a direct statement or recital of the fact that the land-tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid a certain sum for the land as being free of land-tax and other incumbrances; and it was consistent with such statement that the land-tax had not been redeemed, but that it had been purchased or assigned to the then purchaser, or to a trustee for him, in whom or in whose representatives it might still be vested.—And held, that the purchaser was entitled to recover back the deposit with interest, and the costs of investigating the title. Quære, whether this was not properly the subject of compensation, under the ordinary condition for that purpose?

The following case was stated for the opinion of the court, pursuant to a judge's order.

On the 1st of August, 1856, Dr. Andrew Buchanan caused to be put up for sale by auction the house and premises described in Lot 1 of the particulars of sale as "a recently erected modern detached residence" (describing it).

"The land comprises in all 29a. 1r. 31 p. (more or less), divided into convenient inclosures, as follows:—

No. on tythe map.	Description.	Cultivation.		Quantity.					
				a.	r.	p.	a.	r.	p.
227A.	House, Lawn, &c., (part of).....	...	In hand.....	0	0	35			
226A.	Ditto. Ditto.....	...	.....	0	2	27			
231A.	Stable yard.....	...	.....	0	1	14			
227	The Mead.....	Pasture	.....	3	2	14			
217	King's Head Field. ...	...	.....	1	3	37	9	3	7
232A.	Part of Round Hill Meadow.....	...	Let to Mr. Humphreys...	0	0	35			
218	The Seven Acres.....	Pasture	.....	5	3	21			
219	Spring Hill.....	do.	.....	4	2	39			
220	Baker's Grove.....	Arable	.....	6	3	26			
226	Little Two Acres.....	Pasture	.....	1	3	23	19	2	24
							29	1	31

[21] "The house, part of garden, and carriage drive, coloured pink on plan, are freehold. The remainder of the property is copyhold of the manor of Chingford St. Paul's, subject to an annual quit-rent of a few shillings, and the usual fines on death or alienation. Nos. 219 and 220 are heriotable.

"Of the residence, garden, yard, and two meadows (in all 9a. 3r. 7p.), possession

will be given on completion of the purchase; the remainder, together with the whole of Lot 2, is let on lease to Mr. Humphreys, for a term which will expire at Michaelmas, 1859, at the very low rental of 95l. per annum. The rent apportioned in respect of the part of Lot 1 now occupied by him (being 19a. 2r. 24p.), is 40l. The apportioned quit-rent on this lot is 14s. 3d. The purchaser of Lot 1 shall hold Mr. Humphreys's lease. The purchaser of Lot 2 can have an attested copy, at his own expense.

The sale was subject to certain conditions (*a*); and at such sale Richard Poppleton became the highest bidder [22] for the same, at the sum of 2500l., and entered into

(*a*) Conditions of sale.—"1. No person shall at any bidding advance less than 10l. No bidding shall be retracted; the highest bidder shall be the purchaser, and, if any dispute arise concerning the bidding for either lot, the same shall be put up again and re-sold.

"2. The purchaser of either lot shall immediately after the sale, pay a deposit of 20 per cent. of his purchase-money into the hands of the auctioneer, and sign the subjoined agreement.

"3. The fixtures belonging to the vendor in Lot 2 will be included in the purchase of that lot. The fixtures in the house, and the iron hurdles, &c., in the grounds on Lot 1 (according to an inventory which will be produced at the sale), shall be paid for by the purchaser at a valuation to be made by two valuers, one to be nominated by each party, or by their umpire, in the usual manner. The purchaser of Lot 1 shall have the privilege of taking at a valuation, to be similarly made, all or any of the furniture in the said house, the vendor reserving to himself the right of selling on the premises at any time before the completion of the purchase of Lot 1, such furniture as the purchaser shall not within 21 days after the sale have signified in writing to the auctioneer his intention so to take.

"4. The purchaser of each lot will be entitled to the benefit of all the forest rights appurtenant thereto: the said rights are believed to be the right of depasturing or turning upon the forest two cows or one horse to every 40s. of rental, and the purchasers shall accept as conclusive evidence thereof the evidence which satisfied the vendor on his purchase in 1850 of part of the property now offered for sale, viz. a declaration on the subject by the then out-going tenant, who in such declaration states that he had occupied his farm for twenty-one years and upwards.

"5. The titles to Lot 2 and to such part of Lot 1 as is copyhold, shall commence with the admittances of Charles Smith and Drummond Smith respectively on the 19th of May, 1815; the earlier titles will not be shewn, and shall not be investigated. Upon the admittance in 1850 of a former owner of part of the property, an annual sum of 17s. 6d., stated to be part of a quit-rent of 1l. 10s. 8d., was apportioned as the part to be payable in respect of such property; and the purchaser shall assume that the property is subject to no more than such apportioned part.

"6. The purchaser shall assume that every former owner of any part of the property whose widow (if any) would have been entitled to dower or free-bench, and is not mentioned in the title, did not leave a widow.

"7. Every deed and entry on or copy of court roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated therein.

"8. The production, inspection, and examination of, and the making and furnishing official or other copies of, or extracts from, all deeds, documents, court rolls, wills, letters of administration, maps, registers, evidences or muniments of title not in the vendor's possession, and any information not in the vendor's knowledge, whether required for the completion or verification of the title or abstract, or for any other purpose, shall be procured, made, and obtained by and at the expense of the purchaser requiring the same; and such purchaser shall also bear the expense of all journeys and searches for any of the above purposes.

"9. The quantities of the estate as set forth in the particulars, are taken from the tithe commutation appointment, and shall be assumed by the vendor and purchaser as correct; and, inasmuch as it is considered that the property is sufficiently identified with the descriptions thereof in the deeds, court rolls, and other documents of title, by a map dated about the year 1800 (an extract from which is in the possession of the vendor, and for the production of the original of which he holds a deed of covenant), the purchaser shall not be entitled to any other evidence of identity than the said map.

and signed a written contract for the purchase thereof, in the [23] form set forth in the copy of the particulars, and at the same time paid the sum of 500l. as a deposit, pursuant to the said conditions.

[24] In due time, on the 6th of August, 1856, the said Andrew Buchanan delivered an abstract of his title to [25] the said Richard Poppleton, of Lot 1, part of which was freehold and part copyhold. The title to the freehold portion only is in question.

As to the freehold portion, it commenced with the abstract of a conveyance

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"10. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all fines, heriots, services, chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon.

"11. The purchaser of each lot shall pay the remainder of his purchase-money, and the purchaser of Lot 1 shall also pay the amount of the valuation aforesaid, on the 29th day of September next, at the office of Mr. Buchanan, the vendor's solicitor, or to the vendor, or as he shall direct; and, upon such payment, the vendor and all other necessary parties (if any) will make and execute proper conveyances, surrenders, and assurances of such property to the purchasers, who shall bear all the cost and expenses of and incidental to such conveyances, surrenders, and assurances, except the costs of the perusal and execution by the vendor of the necessary deeds.

"12. The rents or possession will be received or retained, and the outgoings discharged, by the vendor, up to the said 29th day of September next; and as from that date the outgoings shall be discharged, and the rents and possession taken by the purchasers, and such rents and outgoings shall (if necessary) be apportioned between the vendor and purchasers for the purpose of this condition. If from any cause whatever either purchase shall not be completed on the 29th day of September next, the purchaser shall pay interest on the remainder of his purchase-money after the rate of 5 per cent. per annum, from that day, until the purchase shall be completed.

"13. The purchaser of Lot 1, the greater part whereof is held under the same title as Lot 2, shall be entitled, after the completion of the sale of both lots, to the custody of the muniments of title comprising the same, and shall enter into the usual covenants with the purchaser of Lot 2 for the production and furnishing copies of such muniments, such covenants to be prepared by and at the expense of the purchaser of Lot 2, if he shall require the same; and, inasmuch as the vendor has entered into a covenant with an owner of other property, held under the same title, for the production of some of the muniments of title relating to the freehold portion of Lot 1, the purchaser to whom those muniments shall be delivered as aforesaid, shall, if and as required, enter into a covenant with the vendor for the production and furnishing copies of such muniments. Every or any such last-mentioned covenants shall be prepared by and at the expense of the vendor, but shall be perused on behalf of, and executed by, the intended covenantor at his own expense. If either lot shall not be sold at this sale, the vendor will retain, until all the property shall be sold, such of the aforesaid muniments as do not relate exclusively to the lot sold; and the purchaser of the lot sold shall in the mean time be entitled, at his own expense, to the production of the muniments so retained, and to copies of them, but not to a covenant for that purpose.

"14. The purchasers shall make their objections and requisitions (if any) in respect of the title, and of all matters appearing on the abstract, particulars, or conditions, and send the same to the office aforesaid within twenty-one days from the day of the delivery of the abstract; and, in default of any such objections and requisitions (if none), and subject to such (if any), shall be deemed to have accepted the title, and to have waived all other objections and requisitions; and, if either purchaser shall insist on any objection or requisition as to the title or abstract, or evidence of title, particulars, conditions, conveyance, surrender, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

dated the 18th of October, 1844, of which portion of the abstract the following is a copy :—

[26] "1844. October 18th. By indenture of this date, made between John Mears, of Bagshot, in the county of Surrey, gentleman, of the first part, W. F. Snell, of Milford, in the county of Southampton, esquire (eldest son and heir-at-law of Thomas Snell, deceased, and sole residuary devisee in fee named in the said will), of the second part, Jeremiah Humphreys, of Chingford, in the county of Essex, farmer, of the third part, and J. B. Gibbons, of, &c., of the fourth part,—reciting that the said Thomas Snell, being at the respective times of making his will and of his decease seised in fee-simple of, or otherwise well and sufficiently entitled to (amongst other estates), the piece or parcel of land or ground, messuage, or tenement and premises in the abstracting indenture described and released, with the appurtenances, duly made and published his last will and testament in writing, bearing date the 24th of August, 1833 (executed and attested as the law then required for the devise of real estates), and thereby gave and devised his several estates situate in the parish of Chingford, in the county of Essex, to the use and intent that his wife Barbara Snell (since deceased) and her assigns, should receive thereout during her life one annual sum or yearly rent-charge of 400*l.* payable as therein mentioned; and, subject and charged as before-mentioned, the said testator gave and devised his said real estates at Chingford, and all and singular other his real estate whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy, and which he had any power to devise or appoint, with their appurtenances, to the use of James Scott, of, &c., the Rev. Thomas Newcome, of, &c., and the said John Mears, their executors, administrators, and assigns, for the term of one thousand years, to commence and be computed from the day of the said testator's death, without impeachment of waste, upon certain trust [27] therein declared, and for raising portions and maintenance for the younger children of the said testator; and, from and after the expiration or other sooner determination of the said term of one thousand years, and in the meantime subject thereto and to the trusts thereof, to the use of his eldest son, the said W. F. Snell, his heirs and assigns, for ever; and in the said will is contained a proviso, that, notwithstanding anything thereinbefore contained, it should be lawful for the trustee or trustees for the time being of that his will, within twenty-one years from his decease, absolutely to sell and dispose of all or any part of his said real estates for the

"15. If either purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to re-sell the property bought by such purchaser, either by public auction or private contract, at such time and place, and subject to such conditions, and in such manner, as the vendor shall think fit; and any deficiency in price which may happen on such second sale, and all expenses attending such sale, shall immediately after such sale be made good and paid to the vendor by the defaulter at this present sale; and, in case of non-payment, the whole or such part of the same deficiency and expenses as shall not be paid, shall be recoverable by the vendor, as and for liquidated damages."

"Memorandum.—I, Richard Poppleton, of, &c., do hereby acknowledge myself to be the purchaser of Lot 1 described in the within particulars, at the auction held this 1st day of August, 1856, at the sum of two thousand five hundred pounds; and I have paid five hundred pounds as a deposit and in part payment of the said purchase; and I hereby contract and agree with the vendor, for myself, my heirs, executors, administrators, and assigns, to complete the purchase of the same in every respect agreeably to the within particulars and conditions of sale. Witness my hand this 1st day of August, 1856. "Richard Poppleton."

"Amount of sale	£2,500	0	0
Deposit	500	0	0
Balance . .	£2,000	0	0

"As agent for the above-named vendor, I hereby acknowledge to have sold Lot 1 to the above-named Richard Poppleton, and to have received the deposit as specified above. "F. G. Debenham.

"Witness, S. N. Debenham."

purpose of raising and paying all or any part of the moneys thereby directed to be raised under the trusts of the said term of one thousand years, if they or he should think fit, such sales to be either by private contract or public auction; and the said testator declared that the receipt or receipts in writing of the said James Scott, Thomas Newcome, and John Mears, and the survivors and survivor of them, for any sum or sums of money payable to them or him under or by virtue of the trusts of the said will should be a sufficient and effectual discharge for the same respectively, or for so much thereof as in such receipt or receipts should be expressed or acknowledged to be received, and that the person or persons to whom the same should be given, his, her, or their heirs, executors, administrators, or assigns, should not afterwards be answerable or accountable for any loss, misapplication, or non-application of the money therein mentioned and acknowledged to be received: and the said testator appointed the said James Scott, Thomas Newcome, and John Mears executors of his said will: And reciting "that the said testator departed this life in or about the month of February, 1843, without having altered or revoked his said will, otherwise than by a codicil [28] bearing date the 6th of July, 1840, but not affecting the devise in the abstracting indenture recited; and the said will and codicil were, on or about the 4th of April, 1843, duly proved in the Prerogative Court of Canterbury by the said John Mears alone: And reciting, that, by a deed-poll under the hands and seals of the said James Scott and Thomas Newcome, bearing date the 27th of September, 1843, the said James Scott and Thomas Newcome absolutely and irrevocably disclaimed and renounced all and singular the trusts, &c. intended to be vested in them by virtue of the said will and codicil jointly with the said John Mears, and also disclaimed and renounced the aforesaid nomination and appointment of them the said James Scott and Thomas Newcome to be executors of the said will, to the intent that the trusts and powers might be exercised by the said John Mears alone, and that all the said estates and interests of the said executorship might be vested in and exercised by him alone: And reciting that the said Barbara Snell, the widow of the said testator, departed this life in or about the month of February, 1843, and that, in pursuance and exercise of the power for that purpose contained in the said recited will, the said John Mears, with the privity of the said W. F. Snell, caused the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture after described and released (with other hereditaments), to be put up to sale by public auction at the Auction Mart in the city of London, on the 25th of June then last, in several lots; at which said sale the said Jeremiah Humphreys attended, and, being the highest bidder for, was declared purchaser of, Lot 12 at the said sale, comprising the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture comprised and released, and the inheritance in fee-simple, free from all [29] incumbrances, at or for the price or sum of 290*l.*: And reciting that the said W. F. Snell had, at the request of the said Jeremiah Humphreys, consented to concur in the conveyance of the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture mentioned,—It was witnessed, that, in order to carry into effect the said sale, and in consideration of the sum of 290*l.* of lawful British money to the said John Mears, as such trustee as aforesaid, in hand paid by the said Jeremiah Humphreys, at, &c., the receipt, &c., and that the same was in full for the absolute purchase of the said premises by the abstracting indenture described and released, and the fee-simple and inheritance thereof in possession, free from land-tax and all other incumbrances, and in consideration of 10*s.* of like lawful money to the said W. F. Snell paid by the said Jeremiah Humphreys, the receipt, &c., the said John Mears, as such acting trustee as aforesaid, and in exercise and execution of the power or authority for that purpose given, limited, or reserved to him by the said recited will of the said Thomas Snell, deceased, and of all and every other power and authority, powers and authorities, in him vested, or him thereto enabling, and also for the purpose of assigning the said term of one thousand years to merge in the free-hold and inheritance of the said premises did, (by abstracting indenture made in pursuance of the 4 & 5 Vict. c. 21,) bargain, sell, release, and convey, and also surrender and yield up, and the said W. F. Snell (as such heir-at-law and devisee as aforesaid, and by way of conveyance and confirmation only, and not of covenant or warranty,) did bargain, sell, alien, and release, ratify, and confirm unto the said Jeremiah Humphreys, his heirs and assigns, all that piece or parcel of land or ground containing half an acre and one perch (more or less), situate and being near a certain house called

or known by the [30] name or sign of the King's Head public-house, at Chingford Green, in the parish of Chingford, in the county of Essex, abutting, &c., together with the messuage or tenement, stable, coach-house, two cottages, and all other erections and buildings thereon, as the same were then lately held under a lease thereof granted to one John Marshall, dated the 9th of September, 1782, for the term of sixty-one years, and which lease had recently expired, and all and singular the rights, members, and appurtenances to the said piece or parcel of land or ground, messuage, or tenement, and other the premises by the abstracting indenture released, or intended so to be, belonging, or in anywise appertaining, or to or with the same, or any part thereof, then or at any time usually had, held, used, and occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, and the reversion, &c., and all the estate, &c., to hold unto the said Jeremiah Humphreys, his heirs and assigns, to the uses, upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and generally in such manner and form, as the said Jeremiah Humphreys, by any deed or instrument in writing to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, should from time to time direct, limit, or appoint, and, in default of any and subject to every such direction, limitation, or appointment, or so far as the same, if incomplete, should not extend, to the use of the said Jeremiah Humphreys and his assigns, during the term of his natural life, without impeachment of waste, remainder to the use of the said J. B. Gibbons and his heirs during the natural life of, and in trust for, the said Jeremiah Humphreys and his assigns; and, after the determination of that estate, to the only proper use and behoof of the said Jeremiah Humphreys, his [31] heirs and assigns, for ever. Declaration by the said Jeremiah Humphreys to bar dower. Covenants by John Mears and W. F. Snell respectively, and for their respective heirs, executors, and administrators, with Jeremiah Humphreys, his heirs and assigns, that they had done no act to incumber."

This was a correct abstract of that deed: and the abstract then set forth the abstract of another deed, dated the 24th of May, 1845, from which the following is an extract:—

"Indenture of release, made in pursuance of an act of parliament, &c., between the said Jeremiah Humphreys, of the first part, the said J. B. Gibbons, of the second part, William Dunsford, of the third part, and George Baker, of the fourth part, reciting the said indenture of the 18th of October, 1844, and which recital is as follows,—'Whereas, by an indenture (made in pursuance of the said act), bearing date the 18th of October, 1844, and made between John Mears, of the first part, W. F. Snell, of the second part, the said Jeremiah Humphreys, of the third part, and the said J. B. Gibbons, of the fourth part, the hereditaments and premises thereinafter particularly mentioned, and intended to be thereby granted and released, with their appurtenances, were, for the valuable considerations therein mentioned, conveyed and assured to the use of such person or persons for such estate and interest, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and generally in such manner and form, as the said Jeremiah Humphreys, by any deed or instrument in writing to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, should from time to time direct, limit, or appoint; and, in default of, and subject to every such direction, limitation, or appointment, and so far as the same if [32] incomplete should not extend, to the use of the said Jeremiah Humphreys and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste; with remainder to the use of the said J. B. Gibbons and his heirs during the natural life of and in trust for the said Jeremiah Humphreys and his assigns; with remainder to the only proper use and behoof of the said Jeremiah Humphreys, his heirs and assigns, for ever," &c.

The abstract then set forth various conveyances, terminating with a conveyance to the said Andrew Buchanan, dated the 2nd of April, 1849.

On the 8th of August, 1856, the said Richard Poppleton's solicitors wrote a letter to the said Andrew Buchanan's solicitor, of which the following is a copy:—

"8th August, 1856.

"Chigwell Estate. Lot 1.

"Be pleased to send us the earlier title to the freehold property. The abstract delivered commences with a deed dated only in 1844."

On August 9th, the following reply was sent by the solicitor of the said Andrew Buchanan :—

"9th August, 1856.

"Chigwell Estate. Lot 1.

"We have no earlier title than 1844: and, if you still require it, it must be at your client's expense, in accordance with the 8th condition of sale."

On the same day the following reply was sent to the last letter :—

"Chigwell Estate. Lot 1. Poppleton and Buchanan.

"We wholly differ from you as to the construction which you put upon the 8th condition. We shall lay the papers at once before our conveyancer: but it must be understood that we call upon the vendor, at his own expense, to furnish a proper abstract of title to the freehold portion of the property."

[33] On the 14th of August, one of the solicitors of the said Richard Poppleton attended at the office of the solicitor of Andrew Buchanan, for the purpose of comparing, and compared, the abstract with the deeds abstracted.

Ultimately, on the 23rd of August, 1856, the solicitor of Andrew Buchanan received from the solicitors of Richard Poppleton certain objections and requisitions to the said title, of which, so far as they are material, the following is a copy :—

"Requisition 1. The vendor must carry back the title to the freehold portion of Lot 1 to a proper and earlier date; and the purchaser requires the earlier title. The 8th condition has no bearing upon the subject, since it conveys no intimation to the purchaser that his rights as to length of freehold title are to be limited. The very fact that the period at which the copyhold title is to commence is fixed, would naturally lead to the conclusion that a distinction was to be drawn between it and the freehold title, and that, as to the latter, the ordinary rules were to prevail.

"16. There is no evidence in the abstract, of the redemption of the land-tax. The vendor should furnish the proper abstract to shew that the land-tax has been redeemed.

"23. The purchaser reserves to himself the right to make any further requisitions and observations which may arise upon the earlier abstract of title to the freehold part of the property, when the abstract is furnished, or upon the answers to the present observations and requisitions, or upon the searches for incumbrances."

To the portion of the abstract of the title subsequent to the conveyance of the 18th of October, 1844, above referred to, no objection arises; and it was agreed that the said Andrew Buchanan deduced such a title to the **[34]** freehold to himself from the last-mentioned deed of 1844 as he was bound to do by the conditions of sale, subject to the objections and requisitions set forth in this case.

To these objections and requisitions, on the 1st of September, 1856, the solicitor of Andrew Buchanan delivered the following answers to Mr. Poppleton's solicitors :—

"Reply 1. The vendor has already shewn such a title to the freehold portion of Lot 1 as by the conditions of sale he undertook to shew. He has, under the 7th condition, furnished the purchaser with conclusive evidence that Thomas Snell, the testator of 1833, was, at the date of his will, and at his death, seised in fee; and he has deduced a title and shewn a possession consistent with his seisin for more than twenty-three years subsequent to that date. The production of earlier deeds shewing how Snell acquired the property, even if the vendor had (which he has not) any such in his possession, could not prove the seisin in fee of Thomas Snell more incontrovertibly than the vendor has by means of the 7th condition already proved it. The chief object of the 5th condition was, to guard the vendor against requisitions on his title to the copyholds, founded on information obtained aliunde, e.g. from searching the court-rolls of an earlier date than 1815. With regard to the freehold, this necessity did not of course exist. The vendor is unable to comply with, and, under the circumstances, declines to entertain, this requisition.

"Reply 16. An abstract of the land-tax-redemption certificate of the copyholds is sent herewith. As to the freehold, the deed of 1844 recites that it is free from land-tax. There is also the declaration by Mears, in 1844, that none had ever been paid subsequently to the purchase or redemption thereof in 1799: and the vendor has never paid any."

[35] In the meantime, Mr. Poppleton instructed Mr. Debenham, the auctioneer, to procure a purchaser from him of the property, if he could, at a profit; which Mr. Debenham tried to do on Mr. Poppleton's behalf, but could not succeed. Mr. Poppleton also offered to sell the lot to one Alcock, for an advance in price, but which Alcock declined to give.

The purchaser's solicitors still insisting that a proper title had not been deduced, on the 22nd of October, 1856, Mr. Buchanan, the solicitor of Andrew Buchanan, sent to Mr. Poppleton's solicitors a letter and an abstract, of which the following are copies:—

"Buchanan and Poppleton.

"On again going through the papers herein, I have found counterpart of an old expired lease, granted in 1782, an abstract of which I send you, without at all admitting your right to call for it, but simply with a view of avoiding litigation: and I must request that you will have the goodness to complete the purchase without further delay."

"1782. September 9th. Counterpart indenture of lease of this date, made between William Snell, of, &c., committee of the estate and effects of his brother John Snell, of, &c., a lunatic, and the eldest brother and heir-at-law of the said John Snell, of the one part, and John Marshall, of, &c., of the other part,—reciting, that, by a memorandum in writing, bearing date the 16th of April then last, entered into between and signed by the said William Snell and John Marshall, in consideration of the said John Marshall agreeing to build a substantial brick building or dwelling-house as should be valued when finished at 200*l.*, exclusive of out-houses, on the ground therein and hereinafter mentioned to be demised, he the said William Snell did, amongst other things, agree with the said John Marshall, to grant unto him a building lease of the said piece or parcel of **[36]** ground for the term of sixty-one years from Michaelmas Day then next, at the yearly rent of 2*l.*, and to fence in nineteen rods of the said ground in manner therein mentioned; and reciting that the said John Marshall, in pursuance of the agreement on his part contained in the said memorandum in writing, had begun and made a great progress in the erection of a brick dwelling-house and premises on the before-mentioned piece of ground, on a scale the completion whereof would fully cost or exceed the sum of 200*l.* mentioned in the said memorandum, exclusive of outhouses; and reciting that the said W. Snell had completed and finished the said nineteen rods of fencing, or as much thereof as was requisite for the completely fencing in the said piece of ground in the manner and on the sides expressed and intended by the said memorandum,—it was witnessed that the said W. Snell, in consideration of the premises, and in full performance and execution of the said agreement on his part, and in consideration of the rents and covenants thereinafter reserved and contained on the part of the said John Marshall, did demise and lease unto the said John Marshall, his executors, administrators, and assigns, all that piece or parcel of land or ground, containing half an acre and one perch, little more or less, situate and being near a certain house commonly called or known by the name or sign of 'The King's Head,' at Chingford Green, in the county of Essex, abutting, &c., together with the erections and buildings thereafter to be erected thereon; and all ways, &c.; to hold the same, with the appurtenances, unto the said John Marshall, his executors, administrators, and assigns, from the Feast day of St. Michael the Archangel then next ensuing the date thereof, for the term of sixty years, at the yearly rent of 2*l.*, and subject to the covenants therein contained. Counterpart executed by the said John Marshall, and attested."

[37] The following correspondence then ensued between the solicitors for Mr. Poppleton and Mr. Andrew Buchanan:—

The purchaser's solicitors to the vendor's solicitor,—

"1856. October 26th. The further abstract which you have now supplied does not remove our objections to the want of a proper abstract of title of the freehold. 1st. It does not appear that the Thomas Snell named in the recital of the deed with which your former abstract commenced, is the same person as is named in the will of the testator of 1816; but, if so, there is no abstract of the will under which he is said to be devisee. 2. There is nothing to shew that W. Snell (whose will is abstracted in

the most meagre form, and is not stated to be attested), was ever seised of this property, or that it passed by his will. 3. The abstract of the counterpart lease, so far as it proves anything, goes to shew that John Snell (the lunatic brother, who is confused with John Snell the father,) was the owner of this property in 1782: and there is no attempt in the abstract to deduce the title of the property (now purchased) from John Snell to the testator of 1816. The time within which the vendor was bound (by necessary implication from the eleventh condition) to deliver a proper abstract, having now expired, as well as the time named in our letter of the 11th of October, we must decline to continue the negotiation, unless you expressly waive the provisions of the fourteenth condition, as to interest, costs, and compensation. In the event of your not doing so within three days from the date of this letter, we shall feel it necessary, without further notice, to commence an action for the recovery of the deposit, and shall hold the vendor liable for interest and costs from the time of his refusal to annul the sale and return the deposit.

"Should you think fit to forward us any further ab-[38] stract, we beg that you will at the same time state, for our information and guidance, whether or not you insist on the application of the eighth and fourteenth conditions either to such further abstract or to the last abstract delivered to us, or whether you deliver such abstract subject to the ordinary rules as to costs attending perusal and verification."

Reply thereto. "1856. October 27th. 1. Thomas Snell named in the recitals of the deed of 18th of October, 1844, is the same person who is named in the will of the testator of 1816; and, if you wish for an abstract of his will, though you now require it for the first time, I will furnish it. 2. The declaration of John Mears, 11th October, 1844, which I shewed to you long since, and a copy of which I now send you, expressly proves that William Snell by his will devised this property to his son Thomas: therefore he must have been seised of it, and it must have passed by his will. 3. There is no confusion in the abstracts furnished to you, between John Snell the lunatic, or any other person. The lunatic, as appears by the lease, was seised of the property in 1782; and his brother, William Snell, the testator of 1816, was, as appears also by the lease, his heir-at-law. I have no further information on the subject than that which I have already furnished and shewn to you; and, if you wish for further evidence or information, I will, at your expense, endeavour to supply it: but I will not waive the eighth or the fourteenth condition of sale; nor do I admit your right to ask for any other title than that I have shewn. I maintain that I have conclusively proved a good title to the whole property sold to you; and, if you wish to contest the point, I beg that you will at once, and without waiting three days, as you propose, commence an action for the deposit: and I give you notice, that, if you fail to complete the pur-[39]-chase, I shall avail myself of the fifteenth condition, and re-sell the property at your risk, &c."

The following is a copy of the declaration referred to, and inclosed in the last-mentioned letter:—

"Whereas, William Snell, late of Salisbury Hall, in the parish of Shenley, in the county of Hertford, Esquire, deceased, by his last will and testament in writing, bearing date the 19th of December, 1816, gave and devised to his son, the Reverend Thomas Snell, late of Windlesham, in the county of Surrey, clerk (now deceased), certain estates and properties therein particularly mentioned or referred to; and also all the residue of his lands and hereditaments not otherwise disposed of in and by his said will, comprising (amongst others) a messuage or tenement, garden, stable, and premises, with the appurtenances thereto belonging, situate near and adjoining to the King's Head public-house and premises at Chingford Green, in the parish of Chingford, in the county of Essex, lately sold or contracted and agreed to be sold to Jeremiah Humphreys, of Chingford aforesaid, farmer: and it was in and by the said will of the said William Snell provided, that, if it should appear that any of the estates and premises by that his will given and devised to or in trust for any person or persons other than and except his said son Thomas Snell, should be entailed or subject to any limitation over which he the said testator had not any control, and which should operate to lessen or abridge the devise thereinbefore made, then the person or persons to or for whose use or benefit such estate or premises so entailed or limited should by that his will be devised, or be mentioned or intended to be devised, should have and

be entitled to an equivalent in other estates and premises from and out of the estates and premises to which his said son Thomas Snell would become entitled under or by virtue of [40] that his will: and he directed that such equivalent should be made and effected by his said son Thomas Snell, his heirs and assigns, accordingly: Now, I, John Mears, of Bagshot, in the county of Surrey, gentleman, sole acting trustee of the will of the said Thomas Snell, deceased, do solemnly and sincerely declare, that, to the best of my knowledge, information, and belief, no claim has ever been made against the said Thomas Snell or his estates under or by virtue of the before-mentioned provision contained in the will of the said William Snell deceased: and I further declare, that, to the best of my knowledge, information, and belief, no land-tax has ever been paid for or in respect of the before-mentioned close of land and premises subsequently to the purchase or redemption thereof in or about the year 1799: And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provision of an act of parliament, &c. (5 & 6 W. 4, c. 62)."

(Signed) "JOHN MEARS.

"Declared at the Marlborough Street police-court, this 11th day of October, 1844, before me. E. H. Maltby, Magistrate, Metropolitan Police-District."

On the 31st of October, 1856, the solicitors of Richard Poppleton sent to the solicitor of Andrew Buchanan a letter of the material part of which the following is a copy: –

"Without waiving any of the objections and requisitions heretofore made by us, we beg to say that we are willing, on behalf of Mr. Poppleton, to receive within seven days from this date such further abstract of title as you may think proper to deliver relating to the freehold portion of the Lot 1; but we must beg that it may be in the usual and proper form of an abstract. We have not asked specially for the will of Thomas Snell, because it ought to form part of the abstract of the earlier title which we have required. The abstract we [41] desire to have, is, one of the usual character, and one which ought properly to contain the will of the said Thomas Snell. The propriety of our requesting a proper abstract of the will of William Snell is evidenced by what is disclosed upon the declaration of Mr. Mears, of which you have sent us a copy. We think you are mistaken in saying that we had previously seen the declaration. We certainly never read it before. An important question may arise upon the provisions of the will, respecting which we should have been left in perfect ignorance had we been satisfied with the very short statement furnished to us. We should be informed when John Snell, the lunatic, mentioned in the lease, died, and who was his heir-at-law. In the abstract of the counterpart lease which you have supplied to us, there is, we must repeat, considerable confusion: William Snell is described as 'committee of the estate of his brother John Snell, of Brill, a lunatic, and the eldest son and heir-at-law of the said John Snell.' According to this statement, William Snell is the brother and also the son of the same John Snell: surely this needs explanation and further information. The further abstract should state when William Snell died, and where his will was proved.

"16. The property comprised in the certificate of the redemption of land-tax now abstracted, cannot be held to include the freehold portion of the lot, because, as far as appears upon the documents furnished to us, Charles Smith, who made the contract for redemption, never was entitled to the freehold, and therefore could not redeem; and, as time is no bar to the Crown, the vendor must now redeem the tax. We cannot find any recital or statement in the deed of 1844, that the property is free of land-tax; but only that money is paid for the purchase of the property free of land-tax.

[42] "We must repeat our former notice to you, that, if you either now decline to make a sufficient title to the freehold portion of the property, or fail to do so within the space of one week from the date of this letter, we shall commence an action for the recovery of the deposit."

The solicitor of Andrew Buchanan, on the same day, sent to Richard Poppleton's solicitors a letter accompanied with an abstract of the will of William Snell, of which abstract and letter, so far as is material, the following are copies:—

"As you now request it, I beg to send you an abstract of the will of William Snell, but without at all admitting that you have a right to it, or in fact anything more than the abstract originally sent to you: and I must distinctly beg you to understand that I do not waive any of our rights under the conditions of sale, and that what I have sent you beside the abstract has been done solely with a view of avoiding litigation. I do not know when John Snell died; and we allege that his brother William was his heir-at-law. In the abstract lease, it is a mere clerical error calling William Snell the son of John, instead of the brother, as you could have seen by comparing the abstract, if you had chosen. We do not know when William Snell died, or where his will was proved.

"16. The statement in the deed of 1844, and Mears's declaration, is sufficient. I have now answered everything that you have asked: but I must beg you again to distinctly understand that I have nothing more in the shape of abstract, and shall furnish nothing more, unless at your expense; and whatever you may require that is not in our possession or knowledge, I will at your request endeavour to obtain, at your expense; and I contend that we have furnished you with a perfectly good title to the freehold; and, as it is quite clear that **[43]** your client is a most unwilling purchaser, I must request, that, if you are still dissatisfied, you will at once commence your action to recover the deposit, as there is another party who is willing to purchase: and if in three days I do not hear from you, I shall treat with him for it at your risk."

"Abstract of will of William Snell, Esquire, deceased.

"1816. December 19th. William Snell, late of Salisbury Hall, in the parish of Shenley, in the county of Hertford, Esquire, deceased, by his last will and testament in writing, of this date, gave and devised to his son, the Reverend Thomas Snell, late of Windlesham, in the county of Surrey, clerk, now deceased, certain estates and properties therein particularly mentioned or referred to; and also the residue of his lands and hereditaments not otherwise disposed of in and by his said will, comprising (amongst other things) a messuage or tenement, garden, stable, and premises, with the appurtenances thereto belonging, situate near and adjoining to the King's Head public-house and premises at Chingford Green, in the parish of Chingford, in the county of Essex: Proviso, that, if it should appear that any of the estates and premises by that his will given and devised to or in trust for any person or persons other than and except his said son Thomas Snell, should be entitled or subject to any limitation over which said testator had not any control, and which should operate to lessen or abridge the devise thereinbefore made, then the person or persons to or for whose use or benefit such estate or premises so entailed or limited should by that his will be devised, or be mentioned or intended to be devised, should have and be entitled to an equivalent in other estates and premises from and out of the estates and premises to which his said son Thomas Snell would become entitled under or by virtue of that his will. Direction that such equivalent should be **[44]** made and effected by his said son Thomas Snell, his heirs or assigns, accordingly."

To this the solicitors of Richard Poppleton sent the following reply: —

"1856. November 6th.

"Having regard to the statement in your letter of the 31st of October, that you have nothing more in the shape of abstract, and that you will furnish nothing more unless at our expense, as well as your announcement that you are about immediately to treat with a new purchaser, we think it unnecessary to say more, with reference to our former objections, than that we still maintain that you have not furnished proper evidence to us of the redemption of the land-tax, and that your abstract of title (previous to 1844) to the freehold is still quite incomplete. You have not furnished an abstract in chief of the will of Thomas Snell, though we have twice referred to its necessity. You profess your ignorance of the date of William Snell's death. You are unable to state when or where his will was proved: it does not appear that it was properly attested; nor do you give us any means of ascertaining these facts. The second abstract which you have now furnished of that document, not only shews the liability of the estate you have contracted to sell to answer claims which may still be subsisting under that will (forming a serious additional objection, but also appears on the face of it to be altogether imperfect, as it does not even shew what the devises

are which the estate now purchased is liable to make good. There is no attempt made to deduce the title of William Snell as heir-at-law of John Snell, by pedigree or otherwise; and no kind of evidence that William Snell was seised of the property previously to 1816, with which year in fact the earlier abstract commences. Under these circumstances, we propose to accede to your request of at [45] once commencing an action for the deposit, if we do not hear anything from you to morrow to prevent our doing so; reminding you that we have hitherto been prevented from taking that course by your continuing from time to time to furnish us with small portions of that which we have demanded, at the same time that you protested against our right to require the information. Had you stood upon the right you claimed, viz. to commence the abstract in the year 1844, our correspondence would have been much more limited. To prove to you, however, that we have no desire but for a cheap and expeditious settlement, we now offer to lay the correspondence and abstracts before any of the conveyancing counsel of the court of Chancery whom you may select, leaving him to decide, -first, whether you have shewn such a title as under the conditions we are bound to accept,- and secondly, if not, whether we have a right to recover back the deposit, with costs, and interest on the deposit from any and what date, —the costs attending the case to follow the result. Requesting your reply to this latter proposal in the course of to-morrow, we remain, &c."

In consequence of a difference as to the questions to be thus submitted, this suggestion was not carried out; and, after a correspondence which is unimportant, Richard Poppleton's solicitors demanded a return of the deposit, and, on the 27th of November, 1856, brought an action against Mr. Debenham, the auctioneer, for the recovery of it. And Andrew Buchanan's solicitor, in December, 1856, proceeded to sell the Lot 1 over again, and by private contract; upon which sale it realized 2340l., including the fixtures, which were not included in Richard Poppleton's purchase,— the price thereof being 120l.: and certain expenses were incurred on such re-sale, which it was agreed should be ascertained, if necessary, by the master.

[46] To this re-sale no objection had been made on the part of Richard Poppleton.

An interpleader summons having been taken out and served by Mr. Debenham's attorney, Richard Poppleton, Andrew Buchanan, and the auctioneer, attended before Crowder, J., upon that summons; and that learned judge directed that the sum of 500l., the deposit, less 3l. 8s., his costs, should be paid into court by Mr Debenham: and a writ having been since issued by Richard Poppleton against Andrew Buchanan, and another writ having been issued by Andrew Buchanan against Richard Poppleton, by the consent of the parties, by an order of Crowder, J., it was ordered that the above-mentioned actions should be consolidated, and that this case should be stated for the opinion of this court, with power to the court to decide the rights of the parties in law and in equity.

Andrew Buchanan insists that he is entitled to the deposit of 500l., and also to his costs incurred in respect to his sale to Richard Poppleton, and the expenses incident to the investigation of title thereunder, and also the deficiency in price realized upon the re-sale, and the expenses thereof. And Richard Poppleton insists that he is entitled to the deposit, and to recover interest thereon, and his costs of investigating the title.

It was agreed that the said costs and expenses, in either of the said cases, should be ascertained by the master, and that the questions for the opinion of the court should be,—

1. Whether the said Andrew Buchanan has shewn such a title to the freehold part of the said lot as by the said conditions of sale he undertook to shew.

2. Whether the said Andrew Buchanan has shewn such a title to the freehold part of the said lot as by the conditions of sale the purchaser was bound to accept.

[47] The court were to have power to declare the rights and liabilities of the parties resulting from their opinion upon the above two questions, and to declare and direct to whom the said deposit, or any and what part thereof, should be paid, and for whom and for what sum judgment should be entered in the said actions respectively.

The case was argued in Michaelmas Term last, before Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

Byles, Serjt. (with whom was Hannen), for the plaintiff, the purchaser (*a*). But for the 7th condition, the vendor would still be bound to shew a sixty years' title, notwithstanding the statute 3 & 4 W. 4, c. 27: *Cooper* v. *Emery*, 1 Phill. 388; Sugden's Vendor & Purchaser, 13th edit. 305; *Blackburn* v. *Smith*, 2 Exch 783. That condition provides that "every deed and entry on or copy of court-roll dated more than ten years ago, shall **[48]** be conclusive evidence of everything recited or stated therein." The recital in the deed of the 18th of October, 1844, that Thomas Snell was, at the time of making his will, and at his death, seised in fee-simple of, or otherwise well and sufficiently entitled to, the land in question, does not meet the difficulty. It is consistent with that statement that he was seised in fee of a reversion which may fall into possession after a term of a thousand years, or seised for life. It is not even alleged that he is seised in fee beneficially: he may be seised in fee as a trustee or mortgagee. Or he may have been seised in fee subject to a condition subsequent which might defeat his estate: and this, as it now appears, was his actual condition. In *Gould* v. *White*, Kay, 683, copyholds having been sold subject to a condition, that all statements and recitals in any of the title deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited, and that, in case any purchaser should not, within fourteen days from the delivery of the abstract, declare his dissatisfaction with the title, and point out some valid objection thereto, the same should be considered as accepted,—the purchaser objected that the first surrender on the abstract was by A. and J. his wife, "which said J.," it was therein stated, "had then lately been admitted there tenant in tail according to the custom of that manor;" and that there was nothing to shew how the estate-tail had been barred: afterwards, the purchaser required evidence that the custom of the manor warranted estates-tail: the first surrender was dated in 1801, and was conditional only: in 1815, the same parties made an absolute surrender in fee, under which the possession had been enjoyed ever since: and it was held, that the recital was conclusive evidence, under the conditions of sale, of the fact that J. had been admitted tenant in **[49]** tail, but not that this was according to the custom of the manor: for, this was not a single fact, but a deduction from a series of facts. [Crowder, J. There, the condition provided that the recitals should be evidence of the facts recited: here, they are to be conclusive evidence of everything recited.] The word is undoubtedly larger here. But parties are never bound by mis-recitals as to matters of law. The rule for the construction of these conditions is well laid down by Sir L. Shadwell, V.-C., in *Symons* v. *James*, 1 Y. & C., C. C. 487, 490,—"If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear and unambiguous. And, if there be any chance of reasonable doubt or reasonable apprehension of his meaning, I think that the construction must be that which is rather favorable to the purchaser than to the vendor." But, assuming that the plaintiff (the purchaser) is by the terms of the 7th condition shut out from requiring a sixty years' title,—assuming that he has agreed not to object to the title on the ground that it does not go back so far,—still he clearly is entitled to a sixty years' abstract, in order that he may see what the title is. [Cockburn, C. J. What is the use of an abstract, if you are precluded from objecting to the title?] The purchaser's agreeing to take such a title as the vendor has, does not dispense with the latter's

(*a*) The following were the points marked for argument on the part of the plaintiff in the first action:—

"1. That the vendor was bound to furnish and verify to the vendee a proper abstract shewing a marketable title, and that he has not done so: and that there is nothing in the conditions of sale to exempt the vendor from this obligation:

"2. That the vendor was bound to shew a good title going back sixty years; and that he has not done so.

"3. That, if it were intended by the vendor to limit by the conditions of sale the ordinary rights of a vendee with repect to the title, such intention ought to have been expressed in clear and unambiguous language; but that neither the 7th nor 8th condition, or any other, does so express such intention:

"4. That the abstract, or pretended abstract, of title to the freehold furnished by the vendor, is defective in the several points particularized in the correspondence set forth in the case:

"5. That no title to the land-tax is shewn by the vendor."

shewing what that title is. [Crowder, J. Does not the 14th condition shew that the abstract is to be confined to the title which the purchaser is bound to accept?] Clearly not. Sugden says,—Vendor & Purch., 13th edit. 355, that "a man may be entitled to an abstract of the title, and yet be compelled to accept the title itself as it stands;" for which he cites *Morris* v. *Kearsley*, 2 Y. & C. Exch. 139. [Willes, J. The learned author notices that case as an exception.] In *Southby* v. *Hutt*, 2 Mylne & Cr. 207, by [50] conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title; but that, as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was further stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: and it was held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title-deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence. In Dart's Vendor & Purchaser, p. 48 (3rd edit. 68), it is said: "Particulars and conditions of sale, if intended to exclude the purchaser from what he would otherwise be entitled to, must be expressed in terms the most clear and unambiguous: if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favour." For this the learned author cites, amongst other cases, *Seaton* v. *Mapp*, 2 Coll. C. C. 562, where Sir L. Shadwell, V.-C., says, —"I do not greatly admire the case on either side: but I think, and have always thought, that, when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness: if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." The correspondence will probably be relied on as sup-[51]-plying all defects. This however, it clearly does not. As to the lease by William Snell, the recitals therein do not amount to an admission of title in him; for, the deed itself shews that he had no title. A link is wanting to shew that he took as heir-at-law of John Snell, the lunatic. Then, as to the will of 1816, it is not shewn that it was duly attested, or that it ever was proved. Then, there is no abstract in chief of Thomas Snell's will, but only a recital of it in the indenture of October, 1844. The property is sold as "land-tax redeemed." The statutory provision for the redemption of land-tax, is contained in the 42 G. 3, c. 116, s. 38. Now, the only evidence of such redemption is, the statement in the conveyance of the 18th of October, 1844, from Mears to Humphreys, that the consideration-money paid by Humphreys was "in full for the absolute purchase of the premises, and the fee-simple and inheritance thereof in possession, free from land-tax, and all other incumbrances." There is no statement of the fact of the land-tax having been redeemed at all. In Sugden's Concise View, p. 274, it is said, that, "to land-tax, if sold separately, or where the estate is sold as discharged from it, a title must be shewn under the land-tax redemption act," 42 G. 3, c. 116. The 7th condition, therefore, cannot help this defect. Mears's declaration, made in 1844, —that, "to the best of his knowledge, information, and belief, no land-tax had ever been paid for or in respect of the before mentioned close of land and premises subsequently to the purchase or redemption thereof in or about the year 1799,"—carries the case no further. It is not a positive allegation that the land-tax was redeemed; and the declarant speaks only upon information and belief.

Hugh Hill, Q. C. (with whom was Dowdeswell), for the defendant, the vendor. The main question is, [52] whether the defendant has shewn such a title to the freehold portion of Lot 1. as he contracted to shew. The rule in equity, upon this subject, is different from that at law. A court of law will not consider whether the title is such as a court of equity would compel an unwilling purchaser to take, but simply whether the vendor has or has not a legal title to convey. *Bonnam* v. *Galeh*, 7 Bingh. 379, 5 M. & P. 222. The case of *Blackburn* v. *Smith*, 2 Exch. 783, is an authority to shew that an abstract for sixty years need not be produced. By the 7th condition, it is provided that every deed and entry on or copy of court roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated

therein. *Corrall* v. *Cattell*, 4 M. & W. 734, affords a strong illustration of the extent to which a court of law will go in giving effect to the plain meaning of the conditions. The recital, therefore, in the deed of the 18th of October, 1844, that Thomas Snell, the testator, was seised in fee, must be taken to be conclusive evidence of that fact. Further, there is in the extract from the conveyance by Humphreys, of the 24th of May, 1845, a statement of the legal effect of the former deed, which fairly comes within the meaning of the 7th condition. There is no case in which a court of law has ever held a sixty years' title necessary since the 3 & 4 W. 4, c. 27. There is ample evidence in the recital in the deed of 1844, and in the declaration of Mears, that the land-tax has been redeemed.

Byles, Serjt., in reply, referred to *Shepherd* v. *Keatley*, 1 C. M. & R. 117, *Sellick* v. *Trevor*, 11 M. & W. 722, 728, and *Jeakes* v. *White*, 6 Exch. 873.

Cur. adv. vult.

Willes, J., now delivered the judgment of the court:—These are cross-actions between the vendor and pur-**[53]**-chaser of an estate in Essex. The vendor claims against the purchaser, as forfeited, the deposit of 500l. (which with the exception of 3l. 8s. deducted under an interpleader order, is now in court), the costs incurred with respect to the sale, the expenses incident to the investigation of the title, the deficiency in the price realized upon a re-sale of the property in consequence of the refusal of the purchaser to complete, and the expenses of such re-sale. The purchaser, on the other hand, claims the deposit and interest, and the costs of investigating the title. These are the claims stated in the special case, and upon which we are to decide.

No question of specific performance can arise, the property having been re-sold, and the vendor having chosen to bring an action. The substantial question is, whether the vendor has shewn a sufficient title.

Upon the argument before my Lord Chief Justice, my Brothers Williams and Crowder, and myself, much discussion took place upon the construction of the conditions of sale, and the sufficiency of the title shewn, with reference to those conditions. Amongst other objections on the part of the purchaser, it was urged, that, by the contract, the land was described as land-tax redeemed, and that no sufficient proof was given by the vendor, that, in respect of the freehold part of the property, the land-tax had been redeemed. This, in the absence of a special condition of sale, would be a well-founded objection. The vendor was bound to give reasonable evidence that the land-tax had been redeemed, or that, if purchased, it was in his power to transfer or release it; and, ordinarily, the proper evidence of this would be the certificate of the commissioners or a copy of the register. A statement in the deed of 1844, to which the purchaser was no party, would not be sufficient, of itself; and the statutory declaration of Mears twelve years before the purchase, that, to the best of **[54]** his knowledge and belief, no land-tax had ever been paid for or in respect of the land "subsequently to the purchase or redemption thereof in or about the year 1799," leaves it doubtful whether the land-tax ever was redeemed so far as to free the land from liability either to the Crown or to a purchaser under the statute 38 G. 3, c. 60, or his representatives.

The vendor, however, relies upon the seventh condition of sale, by which it is provided that "every deed and entry on or copy of court-roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated therein:" and he insists, that, by force of that condition, the statement in the conveyance of the 18th of October, 1844, from John Mears to Jeremiah Humphreys, from whom the property came by various mesne assignments to the defendant, is sufficient, and indeed conclusive, evidence that the land-tax was redeemed. That statement occurs in the witnessing part of the deed, and is as follows:—"It is witnessed, &c., and in consideration of the sum of 290l., &c., to the said John Mears, &c., paid by the said Jeremiah Humphreys, &c., the receipt of which the said John Mears acknowledged, and that the same was in full for the absolute purchase" of the premises, "and the fee-simple and inheritance thereof in possession, free from land-tax and all other incumbrances."

The purchaser insists that this is not a statement of the fact that the land-tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid 290l. for the land as being free of land-tax and other incumbrances; and that it is consistent with such statement that the land-tax had not been redeemed, or at least that it had been purchased and assigned to the then purchaser, or a trustee for him, in whom or in whose representatives it may now be vested.

[55] We are of opinion that the purchaser is right in this contention. The statement, to bind him conclusively under the seventh condition, ought to be something alleged by way of direct recital or similar statement in the deed, and not merely matter to be inferred as the probable, not certain, result of what is stated. Nor can this be considered as other than a substantial objection; for, upon the special case as it stands, there are no materials for forming a judgment whether or not the estate is free from the tax.

For these reasons, we are of opinion that the vendor has failed to make out such a title to the freehold as by the conditions of sale he undertook to shew, or as a purchaser was bound to accept. No question of whether the objection is not mere matter of compensation,—which probably it is,—arises in the present proceeding; there being, as we have stated, and for the reasons we have stated, no claim made or sustainable for specific performance: and, although we are, by consent, to consider the rights of the parties both at law and in equity, that must mean existing rights with reference to the remedies applicable to them.

With regard to the amount to be recovered by the purchaser, it is not affected by the 14th condition of sale; for, the vendor insisted throughout upon his being in the right, and did not give notice under that condition to annul the sale.

We therefore give judgment in *Buchanan* v. *Poppleton* for the defendant: and in *Poppleton* v. *Buchanan*, we give judgment for the plaintiff for the sum of 3l. 8s., deducted on paying the deposit into court, the interest upon the deposit to this time, and the costs of investigating the title, to be ascertained by the master: and we direct that the sum deposited in court be paid out to the plaintiff in that action.

Judgment accordingly.

[56] REES, *Appellant*, DAVIES, *Respondent*. Feb. 11th, 1858.

Upon an application (under the 1 & 2 Vict. c. 74) by a landlord to justices in petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, and its legal determination, and the tenant's refusal to quit, *Held*, that the jurisdiction of the justices to give the landlord possession, was not ousted by the tenant's setting up the title of third person.

This was a case stated for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43.

At a petty sessions holden in and for the hundred of Swansea, in the county of Glamorgan, on the 19th of December, 1857, before, &c., Lewis Rees, the appellant, was charged in and by a certain complaint,—for that he the said Lewis Rees unlawfully held over and detained from the above-named respondent, James Davies, a certain tenement consisting of a house and land situate at Rhyd-y-Pollon, in the borough of Loughor, within the said hundred of Swansea, in the said county, held by the said Lewis Rees, under a yearly tenancy, at the rent of 4l. per annum, and after the said tenancy had been duly determined by a notice to quit, contrary to the provisions of the statute 1 & 2 Vict. c. 74, and, the said parties respectively being then present, the said complaint was duly heard by us; and upon such hearing we adjudged that a warrant should issue to take and give possession of the said tenement to the said James Davies, the respondent, within the time prescribed by the last mentioned statute.

Lewis Rees being dissatisfied with the determination of the said justices, as being erroneous in point of law, gave them notice, pursuant to the statute, requiring them to state a case setting forth the facts and grounds of their determination, for the opinion of this court. A case was thereupon stated, as follows:—

At the hearing of the complaint, it was proved on the part of the respondent, James Davies, that notice to quit the said tenements, and also of the respondent's intention to apply to the justices in petty sessions as [57] sembled to issue their warrant to recover possession thereof, had been duly served on the appellant Rees; and the following evidence was adduced on behalf of both parties:—

James Davies. "In the year 1853, I let a tenement, consisting of a house and garden, for a year, to commence on the 29th of September, in that year, at the rent of 4l., payable half yearly. The defendant paid me the rent from the 29th of September,

1854, to September, 1855, half-yearly. He still retains the said premises. The signatures to the notices now produced, marked A. and B., are in my hand-writing. The tenement is situate in the borough of Loughor, and called Rhyd-y-Pollon."

Cross-examined. "I became tenant for the mill and all the lands belonging to it, together with the cottages, to Mr. C. H. Smith, from the 29th of September, 1853. I did not go under rent until September, 1854, because we were repairing the mill; and for that year Lewis Rees paid the rent to Mr. Smith. In the month of March (the 12th), I told Lewis Rees that he must pay his rent to me, and he agreed to it. I then told him he should have a little piece of land (about 10 perches) into the bargain. He paid me the half-year's rent due March, 1855."

Lewis Rees. "I am the defendant in this case. I reside at Rhyd-y-Pollon, in the borough of Loughor, and have lived there for sixteen years to last Michaelmas. My brother lived there before I went there; and I recollect my grandfather and grandmother living there. I am fifty-five years of age. I was brought up a child there. I recollect my grandfather and grandmother being there fifty years ago. My grandfather had only one son, named Evan Rees, who is my father, and is still alive. My grandfather died about thirty years ago, and my grandmother about sixteen years ago.

"I went into possession of Rhyd-y-Pollon about half **[58]** a year after my grandmother died, with the permission of my father. I took the little field of Mr. Williams, Mr. Smith's agent, after Mr. Smith came into the property, at 4l. a year, payable half-yearly. I paid him 1l. 15s. for the first half-year. My wife, I believe, paid him the second half-year, 1l. 16s. He claimed payment of rent for the house; and I said I would never pay him any rent for the house, as it never belonged to Mr. Smith. The notice now produced, marked C., was left with my wife, and she gave it to me. James Davies came to me and demanded the rent for the field and house. I told him I would pay him for the field, but not for the house. This was the first time James Davies applied to me for the rent. I took the receipts from James Davies as now produced. I would not have taken them, had he mentioned the house and land in the receipts. On the 30th of September last, James Davies applied to me for the rent; and I said I had not got it then, but he should have it on the following morning. We afterwards met at Tavern-y-Trap public-house the same day. Thomas Thomas was present. I took him with me to see that I got a right receipt. James Davies wrote out a receipt for rent for a house and garden. I put the money on the table, and told him I would not take that receipt, and requested him to give me one in the same form as I had received before. The field I took of Mr. Williams was about three quarters of an acre. I paid so much for it, because it was convenient Morgan Jones occupied part of the premises, and Samuel Rosser the rest, when I occupied Rhyd-y-Pollon. Neither Samuel Rosser nor Morgan Jones, or any other person, ever asked me for any rent; and those two gentlemen hold now the same premises as Mr. James Davies does. I never sent my brother-in-law, John Richards, with any message from me to James Davies."

By the magistrates. "James Davies put up the last **[59]** fence to the field, my fence having fallen down. I manured the land about eight years ago. James Davies put up the fence after Mr. Smith purchased the property. I used to pay poor-rate for the house; but James Davies pays it now. He stopped me from paying it. Davies inclosed the field before I paid rent to Mr. Williams, Mr. Smith's agent. I gave up the field to James Davies on the 30th of September last. I turned out of it at Michaelmas Day. I have not concerned myself about it ever since. I did not pay any rent to any person whatever, before I paid the first half-year to Mr. Smith's agent. I have searched for all the receipts; but could not find more than those produced. I had possession of the field from Michaelmas, 1853, to Michaelmas, 1854; but I did nothing with it. I am not aware that any other person used it. James Davies pulled down the fence that was there, and re-fenced it before I paid any rent to Mr. Williams. The field was re-fenced by Davies about the first of the Summer of 1854. I paid the rent of the field for that year, although I did not use it, because I thought it would be a convenience to me thereafter. James Davies did not use it that year. I have not measured it. To the best of my knowledge, the field is half an acre. I am sure it is forty perches."

Mary Rees, the wife of Lewis Rees. "I have lived in Rhyd-y-Pollon for sixteen years with my husband. I never saw Mr. Smith, who is now present, until about three weeks ago, when I saw him in this court. I never had any conversation with

James Davies as to renting Rhyd-y-Pollon. I recollect Samuel Rosser and Morgan Jones holding the premises now held by Davies. I remember Williams holding the mill. I never heard either of those persons demand rent for Rhyd-y-Pollon."

By the magistrates. "We used to pay poor-rates 15½d. every quarter. We were rated according to the rent. We never paid rates before Davies came there. I paid [60] a poor-rate to the landlord of the Cross-Keys, who I think was overseer of the poor. I think it was 15½d. I think this was twelve months or a year and a half ago. Then James Davies took the payment of the poor-rates out of our hands. The poor-rate was paid for the house. We had a portion of land before Davies came into possession,—about a quarter of an acre. Davies afterwards gave us another piece, larger. There was a fence between the piece Davies gave us and the piece we held before. Afterwards, Davies made a new hedge round the whole; and we afterwards drew the old fence down. I am certain we paid poor-rates for the house before Davies came into possession."

Morgan Jones. "I occupied Gors-y-flin, near Loughor,—about ten acres of land. I held it under the Duke of Beaufort for thirty-four years. I left it when James Davies took possession. I had notice from James Davies to leave. I remember Lewis Rees's grandfather and grandmother living at Rhyd-y-Pollon; and it has always been with the family up to the time of the possession of Lewis Rees, whose father is now alive. It did not belong to Gors-y-flin. It was formerly a poor-house. The parish did not pay rent to any person. It was built on a common in the possession of the corporation of Loughor. I recollect its being taken in by the corporation."

Cross examined. "The piece of land at Rhyd-y-Pollon was inclosed from the common about twenty years ago. Twenty years ago, Samuel Rosser occupied seven acres (the lower meadow) of Gors-y-flin, and some waste-lands which Samuel Rosser inclosed, and I believe paid rent for. Samuel Rosser never did pay for the waste-lands. I inclosed part of the waste-lands about thirty years ago. Lewis Rees's family occupied Rhyd-y-Pollon for about thirty years before the new inclosure was made. Rhyd-y-Pollon house was a poor-[61]-house forty years ago. Lewis Rees's father lived at Rhyd-y-Pollon when it was a poor-house."

Susan Jones. "I am seventy four years of age. I lived in the house next door to Rhyd-y-Pollon for seventy-two years. I was born there. My first recollection of Rhyd-y Pollon is, that it was a poor-house. I recollect Lewis Rees's grandfather living at Rhyd y-Pollon sixty years ago. I remember Mary Bulk living in the poor-house for twenty years; and she died in 1805; and it was after she died that Lewis Rees's grandfather came there to live."

Josiah Williams. "About thirty-six years ago I rented Loughor Mill, and occupied it for thirty-two years. I had nothing to do with Rhyd y-Pollon. Lewis Rees's family lived there then."

Thomas Thomas. "On the 30th of September last, I was at the Tavern-y-Trap with Lewis Rees and James Davies, when Lewis Rees objected to the form of a receipt made out by James Davies, because it mentioned the house and land."

At the hearing it was contended, on the part of the appellant, that no legal tenancy was proved, and that the justices had no jurisdiction in the matter, inasmuch as one Evan Rees claimed to be entitled to the said tenement.

The justices, however, being of opinion that the evidence adduced brought the case within the operation of the statute 1 & 2 Vict. c. 74, gave judgment against the appellant, and ordered that a warrant should issue to take and give possession of the tenement held over, within twenty five days from the date of the order, upon the following ground, viz. that, the tenancy and holding over being proved to their satisfaction, they were not impowered to entertain a claim to the fee of the property, set up on behalf of a third party.

[62] Griffits, for the appellant. There was no evidence of tenancy. [Williams, J. Surely there was some evidence. Byles, J. The appellant admits that he paid the respondent two half years' rent.] Not for the house, but for the additional piece of land, the possession of which he derived from the respondent. It sufficiently appears from the whole case that the appellant never did come in under the respondent. But, there being a bonâ fide claim of title in Evan Rees, the justices had no jurisdiction. [Willes, J. Where is that laid down?] In Burn's Justice, title "Justices of the Peace," § vii., 4, 29th edit. p. 1012, where it is said, that, "as a general rule, where property or title is in question, justices have no jurisdiction to decide upon it," citing

Rex v. *Burnaby*, 3 Salk. 217, 2 Lord Raym. 900; *Rex* v. *Speed*, 1 Lord Raym. 583; *Kinnersley* v. *Orpe*, Dougl. 499. Indeed, it would be somewhat singular if the magistrates had such power under the 1 & 2 Vict. c. 74, when it is not vested in the county-courts. [Williams, J. The justices here do not affect to determine any question of title: all they decide is, that there was a tenancy, that the term was duly put an end to, and that the tenant refused to quit.] The justices could not decide in favour of the respondent without entertaining the question of title.

Josiah Rees, contrà, was stopped by the court.

Williams, J. I think the justices must be taken to have given credit to the story of the respondent, and to have disbelieved that told by the appellant and his witnesses, and to have decided that a tenancy was proved, and a determination of that tenancy by a regular notice, and a refusal on the part of the tenant to quit. And that being established, they held that it was not competent to the tenant to set up the title of a third **[63]** person. That seems to me to be perfectly good law, and consequently there is no ground for our entertaining this appeal.

The rest of the court concurring,

Appeal dismissed, with costs.

Baxendale and Others *v.* The Eastern Counties Railway Company.

Feb. 11th, 1858.

[S. C. 27 L. J. C. P. 137. Referred to, *Great Western Railway* v. *Sutton*, 1869, L. R. 4 H. L. 237.]

A railway company were impowered by the 175th section of their act of incorporation (6 & 7 W. 4, c. cvi.) to charge certain tonnage-rates or tolls for all articles, matters, and things carried or conveyed along the line, and (by ss. 177 and 179) to provide locomotive or other power for the carriage and conveyance of passengers, cattle, goods, &c., and to make reasonable charges for such carriage and conveyance, in addition to the tonnage-rates.—By s. 182, it was provided that the company might "from time to time make such orders for fixing, and by such orders fix, the sum to be charged by them in respect of small parcels, not exceeding 1 cwt. each, as to them should seem proper."—And by s. 186, it was further provided that "the aforesaid rates and tolls to be taken by virtue of the act should at all times be charged equally and after the same rate per ton throughout the whole of the said railway, in respect of the same description of articles, matters, or things," and that "no reduction or advance in the said rates and tolls should either directly or indirectly be made partially or in favour of or against any particular person or company."—Under the powers given to them by s. 182, the company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each, which charges were higher than the tonnage rates warranted by s. 175, but which included a reasonable charge for the use of their carriages and locomotive power under ss. 177 and 179. Under this scale, where a number of separate parcels (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) were brought to the railway by the same person, and containing the same article, and all directed to the same person at their place of destination, the company charged the tonnage or lower rate allowed by s. 175: but, if similar parcels were brought addressed to several different persons, they were charged the higher or parcels rate.—Upon a special case setting out these facts,—Held, that there was nothing to induce the court (or which ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company. —Quære, whether the 186th section applies to "small parcels!" Semble, per Byles, J., that it does.—Though limited to a reasonable charge, there is no common-law obligation on a carrier to charge equal rates of carriage to all his customers.—The Railway Traffic Act, 17 & 18 Vict. c. 31, does not interfere with the right of a party aggrieved by over-charges, to maintain an action to recover back the sums paid in excess.

This was an action brought by the plaintiffs against the defendants, to recover back alleged over-charges in respect of goods sent by the plaintiffs from London to Norwich and Norwich to London by the defendants' **[64]** railway, and also damages in respect of such over charges. By a judge's order, after issue joined, it was ordered that the

questions of law should be stated in a special case, and that the damages, if any, should be assessed by an arbitrator, subject to the opinion of the court whether the plaintiffs were entitled to recover any special damages.

The plaintiffs are, and for many years have been, carriers, carrying on their business as such under the style and firm of Pickford & Co., and as such they have been in the habit of carrying goods for hire to and from, amongst other places, London to Norwich and Norwich to London.

The defendants are the Eastern Counties Railway Company, incorporated by the 6 & 7 W. 4, c. cvi., and the proprietors of the railway constructed under the powers of that act between London and Norwich.

The mode in which the plaintiffs carried on their business between London and Norwich, was and is, by collecting at their receiving houses in those towns all parcels and packages of their customers to be sent from one to the other of those towns, and from such receiving houses taking them to the stations of the defendants' railway in London and Norwich, and there delivering them to the defendants, to be carried by them from London to Norwich, and from Norwich to London, respectively, such parcels and packages being addressed to the several parties at London or Norwich for whom they are intended. Separate entries are made by the defendants of each parcel and package in the invoices and in the freight-notes, weigh bills, and counting-house books, when the same are directed to different persons; and each package is weighed separately: but that is not the case when they are directed to the same ultimate consignee. At Norwich and London they were and are delivered in separate packages at the same [65] time by the defendants to the plaintiffs, and by them delivered to their customers, or their consignees, according to the different addresses on such parcels respectively. There is no other railway from London to Norwich except the defendants'; and the plaintiffs, unless they so used the defendants' railway, could not have carried or carry the goods of their customers with the same celerity as now, or carry on their business with the same convenience, advantage, and profit. All the parcels and packages mentioned in this case were delivered by the plaintiffs to the defendants at one of their said stations, to be carried by them, and they were so carried, from London to Norwich or Norwich to London, and were parcels and packages which the plaintiffs were employed by their customers to carry as common carriers, as before described.

By s. 175 of the defendants' act, 6 & 7 W. 4, c. cvi., they are authorized to demand, receive, and recover for the tonnage of all articles, matters, and things which are carried or conveyed upon or along the said railway, or any part thereof, rates and tolls on, amongst other things, all silk, cotton, linen, and woollen manufactures, raw-silk, raw-cotton, cotton-thread, dye-stuffs, groceries, earthenware, hardware, iron and other metals, and all articles of merchandize not otherwise charged, any sum not exceeding 6d. per ton per mile.

By s. 177 of the same act, the defendants are authorized (if they shall think proper) to use and employ locomotive and other engines or other motive power, and in carriages and waggons drawn or propelled thereby to carry and convey upon the said railway, and also upon and along any other railway communicating therewith, all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance, as [66] they may from time to time determine upon, in addition to the several tonnages and tolls thereinbefore authorized to be charged and received.

Section 179 enacts that it shall be lawful for the defendants, and they are thereby impowered, to provide locomotive engines, or other motive power, for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals, upon the said railway, and also along and upon any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said defendants should think proper, in addition to the several rates, tolls, or sums by that act authorized to be taken.

Section 182 provides that the defendants may from time to time make such orders for fixing, and by such orders fix, the sum to be charged by them in respect of small parcels not exceeding 1 cwt. each, as to them shall seem proper.

Section 186 provides "that the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate per ton through

out the whole of the said railway, in respect of the same description of articles, matters, or things; and no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favour of or against any particular person or company, or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway upon and in respect of the same description of articles, matters, and things so reduced or advanced, and shall extend to all persons whomsoever using the same or carrying the same description of articles, [67] matters, or things thereon, anything to the contrary thereof in any wise notwithstanding."

Under the power given by s. 182, the defendants framed a scale of charges, by which the rates for the carriage of parcels not exceeding 1 cwt. each from London to Norwich, and vice versâ, were higher than the charges which the defendants were entitled to receive and did receive under section 175; but such rates included, not merely the tolls for the use of the railway under section 175, but also a reasonable charge for the use of their carriages and locomotive power under sections 177 and 179.

In all cases in which a number of separate parcels or packages were brought and delivered to the defendants at the same time by the plaintiffs or others of the public, to be carried, which, if taken separately, would weigh less than 1 cwt., but which, if taken in the aggregate, would weigh more than 1 cwt.,—if they all contained the same article, and were directed to the same party, the defendants charged them in the aggregate, and according to the tonnage or lower rate of charges allowed by section 175; whereas, if a number of separate parcels or packages of the same kind and weight were brought and delivered by the plaintiffs to the defendants under similar circumstances (except that they were addressed to several persons, instead of to one person only), the defendants charged to the plaintiffs the parcel-rate, although such parcels or packages were all delivered to the defendants by the plaintiffs at the same time and place, and were also received at the other end by the plaintiffs from the defendants at the same time and place. Thus, if ten packages of ¾ of a cwt. each, containing the same article, and addressed to the same consignee, were brought by one of the public, or by the plaintiffs, the whole would be charged in the aggregate at the tonnage-rate on 7½ cwt.; but, if [68] such packages were brought by one of the public, or by the plaintiffs, addressed to different parties, they would be charged by the parcel rate as ten parcels, although delivered by the plaintiffs to the defendants at the same time, and also consigned to the plaintiffs and received by the plaintiffs from the defendants at the other end at the same time. If, amongst a number of separate packages so brought by the plaintiffs to the defendants to be carried, some were addressed to the same person, whilst the others were addressed to different persons, the defendants then lumped together in one weight those addressed to the same person, and charged them in the aggregate according to the tonnage or lower rate only; whereas, with respect to the others, they charged the higher or parcel rate for each package under 1 cwt. in weight.

No other carriers use the defendants' railway. A weigh-bill shewing this mode of charging is appended to and to be taken as part of this case. (See opposite.)

This practice continued for some months previous to September, 1856. The plaintiffs from time to time complained to the defendants of this mode of charging, and objected to it, and claimed to be charged according to the lower scale, in the same manner as if the parcels had been all addressed to the same consignee. They continued, however, to send goods by the defendants from Norwich to London, and vice versâ, paying to the defendants according to the higher scale, as demanded.

During the months of September, October, and November, 1856, the plaintiffs delivered to the defendants at London and Norwich respectively, to be carried as aforesaid, goods in separate packages, each under 1 cwt. in weight, but always at the same time, addressed to different consignees, and containing the same articles as aforesaid, and upon each occasion protested against the defendants' mode of charging, and insisted [70] on the plaintiffs' right to be charged according to the lower or tonnage-scale. This the defendants declined to accede to, and insisted on the plaintiffs' paying according to the higher or parcels-scale. The plaintiffs on each occasion paid the higher or parcels-scale under protest; and the goods were received and carried by the defendants. The sums so paid by the plaintiffs to the defendants under protest,—being

[69] The Eastern Counties Railway Company

Carrying Department. 23 10 56.

Messrs. Pickford & Co.,

To the Eastern Counties Railway Company,

R. Moseley, Manager.

		No. of Articles.	Species of Goods.	Weight.	Rate.	Paid on.	Cartage.	Freight.	Total.
Wilson . .	Nov.	1	Parcel Drapery	„ „ 22	ea.			1 0	
Bollingbrook	„	2	Trusses do. .	„ „ 24	„			1 0	
Rigg & Co. .	„	1	Do. do. .	3 2 24	1/4			4 9	
Warner .	„	1	Parcel do. .	„ 20	ea.			1 2	
Povey . .	„	2	Do. do. .	„ „ 20	„			1 0	
Beane . .	„	1	Chest Leather .	1 0 26	ea.			1 2	
Homan . .	„	3	Hampers do. .	4 3 9	9			3 8	
Loman . .	„	1	Bag do. .	„ 1 0	ea.				0
Snowden .	„	1	Truss Twine .	1 1 17	ea.			1 2	
Wodehouse .	„	1	Box Soap . .	„ 1 6	ea.			1 0	
Custance .	„	1	„ Books .	„ 1 6	ea.			1 0	
Watson .	„	1	Package Frames	„ „ 14	ea.			1 0	
				13 1 0				18 11	
			Paid J. Constable						
			23/10/56						
	Drapery	4 3 6	@ 1/4 . .	6 5					
	Leather	6 1 7	@ 9 . .	4 9					
	Twine .	1 1 17	ea. . . .	1 2					
	Soap .	0 1 6	„ . . .	1 0					
	Books .	0 1 6	„ . . .	1 0					
	Frames	0 0 14	„ . . .	1 0					
	Box .	0 0 6	„ . . .	1 0				16 4	

the difference between the tonnage-scale and the parcels-scale in respect of such goods, —amounted to 26l. 9s. 5d. The plaintiffs contend that to this extent they have been deprived of their profits as carriers in respect of such goods. They also allege, that, by the course adopted by the defendants, they have been injured in their trade, by being unable to carry goods for their customers at so low a rate as they otherwise would have been; and thus have lost much custom, and been unable so well to compete in the carriage of goods with the defendants. They also allege that they have been put to great trouble in paying, as before mentioned, the difference to the defendants under protest, and keeping accounts of such payments; and that they have also been obliged to charge their customers a higher rate for carriage between London and Norwich, to the detriment and injury of their trade as carriers.

The defendants contend, that the plaintiffs have no right to have their parcels carried upon any other terms than the above; and that it is for the plaintiffs' own advantage that they undertake the delivery to their customers of the different parcels. The defendants make a separate charge to the rest of the public for the delivery of parcels at the places designated, in addition to the charge for carrying the parcels on the railway. The same mode of charging has been adopted by the defendants ever since the opening of their railway. The defendants contend, that, even if the plain-
[71] tiffs are entitled to the 26l. 9s. 5d., they are not entitled at law to more damages, upon any of the other grounds alleged.

The court was to be at liberty to draw from the above facts any conclusions which in their judgment a jury ought to have drawn.

The questions for the opinion of the court were,—

First, whether the defendants were bound to carry for the plaintiffs all or any of the goods so delivered to them by the plaintiffs, at or for the lower or tonnage-rate?

Secondly, whether the plaintiffs are entitled to recover from the defendants the said sum of 26l. 9s. 5d. paid by them to the defendants under protest under the circumstances stated in the case?

Thirdly, whether the plaintiffs were entitled to recover from the defendants, beyond the said sum of 26l. 9s. 5d., damages for the alleged wrongful refusal by them to carry the said goods at or for the said rates?

The verdict on the several issues were to be entered in such manner and form as to the court should seem proper.

C. Pollock (with whom was W. H. Willes,) for the plaintiffs (*a*). This court held, so long ago as the case [72] of *Parker* v. *The Great Western Railway Company*, 7 Scott, N. R. 875, 7 M. & G. 253, that the company, as common carriers, are bound to carry for all persons upon equal terms. [Williams, J. That turned upon the construction of the company's acts. Willes, J. Is it not a question for a jury whether the difference of trouble, in the case of several parcels addressed to several different persons, does not justify a difference of charge?] In *Crouch* v. *The Great Western Railway Company*, 11 Exch. 742, the court of Exchequer held, that a railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels all belonging to one person. There, Martin, B., in a very luminous judgment, goes through all the cases bearing upon this question. He says: "The first case on this subject is, *Pickford* v. *The Grand Junction Railway Company*, 10 M. & W. 399. That was a special case prepared by the parties, who wished to ascertain what the law was on the subject of packed parcels. Several packages had been made up by the plaintiffs, and tendered to the defendants, for the express purpose of having the law settled; and it was supposed that the decision on the questions then raised would have set the matter at rest. The case was argued on behalf of the company by the late Mr. Cowling (one of the most acute and able men ever at the bar); and the only additional risk which suggested itself to his mind was, that, by reason of goods belonging to different people being contained in one parcel, the carrier might be [73] liable to several actions at the suit of the different owners, instead of one action at the suit of a single owner. The court were of opinion that the plaintiff was entitled to judgment: and Baron Parke, in delivering it, read the following passage, which was not necessary for the decision of the case: -'But then it is argued on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is said, that, in the event of a misdelivery, the company would be liable to several actions of trover, instead of one: and, even in case of loss or damage by neglect, each separate owner might maintain an action on the custom of England in respect of his own goods. It is very doubtful at least, whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier would not have subsisted between them and the company but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration on account, not of the liability to pay greater damages, for they would be the same in

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the defendants were bound to carry for the plaintiffs the goods mentioned in the case at the lower or tonnage-rate, and were not entitled to charge the higher or parcels-rate.

"2. That the fact that the separate packages were addressed to different persons did not entitle the defendants to charge the higher or parcels-rate, inasmuch as the goods were all delivered at one time and in one consignment, to be delivered to the plaintiffs.

"3. That the plaintiffs are entitled to recover back from the defendants the difference between the tonnage and the parcels-rate, paid under protest.

"4. That the plaintiffs are also entitled to recover from the defendants damages beyond such difference, for the trouble, expense, and annoyance to which they have been put, for the injury to their business, and for the infringement of their rights by the defendants."

both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which at all events would be trifling) on this account should be, because it is admitted on the special case that the sum tendered is proper, unless the defendants had a right to charge for separate parcels,' &c. Now, that is the origin of all the controversy which has taken place on this subject: and I listened at the trial, and have listened now, for any distinction to be pointed out between packed parcels and inclosures, except this; and I have heard none. The next case is that of *Parker* v. *The Great Western Railway Company*, 7 M. [74] & G. 253, 7 Scott, N. R. 835; and all that there passed having reference to this subject was, that the court in a deliberate judgment, decided that there was no distinction between carriers and other people. I agree with Mr. Clarke, that there is nothing in that case conclusive of the present: but, in a subsequent case of *Parker* v. *The Great Western Railway Company*, 11 C. B. 545, this point was expressly raised by the fourth and fifth questions; and the court were of opinion that Mr. Parker, who stood in the same position as the present plaintiff, was entitled to recover. Maule, J., in distinct terms, says that there is no difference whatever between a parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual all the contents being his own. There is, therefore, an express decision of the court of Common Pleas upon the very point now in controversy. But the misfortune is, that it does not seem to have occurred to the courts to call attention to what was thrown out in *Pickford* v. *The Grand Junction Railway Company*. In a case of *Crouch* v. *The Great Northern Railway Company*, 9 Exch. 556, which was identical with the present, the counsel for the defendants treated the decision of the court of Common Pleas as conclusive: and Parke, B., said,—'The court of Common Pleas have already decided the point, and we are bound by their decision.' There is, therefore, the express decision of the court of Common Pleas; and the only proper mode of raising the question again is, by writ of error." Assuming, then, that the company are not justified in imposing upon a package the higher rate of charge because it is made up of several parcels, though addressed to several different persons,—the question is, whether the mere fact of the parcels being delivered to and received from the company without being inclosed in one package, the person so delivering them to and so [75] receiving them from the company being the same, will justify the company in imposing an increased charge, because they happen to be addressed to several ultimate consignees, with whom the company have nothing to do. [Williams, J. Is it not a question for a jury, whether the difference of trouble in separately weighing and entering the parcels so differently addressed will justify the difference of charge?] The directions on the parcels are not for the guidance of the company: and if they choose, for their own convenience, separately to weigh and enter each parcel, they have no right to make that a pretext for an extortionate charge. The 186th section of the company's act is conclusive.

Bovill, Q. C. (with whom was Holland), for the defendants (*a*). This company, which was originally in-[76]-corporated by the 6 & 7 W. 4, c. cvi., for the purpose of making a railway from London to Norwich, are impowered by s. 175 to demand and receive certain tonnage rates upon all articles, matters, and things carried upon or along the railway. The rates now in question have no connection with the tonnage-rates there mentioned. The 177th section impowers the company, if they shall think proper, to use and employ locomotive or other engines, or other motive power, and in carriages and waggons drawn or propelled thereby to carry and convey upon the said railway, &c., all such passengers, goods, &c., as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance as

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That the defendants were entitled, under the provisions of their act set out in the special case, and under the circumstances therein stated, to adopt the mode of charging complained of.

"2. That the facts found shew that no preference was, directly or indirectly, by such mode of charging, shewn to the public or any other persons over the plaintiffs.

"3. That the facts found shew that the benefit derived from the waiver by the defendants, in certain cases, of their right to charge parcel rate upon separate packages, was shared alike by the public and the plaintiffs.

they may from time to time determine upon, in addition to the tonnage-rate before mentioned. By s. 179, the company are impowered to provide and charge for locomotive engines or other motive power. The 182nd section relieves the company, as to "small parcels," from the restriction imposed by s. 177; for, it enacts "that it shall be lawful for the said company from time to time to make such orders for fixing, and by such orders to fix, the sum to be charged by the said company in respect of small parcels not exceeding 1 cwt. each, as to them shall seem proper." The plaintiffs rely upon the 186th section, which clearly applies to tonnage-rates, and not to small parcels: it provides and enacts "that the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate per ton throughout the whole of the said railway, in respect of the same description of articles, matters, or things, and that no reduction or advance in the said **[77]** rates and tolls shall either directly or indirectly be made partially or in favour of or against any particular person or company, or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway upon and in respect of the same description of articles, matters, and things so reduced or advanced, and shall extend to all person whomsoever using the same, or carrying the same description of articles, matters, or things thereon, anything to the contrary thereof in anywise notwithstanding." [Byles, J. Is not the provision in the general act,—the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 90,—incorporated with the local act?] No: only as to the extension acts (*a*). Besides, the general act was found, in practice, so far as this question is concerned, to be a dead letter. [Crowder, J. The giving undue preferences is now restrained only by Mr. Cardwell's act, 17 & 18 Vict. c. 31, s. 2.] That act merely gives power to this court to afford relief by injunction, but does not enable the party aggrieved to recover back the tolls charged in excess. [Crowder, J. There is a positive prohibition.] Not under a penalty. [Williams, J., referred to *Stevens* v. *Jeacocke*, 11 Q. B. 731. Willes, J. The 6th section of the 17 & 18 Vict. c. 31, is decisive of this matter: it enacts that "no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."] The judgment of this **[78]** court in *Parker* v. *The Great Western Railway Company*, 7 Scott, N. R. 835, 7 M. & G. 253, leaves this still an arguable point. Under the Railway Traffic Act, 17 & 18 Vict. c. 31, the court has on more than one occasion recognized the right of the company to make a difference in their charges where it is shewn that there is a difference in the cost of carriage to the company: see *Ransome* v. *The Eastern Counties Railway Company*, ante, vol. i., p. 437; *Oxlade* v. *The North Eastern Railway Company*, ante, vol. i., p. 454. All these acts are in pari materiâ: and the whole course of the legislation upon the subject shews that these provisions for equal charges were intended to apply to the tonnage-rates only, and not to the charges imposed by railway companies as carriers: and therefore, it is submitted, the 186th section of the 6 & 7 W. 4, c. cvi., has no application here. It is hardly necessary to refer to the common law rights of carriers. *Parker* v. *The Great Western Railway Company* was decided upon the construction of the acts relating to that company, which are altogether different from the act in question. [Williams, J. In Smith's Leading Cases, 4th edit. 174, speaking of the

"4. That, even if the plaintiffs are entitled to recover 26*l.* 9*s.* 5*d.*, the amount of the alleged overcharges, they are not entitled at law to any special damage, upon any of the grounds alleged in the declaration: but that they can only recover in this action the amount of the said overcharges.

"5. That, even if the mode of charging be held to be incorrect, still the facts found negative the averments in the first and second counts of the declaration, that the defendants wilfully and maliciously intended to injure the plaintiffs, to destroy their said business and diminish their said profits, and to create and establish for themselves, the defendants, a monopoly of the business of carriers from London to Norwich and from Norwich to London."

(*a*) See 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xcvii., 9 & 10 Vict. c. liii., 9 & 10 Vict. c. cclxxx.

liabilities of carriers, it is said that "the hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same service:" but all the authorities cited are railway cases (*a*). Byles, J. I know no common law reason why a carrier may not charge less than what is reasonable to one person, or [79] even carry for him free of all charge. The 186th section of the act seems to be a mere proviso on the 185th section, which enacts "that it shall be lawful for the said company, from time to time, as they shall think fit, to reduce all or any of the rates, tonnages, tolls, or duties by this act authorized to be taken, and to take the reduced rates, tonnages, tolls, or duties, and afterwards from time to time again to raise the same or any of them, and to take such higher rates, tonnages, tolls, or duties, so that the same respectively shall not at any time exceed the amount by this act authorized."] So far as the act is concerned, there is nothing to disentitle the company to charge any sum they please in respect of small parcels, however unreasonable: and there is nothing in the special case to shew that any preference is given to any one as against the plaintiffs. [Willes, J. If the statement of facts does not imply a preference as against Messrs. Pickford & Co., there is an end of the case. It had better be amended by averring that in point of fact packages under similar circumstances never were brought by any one else.] It certainly was not intended to be inferred from the statement of the case that the rest of the public would be charged at a rate different from that charged to the plaintiffs, under the like circumstances. But, assuming that the 186th section does apply, and that the company are bound to charge equal rates for carriage to all persons, that must mean where the circumstances are alike. It appears that, where a number of small parcels (each weighing less than 1 cwt.) are brought to the railway by one party,—and consigned to one party,—whether loose or packed,—so that one weighing and one entry will suffice for the whole, and one responsibility only be incurred, they are carried at the lower rate of charge. But, what do the plaintiffs do? They take to the termi-[80]-nus in London one hundred parcels, directed to one hundred different persons, at Norwich, with nothing upon them to indicate that they are consigned to the plaintiffs. The company are necessarily obliged to weigh and enter each of these parcels separately: whereas, if they were all packed or tied together, and addressed to one person, one weighing and one entry would suffice. It is said that this weighing and entering is for the company's own convenience, and ought not to be made a pretext for increasing the charge. But, suppose, on their arrival at Norwich, the plaintiffs demand the hundred parcels, and ninety-nine only are produced,—how is the hundredth parcel to be accounted for or traced unless the company keep an account of the particulars and weight of each? The account annexed to the case shews the amount of trouble that is imposed upon the company by this course of dealing. [Willes, J. Is the excess charged here more than a reasonable equivalent for the extra trouble occasioned to the company?] Assuming it to be unreasonable, the plaintiffs are clearly not entitled to recover it back. [Williams, J. I do not see how we can be called upon to say that there is anything unreasonable, under the circumstances, in the difference of charge.]

C. Pollock, in reply. Pickford & Co. are both consignors and consignees; and each delivery of parcels is accompanied by a consignment note. The circumstance of an ulterior destination appearing upon each parcel, is utterly immaterial as between the plaintiffs and the company; for, they incur no responsibility to any other person than those who employ them to carry.

Williams, J. I am of opinion that the defendants are entitled to our judgment. I was at first under the [81] impression that the parcels in question had something on the face of them to shew that they were consigned to Pickford & Co. But, when the facts come to be known, it seems to me that we are not called upon to trouble ourselves with the construction of the 186th section of the 6 & 7 W. 4, c. cvi., or to inquire, whether or not it applies to parcels or packages under 1 cwt. There is no

(*a*) *Pickford* v. *The Grand Junction Railway*, 10 M. & W. 399, *Parker* v. *The Great Western Railway Company*, 7 Scott, N. R. 835, 7 M. & G. 253, *Parker* v. *The Bristol and Exeter Railway Company*, 6 Exch. 702, *Crouch* v. *The Great Northern Railway Company*, 9 Exch. 556, *Parker* v. *The Great Western Railway Company*, 11 C. B. 545, and *Edwards* v. *The Great Western Railway Company*, 11 C. B. 588.

evidence upon the face of the special case from which the court or a jury could come to the conclusion that there has been any inequality in the charges for carriage made to the plaintiff as compared with other persons having goods carried under the like circumstances. It appears that the company charge a higher rate for the carriage of several parcels addressed separately to several different persons, than they charge for the same parcels if all addressed to one consignee. I see nothing unreasonable in that. Where a number of parcels are directed to a number of different persons, some additional trouble and expense must necessarily be incurred by the company in their transmission and delivery.

CROWDER, J. I am of the same opinion. The first question submitted for our consideration is, whether the defendants were bound to carry for the plaintiffs all or any of the goods delivered to them by the plaintiffs under the circumstances stated in the special case, at or for the lower or tonnage-rate. I agree with my Brother Williams that it is unnecessary for us on the present occasion to come to any conclusion as to the applicability of the 186th section of the 6 & 7 W. 4, c. cvi., because, assuming that that section does apply here, the plaintiffs were not entitled to have the goods in question carried at the tonnage-rate. It seems, that, where a number of parcels, each weighing less than 1 cwt., are addressed to the same individual, a lower **[82]** rate is charged than that which is imposed for the carriage of the same description of parcels when directed to different individuals. I, like my Brother Williams, was for some time under the impression that there was something on the face of the parcels to denote that the whole were to be delivered to Messrs. Pickfords. That, however, turns out not to be the fact. There is nothing but the ultimate address upon each parcel. This necessarily must entail upon the company some additional labour. Is it, then, necessarily unreasonable that they should make an additional charge for this increased labour? I see nothing on the face of this special case to induce me, or which ought to induce a jury, to conclude that the charge made here was an unreasonable one. Upon the whole, therefore, I am of opinion that the defendants are entitled to judgment.

WILLES, J. I am of the same opinion; and I found my judgment entirely upon the fact which has been stated and admitted at the bar, and which we are to assume, that there was no direction upon the several parcels other than the direction to the persons to whom Messrs. Pickford & Co. were to deliver them. That fact should be considered as added to the case. The special case is not accompanied by the document of charge. We must assume from its non-appearance, that, when a number of small parcels are delivered to the company together, to be carried from the same person to the same person, the lower or tonnage-rate is charged, and not the small-parcels-rate; but that, if the parcels are directed to different persons, they are charged at the small-parcels-rate. It appears that the plaintiffs, as carriers, are in the habit of collecting parcels, and bringing them to the defendants in London (or at Norwich), to be carried for them to Norwich (or to London), and there delivered to an agent of the plain-**[83]**-tiffs, to be forwarded to their several destinations. The complaint is, that they are required to pay for such carriage the parcels-rate instead of the tonnage-rate; and the difference claimed in this action is 26l. 9s. 5d. It is clear upon the terms of the rule itself laid down by the company, the plaintiffs are not entitled to recover; for, that rule is confined to small parcels all of which are addressed to the same person. It must therefore be by reason of that part of the rule being unreasonable that the plaintiffs recover, if at all. It is unnecessary to consider how the matter would stand at common law. The passage referred to by my Brother Williams in the notes in p. 174 of the first volume of Smith's Leading Cases, undoubtedly is inaccurately expressed. Nor is it necessary to express any opinion upon the construction of the statute 6 & 7 W. 4, c. cvi. I am of opinion that the direction of the parcels to several persons makes a material difference. A jury would necessarily assume that that would occasion an increased amount of trouble. I do not rely upon the course which the company choose to adopt. But, when the parcels arrive at the end of the line, if all are addressed to one person, the servants of the company could at once place them together: whereas, if addressed to different persons, each package must be searched for separately. That might, and obviously must, impose upon the company an additional trouble, for which it is not unreasonable that they should make an additional charge. The question is, what would be a reasonable sum for that. It is impossible for the court to say whether the alleged overcharge here is or is not unreasonable, though

a jury might have means of coming to a conclusion. For these reasons, I think the defendants are entitled to judgment.

BYLES, J. I am glad to find that the court is enabled [84] to decide this case, without sending the matter to a jury. It has already been decided that "packed parcels" are to be carried at the lower or tonnage-rate: and it is admitted that loose parcels, if all addressed to the same individual, are also to be subjected to the lower charge: but this is an attempt to carry the concession further. This is the case of loose parcels, directed to several different persons, with nothing to enable any one to discriminate between them and any other parcels. That clearly must impose additional trouble upon the company. There is nothing on the face of the special case to shew that the difference of charge was unreasonable: and the onus of shewing that lies on the party who asserts the unreasonableness. To enable the court to decide in favour of the plaintiffs, they must be enabled to fix the smaller sum as well as that for which it is to be substituted. As to the 186th section of the 6 & 7 W. 4, c. cvi., it has become unnecessary to pronounce any opinion upon it; though I cannot help saying that nothing which has fallen from Mr. Bovill has induced me to think that that section is not applicable to this case.

Judgment for the defendants.

[85] HALE AND ANOTHER *v.* RAWSON AND OTHERS. Feb. 9th, 1858.

[S. C. 27 L. J. C. P. 189; 4 Jur. N. S. 363; 6 W. R. 339.]

Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery: but, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, though without default on his part; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.—The defendants contracted to sell to the plaintiffs 50 cases of East India tallow, at 48s. 6d. per cwt., to be paid for by the plaintiffs in cash fourteen days after finishing the landing thereof; to be delivered by the defendants to the plaintiffs on safe arrival of a certain vessel called the "Countess of Elgin," then on passage from Calcutta to London:—Held, that this was an absolute contract to sell and deliver the tallow provided the ship arrived, and that the defendants were liable for a breach, notwithstanding that the non-delivery was occasioned by the ship's arrival (through no default on their part) without the tallow on board; and that the stipulation as to payment fourteen days after finishing the landing introduced no additional condition.

This was an action for an alleged breach of a contract for the sale of tallow.

The declaration stated, that, on the 17th of May, 1856, the defendants contracted and agreed to sell to the plaintiffs, and the plaintiffs then contracted and agreed to buy of the defendants, fifty cases of East India tallow, at the price of 48s. 6d. per cwt., to be paid for by the plaintiffs to the defendants in cash fourteen days after finishing the landing thereof, with 2½ per cent. discount; to be delivered by the defendants to the plaintiffs on safe arrival of a certain ship or vessel called the "Countess of Elgin," then alleged to be on her passage from Calcutta to London; the quality to be equal to the sample by which the same was sold; but, should it turn out inferior to the sample, an allowance to be made, in the usual mode, by arbitration; but the said contract was not to be void on that account: Averment, that afterwards, and long before the suit, the said ship or vessel safely arrived at London, and the plaintiffs were, on such arrival, and at all times afterwards, ready and willing to accept and receive the said tallow, and to pay for the same according to the said contract, of which the defendants had notice; and a reasonable time for the delivery of the said tallow to the plaintiffs elapsed after the said arrival of the said ship or vessel and before the commencement of the suit, and all other things were done and observed and happened to entitle [86] the plaintiffs to have the said tallow delivered to them according to the said contract before the suit, and to maintain the suit: Breach, that the defendants had not delivered to the plaintiffs the said fifty cases of tallow, or any part thereof, and, by reason of the premises, the plaintiffs had lost and been deprived of the said tallow, and of the benefit of the said contract, and of divers profits and advantages

which they might and would have acquired if the said tallow had been delivered to them according to the said contract: and the plaintiffs claimed 300l.

The defendants pleaded,—first, that they did not contract and agree as alleged,—secondly, that the said fifty cases of East India tallow did not, nor did any portion of that quantity, arrive in the said ship or vessel called the "Countess of Elgin," when the said ship or vessel so arrived in London as in the declaration mentioned, without any default or negligence on the part of the defendants; whereby, without any default or negligence on their part as aforesaid, the defendants were unable to deliver the said fifty cases of East India tallow, or any part thereof, to the plaintiffs.

The plaintiffs took and joined issue on these pleas, and also demurred to the second plea, the grounds of demurrer stated in the margin being,—"that the second plea affords no answer to the action; that the contract to deliver declared on is an absolute contract, and not dependant upon the arrival of the goods in the ship the 'Countess of Elgin.'" Joinder

Watkin Williams, in support of the demurrer (*a*)[1]. **[87]** 1. No property in the tallow passed by the contract to the plaintiffs, for, the contract would have been satisfied by the delivery of any fifty cases of tallow, provided it answered the character of that which was agreed to be delivered; *Wait* v. *Baker*, 2 Exch. 1,—even, perhaps, though it arrived contemporaneously by another vessel. In *Aldridge* v. *Johnson*, 7 Ellis & B. 885, the plaintiff agreed with one Knights to purchase from him 100 out of 200 quarters of barley which the plaintiff had seen in bulk and approved of; and he paid part of the price: it was agreed that the plaintiff should send sacks for the barley, and that Knights should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge, and send them to the plaintiff; the plaintiff sent sacks enough for a part only of the 100 quarters; these Knights filled; and Knights also endeavoured to find trucks for them, but was unable to do so: the plaintiff repeatedly sent to Knights demanding the barley: Knights finally detained it, and emptied the barley from the sacks into the bulk: and the court held, that the property in so much of the barley as was not put into the sacks did not pass to the plaintiff. Lord Campbell, Coleridge, J., and Erle, J., also held, that the portion put into the sacks passed to the plaintiff,—hæsitante, Crompton, J., on the ground that it did not appear quite clearly, that, at the time when the plaintiff demanded the barley, he knew that any portion had been put into the sacks, and that, therefore, his assent to the particular appropriation was doubtful. Lord Campbell there says: "No rule of the law of vendor and purchaser is more clear than this, that, until the **[88]** appropriation and separation of a particular quantity, or signification of assent to the particular quantity, the property is not transferred" (*a*)[2]. And Erle, J., says: "It is clear, that, where there is an agreement for the sale and purchase of a particular chattel, the chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained." 2. Assuming, even, that the property did pass, still the question remains, whether the contract is absolute, or subject to a condition that the tallow shall arrive, and arrive in the particular ship. It is submitted that the fair construction of the contract, upon all the authorities, is, that it is an absolute contract dependant only on the arrival of the vessel; and that the defendants are not excused from performing it, even though its performance should without any default of theirs become impossible. A contract for the sale of goods "on arrival," —*Boyd* v. *Siffkin*, 2 Campb. 326, —"to be shipped" or "to arrive" by a particular ship,—*Splidt* v. *Heath*, 2 Campb. 57, n., *Lovett* v. *Hamilton*, 5 M. & W. 639, *Stockdale* v. *Dunlop*, 6 M. & W. 224, *Johnson* v. *Macdonald*, 9 M. & W. 600, —or, "that may be loaded,"—*Hayward* v. *Scougall*, 2 Campb. 56, has been held to be subject to

(*a*)[1] The points marked for argument on the part of the plaintiffs were,—

"That the second plea affords no answer to the action.

"That, by the contract, the defendants were bound to deliver fifty cases of East India tallow upon the arrival of the 'Countess of Elgin,' and that that obligation was not conditional upon the arrival of the tallow in that vessel.

"And that the mere inability of the defendants to perform their contract affords no answer to an action for a breach of it, even though such inability was occasioned without any fault or negligence of the defendants."

(*a*)[2] Quære whether his Lordship did not mean "and signification of assent to the appropriation and separation."

the double contingency of the arrival of the vessel named, and of the goods being on board. In *Idle* v. *Thornton*, 3 Camph. 274, the contract was contingent on the arrival of the tallow. But here the only contingency is, the arrival of the vessel named. The case of *Fischel* v. *Scott*, 15 C. B. 69, as explained in *Gorrissen* v. *Perrin*, ante, vol. ii., p. 681, is also an authority to shew that the non-arrival of the tallow on board the "Countess of Elgin" did not excuse the defendants for the non-performance of their contract. In *Gorrissen* v. *Perrin*, A. contracted to sell to [89] B. 1170 bales of gambier, "now on passage from Singapore, and expected to arrive in London per 'Ravenscraig' and 'Lady Agnes Duff;'" and this was held to be a warranty that the goods were then on passage. Cockburn, C. J., in giving the judgment of the court, there says: "Without desiring at all to interfere with the rule laid down in the cases referred to, we may, in passing, observe that we think it has been carried far enough, and that its effect may have been to introduce uncertainty into contracts which were not intended by the parties to be contingent on accidental circumstances, such as, the transfer of a cargo from one ship to another. We are, however, of opinion that the present case is plainly distinguishable from those referred to, by the statement that the goods were on board at the time the contract was entered into. We are of opinion that this statement amounts to a warranty; and although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words 'expected to arrive,' we think they cannot resort to them to get rid of the positive assurance that the goods were then on their passage; on the faith of which, possibly, the purchaser may have entered into the contract to buy." So, here, the defendants might, if they chose, have inserted in the contract words which would have made the delivery of the tallow contingent on the double event. But not having done so, their contract became absolute on the arrival of the vessel. And this construction is in no degree affected by the stipulation for payment within a limited time after the landing of the goods.

Coleridge, contra (*a*). 1. This is a contract for the sale of a specific quantity of tallow, and consequently [90] immediately on the signing of the document, the property in the subject matter of the sale passed to the purchaser: and, if the goods had been burnt or lost on the voyage, the defendants would clearly have been emancipated from the performance of their contract, the performance having by no default on their part become impossible. 2. Assuming that not to be so, the contract is conditional on the safe arrival of the "Countess of Elgin" with the 50 cases of tallow on board. This would be the natural and fair interpretation of the contract, if the matter were res integra. The price is to be paid "in cash fourteen days after finishing the landing thereof:" and the tallow is to be delivered "on safe arrival of a certain ship or vessel called the 'Countess of Elgin.'" In *Boyd* v. *Siffkin*, 2 Camph. 325, the contract was as follows, - "Sold for Mr. H. Siffkin to Mr. M. Boyd, about thirty-two tons, more or less, of Riga Rhine hemp, on arrival per 'Fanny' and 'Almira,' at 82*l.* 10*s.* per ton, &c., from the landing scale," &c.: and it was held that this meant on arrival of the goods which the vessel was expected to bring: and that, the vessel arriving empty, without any default on the part of the vendor, he was not liable to the purchaser for the non-delivery. *Hawes* v. *Humble*, 2 Camph. 327, n., is rather more in point. There, the [91] contract was in these terms, - "I have this day sold for and by your order, on arrival, 100 tons, more or less, of Teneriffe barilla, in your 'Bon Fim,' from Teneriffe, to Messrs. Hawes & Co., at 41*s.* per cwt," &c. The 'Bon Fim,' from accidental circumstances, and without any default on the part of the sellers, arrived without any barilla. Baron Wood was of opinion that the contract was conditional; and the court of Queen's Bench unanimously agreed with him. [Crowder, J. Have you found any case where

(*a*) The points marked for argument on the part of the defendants were,

"That, upon the true construction of the contract mentioned in the declaration, the property in the fifty cases of tallow ascertained and on board the 'Countess of Elgin,' passed to the plaintiffs by the said contract, and that the said cases of tallow were the property and in the possession and at the risk of the plaintiffs from the time of the making thereof:

"And that the said contract was not an absolute contract on the defendants' part, to deliver to the plaintiffs the said cases of tallow on the arrival of the 'Countess of Elgin,' but a contract on their part to deliver to the plaintiffs the said cases of tallow on the safe arrival of the 'Countess of Elgin' with the said cases of tallow on board."

"on arrival of a certain ship" has been construed to mean "on her arrival with the goods on board!"] That was assumed in *Idle* v. *Thornton*, 3 Campb. 374. In *Alewyn* v. *Pryor*, R. & M. 406, the contract was as follows,—"London, 30 March, 1825. Sold this day, by order of Messrs. Prior & Co., all the Galipoli oil on board the 'Thomas,' Captain Nichols, above ninety tuns, say thirty to forty tuns (more or less), direct from Galipoli, on arrival in Great Britain, at 54l. per tun of 236 gallons, duty paid; usual allowance for dirt, grease, and water: to be delivered by sellers on a wharf in Great Britain, to be appointed by the buyers, with all convenient speed, but not to exceed the 30th of June next, and taken at the King's landing scale, and to be paid for in fourteen days from landing, in ready money, allowing seven months' discount." The ship did not arrive until the 4th or 5th of July, and the buyers declined to accept the oil, and brought an action for the alleged breach of contract. For the defendants it was objected "that the arrival was a condition precedent to the sale, and that the sellers meant, not to warrant the arrival of the oil by the 30th of June, but that, if the oil did not arrive sooner, the buyers would not be bound to accept it:" and Abbott, C. J., assenting to this view, nonsuited the plaintiff. In *Lovatt* v. *Hamilton*, 5 M. & W. 639, the defendants, by their broker, entered into a contract **[92]** for the sale to the plaintiffs of "50 tons of palm-oil, to arrive per the 'Mansfield,' at 32l. per ton, &c.: in case of non-arrival, or the vessels not having so much in after delivery of former contracts, this contract to be void." At the time this contract was entered into, the defendants had several vessels on the coast of Africa for the purpose of obtaining palm-oil, and, amongst others, the "Mansfield" and the "Watt." After the date of the contract, the "Mansfield" was loaded with 315 tons of palm-oil, and sailed homewards. On her arrival at Cameroons, the defendants' agent ordered the Captain of the "Mansfield" to trans-ship part of her cargo to the "Watt," which was the larger vessel. This trans-shipment was accordingly made bonâ fide and without fraud, for the purpose of enabling the "Watt" to proceed home with a full cargo. The "Watt" proceeded on her voyage, and arrived in Liverpool on the 8th of April, 1838, and the "Mansfield," on the 20th of May following. The "Mansfield," on her arrival, had on board 235 tons of palm-oil, but the contracts made previously to the above contract amounted to 228 tons, leaving only seven tons applicable to this contract, which were delivered by the defendants to the plaintiffs. In an action for the non-delivery of the oil, it was held that the arrival of the oil in the "Mansfield" was a condition precedent, and that the plaintiffs were not entitled to the oil brought by the "Watt." There is no substantial difference between that case and this: the two contracts are almost identical. *Stockdale* v. *Dunlop*, 6 M. & W. 224, only shews that a contract for the sale of goods "to arrive" by a particular vessel, is a contract to sell the goods when they arrive. *Johnson* v. *Macdonald*, 9 M. & W. 600, however, is expressly in point: there, the defendant by a bought and sold note agreed to sell to the plaintiffs "100 tons of nitrate of soda, at 18s. per cwt, to arrive ex 'Daniel Grant;' to be taken from the **[93]** quay at landing weights," &c.: and below the signature of the brokers there was the following memorandum,—"Should the vessel be lost, this contract to be void:" and it was held that the contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition, of the arrival of the vessel, with the specified cargo on board. [Crowder, J. By the terms of the contract there, the condition was that the soda should arrive.] So here, the tallow is to be delivered on the safe arrival of the ship,—having the tallow on board, of course: and the price is to be paid "fourteen days after finishing the landing thereof." Unless both ship and goods arrive, the contract cannot be performed. Parke, B., in giving judgment, there says: "I admit, that, in the cases which have been referred to, with the exception of *Lovatt* v. *Hamilton*, 5 M. & W. 644, and *Stockdale* v. *Dunlop*, 6 M. & W. 224, the words used in the contract entered into, were not simply the words 'to arrive,' but were, that the contract was to be completed 'on arrival' of the vessel. It appears to me, however, that the meaning of both these expressions is precisely the same. This is a contract not passing any property in any existing chattel on board the vessel at the time it was entered into, but merely an agreement for the sale and delivery of a portion of her cargo at a future period, viz. when the vessel should arrive: in short, that the goods are to be delivered at the quay out of the vessel, if she should arrive; in order to fulfil which condition, a double event must take place, viz. the arrival of the vessel with the nitrate of soda on board. Such was the meaning put by the court on a similar contract in *Lovatt* v. *Hamilton*;

and I must own that I, for my own part, never had the least doubt [94] as to the meaning of these words. The word 'to' does not mean that the goods 'shall' arrive, but merely that they shall be sold on their arrival. I think, therefore, that, according to its true meaning, the language of this contract renders the performance of it conditional on a double event,—the arrival in safety of the vessel and her cargo." [Crowder, J. The question is whether the defendants do not by the terms of this contract guarantee that the "Countess of Elgin" shall have the 50 cases of tallow on board, and that the plaintiffs shall have them if the vessel arrives.] The stipulation as to payment fourteen days after landing, it is submitted, negatives that being the true construction of the contract.

Williams, in reply. No property in any specific tallow passed by this contract. [Willes, J. The court are all of opinion that this is not a sale of a specific chattel.] In order to satisfy the contract, it was not necessary that the 50 cases of tallow should arrive by this particular ship. It is not a contract for tallow "to arrive ex 'The Countess of Elgin.'" In *Alewyn* v. *Pryor*, R. & M. 406, the sale was subject to the condition that the goods should arrive by a given day: that case, therefore, has no application. [Willes, J. It is to be regretted that the note is not set out in terms in the pleadings.] In *Johnson* v. *Macdonald*, 9 M. & W. 600, the only question was, whether the words "to arrive ex 'Daniel Grant'" amounted to a warranty, or merely to a condition of sale, not whether they amounted to a condition of delivery. Alderson, B., says,—"When goods are to be sold on a condition to take effect at some future time, I agree in thinking that it is more rational to construe the words 'to arrive' in the light of a condition, than as amounting to a warranty." It may be conceded that the arrival of [95] the ship here was a condition precedent to the obligation on the defendants' part to deliver the tallow; but the arrival of the vessel is the only event provided for: and the absolute character of the contract is in no degree altered or affected by the subsequent stipulation that the defendant shall pay for the tallow in a given time after the defendants have performed their contract by completing the delivery of it.

Williams, J. As to the first point, the court entertain no doubt at all. It is clear that the contract would have been satisfied by the delivery of any 50 cases of tallow answering the description given. Clearly, therefore, no property in any particular tallow passed by the bargain. The second point, however, presents some nicety; and, as it is likely to be one of general application, we will take a little time to deliberate upon it.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court:—

The principles of law applicable to this case are undisputed. Where there is an agreement to deliver goods to a vendee on a certain condition, and the condition (without any default on the part of the vendor) never comes to pass, it is plain that he will not be liable for a non-delivery. But, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.

The question, therefore, is, whether the agreement to deliver the tallow, stated in the declaration in this [96] case, is conditional on the arrival of the ship merely, or on her arrival with the goods on board. The contract alleged is, to sell the tallow at a certain price, to be paid for fourteen days after finishing the landing, to be delivered on safe arrival of the "Countess of Elgin." The plaintiffs contend that this is an absolute contract to sell and deliver the tallow, provided the ship arrives. The defendants insist, that, as the price is not to be paid till a certain time after the landing, there is also an implied condition that the tallow shall arrive in the ship. Now, if there were no such stipulation as to the time of payment, the contract would surely be, to deliver the tallow out of the ship if she arrived, whether it should be possible or impossible to perform the contract. How, then, can it make any difference, that the plaintiffs undertake, in case the contract is performed by the defendants' delivering the tallow out of the ship, to pay for it within a certain time after it is landed. We think that this stipulation introduces no additional condition, and that, as the ship has arrived, there was nothing to absolve the defendants from performing their contract, and, consequently, that they are liable for a breach of it.

Judgment for the plaintiffs.

[97] REINDEL *v.* SCHELL. Feb. 10th, 1858.

[S. C. 27 L. J. C. P. 146; 4 Jur. N. S. 310.]

The declaration stated, that, by a memorandum of agreement made between the plaintiff of the one part and the defendant of the other part, it was witnessed, that, in consideration, &c., the defendant agreed to become and be for five years assistant to the plaintiff in his art and profession of photographic colourer or painter, and would during the term give up his whole time and attention to superintending the same, in retouching and perfecting all such portraits, &c. as should be coloured or painted by the plaintiff in the prosecution of his said art or profession, and as the plaintiff should from time to time require,—that the defendant would not at any time during the term take employment from any other person, or be otherwise engaged in colouring, &c. any photographic portrait, &c.,—that the defendant would during the term do and perform all such acts, &c. in or relating to the said art or profession as the plaintiff should direct, and would not reveal any secret relating thereto,—and that the defendant would be just and faithful in his dealings, &c.: that it was thereby further witnessed, that, for and in consideration of the agreement on the defendant's part, the plaintiff thereby agreed to pay the defendant weekly a certain specified remuneration for every portrait, &c. which he should retouch to the plaintiff's satisfaction, and to guarantee that the defendant should be continually supplied with photographic portraits to be retouched, &c.: and that, lastly, it was thereby mutually agreed and declared by and between the plaintiff and the defendant, that they should respectively forfeit the sum of 500*l.*, to be paid to the other of them as liquidated damages, in the case of any breach being made by either of them in the true performance of the terms and conditions of the said agreement. After averring performance by the plaintiff of all things necessary to entitle him to have the agreement performed by the defendant, the declaration alleged for breaches, —that the defendant did not continue the assistant of the plaintiff for the stipulated period, nor give the whole of his time in retouching portraits, &c. as required,— —that, during that period, he took employment from other persons,—that he refused to perform certain acts in and relating to the said art or profession as the plaintiff required, and divulged secrets, &c.,—and that the defendant did not nor would during the term be just and faithful in his dealings, &c.; and it concluded as follows: "by reason of which said several premises the defendant forfeited and became liable under and by virtue of the agreement to pay to the plaintiff the said sum of 500*l.*, as liquidated damages, but the defendant has not paid the same, or any part thereof, and the plaintiff claims 500*l.*"—The defendant pleaded, "to the plaintiff's claim of 500*l.* as and for liquidated damages," that the said memorandum of agreement was and is in the words and figures following (setting it out); averment, that the 500*l.* in the agreement mentioned was a penalty, and not liquidated damages, and that the defendant was not liable to pay to the plaintiff the said sum of 500*l.* as and for liquidated damages, in manner and form as in the declaration alleged:—Held, on demurrer (dubitante Willes, J.), that the concluding averment in the declaration, that the defendant became liable to pay the 500*l.* as liquidated damages, but had not paid the same, was a mere erroneous allegation of an inference of law, and immaterial, it being sufficiently apparent on the declaration that the 500*l.* was a penalty, and not liquidated damages, and that the plea was bad, as being a mere plea to damages.

The declaration stated, that, by a memorandum of agreement in writing made and dated the 6th of September, 1853, between the plaintiff of the one part, and the defendant of the other part, after reciting as therein is recited, It was witnessed, that, in consideration of the plaintiff having, at the request of the defendant, paid the expenses of the defendant's journey to London, and for other the considerations in the said agreement and thereinafter expressed, the defendant agreed with the plaintiff forthwith to become and be, **[98]** and continue thenceforth during the term of five years, to be computed from the day of the date of the said agreement, if the plaintiff and the defendant should both of them so long live, assistant of and to the plaintiff in his the plaintiff's art and profession of photographic colourer or painter, and should and would during the said term give up his whole time and attention to superintending the same,

in retouching and perfecting all such portraits, pictures, and other articles and things as should be coloured or painted by the plaintiff in the prosecution of his said art or profession, and as the plaintiff should from time to time require the same to be done; and that the defendant should not nor would at any time during the said term take employment from any other person or persons whatsoever, or be otherwise engaged in colouring or painting, or in retouching, any photographic portrait or other picture; and also that he the defendant should and would, during the said term, do and perform all such acts, matters, and things, in and about or relating to the said art or profession, as the plaintiff should from time to time direct, order, and appoint, and should not nor would at any time thereafter, without the consent in writing of the plaintiff, divulge or make known any trust, secret, or dealing of or relating to the said art or profession; and that he the defendant should and would during the said term be just and faithful to the plaintiff in all his dealings and transactions connected with the said art or profession: And it was thereby further witnessed, that, for and in consideration of the agreement therein above and thereinbefore contained on the part of the defendant to be by him observed and kept, the plaintiff did thereby agree with the defendant to pay the defendant weekly and every week a remuneration, for every portrait, picture, or other article or thing which he should [99] well and perfectly retouch to the satisfaction of the plaintiff, at and after certain rates specified in that behalf in the said agreement, or to be from time to time settled and determined between them, and to guarantee that the defendant should be continually supplied with photographic portraits or pictures by the plaintiff, to be retouched and perfected under the plaintiff's direction by the defendant in pursuance of the said agreement: And lastly it was thereby mutually agreed and declared by and between the plaintiff and the defendant, that they should respectively forfeit the sum of 500*l.*, to be paid to the other of them as liquidated damages, in the case of any breach being made by either of them in the true performance of the terms and conditions of the said agreement: That, after the making of the said agreement, and before any breach thereof by either of the parties thereto, and during the said term of five years, on the 29th of June, 1855, by a certain other memorandum of agreement made and dated on that day, between the plaintiff of the one part, and the defendant of the other part,—after reciting that the defendant had since the date of the first above-mentioned agreement continued with and acted for the plaintiff as an assistant in his said profession, in accordance with the terms of the said agreement; and that the defendant had, at the request of the plaintiff, and for the considerations thereinafter expressed, agreed with the plaintiff to continue as such assistant for the further term of three years after the expiration of the said term of five years, if both of them should so long live,—It was witnessed that, in consideration of the defendant binding himself to continue the assistant of the plaintiff for the further term of three years from and after the expiration of the said term of five years, the plaintiff agreed with the defendant that the plaintiff should and would, on and after [100] the 6th of September, 1856, during the remainder of the said term of five years, pay to the defendant as a remuneration for his services as such assistant, for every portrait, picture, or other article which he should well and perfectly retouch to the satisfaction of the plaintiff, at and after certain rates or scales in the secondly mentioned agreement in that behalf particularly specified and set forth, the same being larger and increased rates and scales of remuneration than and over the rates and scales in the first agreement mentioned; and it was by the second memorandum of agreement mutually agreed, that, during the remainder of the said term of five years, the plaintiff should be only liable and bound to pay to the defendant from week to week after the rate or scale mentioned in the first memorandum of agreement, and that the difference payable to the defendant on and according to the said larger and increased rates or scales should be payable and paid by the plaintiff to the defendant on the 6th of September, 1858: And the plaintiff agreed with the defendant, that, for every portrait, picture, or article which he should during the extended period of three years well and perfectly colour or retouch to the satisfaction of the plaintiff, he the plaintiff would weekly pay to the defendant after the increased and larger rate or scale in the second memorandum of agreement specified, and that the defendant should during such extended period of three years be continually supplied with photographic portraits or pictures to be retouched and perfected under the direction of the plaintiff: And the defendant, for the considerations in this behalf aforesaid, agreed with the plaintiff that he the defendant would, during the

remainder of the said term of five years, faithfully and truly perform his part of the said agreement, and that he would during the said extended period of three [101] years be and continue the assistant of the plaintiff in his said art or profession, and upon the same terms and conditions as were mentioned and contained in the said first memorandum of agreement, save so far as the same were varied by the said second memorandum of agreement: And lastly, it was by the said second memorandum of agreement mutually agreed and declared by and between the plaintiff and the defendant, that they should be respectively subject to the forfeiture of the sum of 500l., to be paid to the other of them as liquidated damages, in the event of any breach being made by either of them in the true performance of the terms and conditions of the said second memorandum of agreement: Averment, that, since the making of the said several agreements hitherto, the plaintiff had done everything on his part in the said agreements and each of them contained to be by him done, and had always been ready and willing to do everything in the said agreements and each of them contained which he ought on his part to do, and everything had happened necessary to entitle him to have the said last-mentioned agreement performed by the defendant on his part; but that the defendant, since the making of the said last-mentioned agreement, had broken and neglected and refused to perform the same, in this, that, during the said term of five years in the said first memorandum of agreement mentioned, he did not nor would continue the assistant of the plaintiff in his said art or profession, nor did nor would give up his whole time or attention to superintending the same, in retouching the said portraits, pictures, and other articles and things as agreed, and as the plaintiff required; and in this, that the defendant did, during the said term of five years, take employment from persons other than the plaintiff, and was and became engaged in colouring, painting, and retouching photographic [102] portraits and pictures otherwise, that is to say, on his own behalf, and for other persons than the plaintiff, than was agreed between the defendant and the plaintiff; and in this, that, during the said term of five years, the defendant did not nor would do or perform certain acts, matters, and things in, about, and relating to the said art and profession, as the plaintiff did from time to time during the said term direct, order, and appoint the defendant to do and perform, and did, during the said term, without the consent in writing of the plaintiff, divulge and make known certain trusts, secrets, and dealings of and relating to the said art and profession; and in this, that he the defendant did not nor would, during the said term of five years, be just and faithful to the plaintiff in his dealings and transactions connected with the said art or profession: By reason of which said several premises the defendant forfeited and became liable, under and by virtue of the agreements aforesaid, to pay to the plaintiff the said sum of 500l. as liquidated damages, but the defendant had not paid the same, or any part thereof: And the plaintiff claimed 500l.

Third plea,—to the plaintiff's claim of 500l. as and for liquidated damages,—that the said memorandum of agreement in the declaration firstly mentioned was and is in the words and figures following, that is to say, "Memorandum of an agreement made the 6th day of September, 1853, Between Albert Reindel, of Nuremberg, photographic artist, of the one part, and Anton Schell, of Frankfort-on-the-Maine, artist, of the other part: Whereas the said Albert Reindel practises the art or profession of colouring photographic portraits and other photographic pictures, and, in the pursuit of that art or profession, accepts public and other engagements to colour all such portraits and other photographic pictures as shall be required, at such public esta- [103]-blishments, or by the private persons with whom he shall enter into engagements: And whereas, he the said Albert Reindel, having occasion for an assistant in his art or profession of a photographic painter, to retouch and perfect under his immediate guidance and direction the various portraits and other pictures which in the course of his public and other engagements he shall be required to colour as aforesaid, hath applied to the said Anton Schell to become his assistant to retouch and perfect all such portraits, pictures, and other drawings which the said Albert Reindel shall undertake to, and shall, colour as aforesaid; which he the said Anton Schell hath agreed to do, for the period, and upon the terms, hereinafter mentioned: Now, this memorandum of agreement witnesseth, that, in consideration of the said Albert Reindel having paid the costs and expenses of the journey of the said Anton Schell to London, and for the considerations hereinafter contained and on the part of the said Anton Schell to be observed and performed, he the said Anton Schell, for him-

self, his executors and administrators, doth undertake, promise, and agree to and with the said Albert Reindel, that he the said Anton Schell shall and will henceforth, during the term of five years, to be computed from the day of the date of these presents, if both of them the said Albert Reindel and Anton Schell shall so long live, become, be, and continue assistant of the said Albert Reindel in his art or profession of a photographic colourer or painter, and shall and will during the said term give up his whole time and attention to superintend the same, in retouching and perfecting all such portraits, pictures, and other articles and things as shall be coloured or painted by the said Albert Reindel in the prosecution of his art or profession of a photographic colourer or painter, and as the said Albert Reindel **[104]** shall from time to time require the same to be done; and that he the said Anton Schell shall not nor will at any time during the said term take employment from any other person or persons whomsoever, or be otherwise engaged in colouring or painting or in retouching any photographic portrait or other picture; and also that he the said Anton Schell shall and will during the said term do and perform all such acts, matters, and things in, about, or relating to the said art or profession of photography, and the painting, colouring, and retouching photographic portraits and other pictures, articles, and things, as he the said Albert Reindel shall from time to time direct, order, and appoint; and shall not nor will at any time hereafter, without the consent in writing of him the said Albert Reindel, divulge, or make known any trust, secret, or dealing of or relating to the said art or profession of a photographic artist, painter, or colourer, of the said Albert Reindel; and also that he the said Anton Schell shall and will during the said term be just and faithful to the said Albert Reindel in all his dealings and transactions connected with his said art or profession of a photographic artist, painter, or colourer as aforesaid: And this memorandum of agreement further witnesseth, that, for and in consideration of the undertaking, promise, and agreement hereinbefore contained on the part of the said Anton Schell to be observed, kept, and performed, he the said Albert Reindel both hereby undertake, promise, and agree that he the said Albert Reindel shall and will, weekly and every week, well and truly pay to the said Anton Schell a remuneration for every portrait, picture, or other article or thing which he shall well and perfectly retouch to the satisfaction of the said Albert Reindel, at and after the rate following, that is to say,—

[105]

Size.	Coloured.	Tinted.
	£ s. d.	£ s. d.
3¼ × 4¼	0 6 0	0 5 0
4 × 5	0 7 0	0 6 0
5¼ × 7	0 9 6	0 7 0
7 × 9	0 12 0	0 9 0

and, for all other portraits or pictures of other dimensions, at and after the same rate, the actual amount to be paid to be estimated, settled, and determined from time to time by the said Albert Reindel; and, further, that he the said Albert Reindel shall, and he doth hereby undertake, promise, and agree, to guarantee that the said Anton Schell shall continually be supplied with photographic portraits or pictures by him the said Albert Reindel under his direction to be retouched and perfected by the said Anton Schell in accordance with and in performance of the terms of this agreement: And lastly, it is hereby mutually agreed and declared by and between the parties hereto, that they shall be respectively subject to the forfeiture of the sum of 500*l*., to be paid to the other of them, his executors or administrators, as liquidated damages, in the case or event of any breach being made by either of them in the true performance of the terms and conditions of the agreement hereby made and entered into. In witness," &c.

And the defendant further says that the said memorandum of agreement in the declaration secondly mentioned was and is in the words and figures following, that is to say, – "Memorandum of agreement, made the 29th day of June, 1855, Between the within-named Albert Reindel, of the one part, and the within named Anton Schell, of the other part: Whereas the said Anton Schell has, since the date of the within agreement, continued with and acted for the said Albert **[106]** Reindel as an assistant

in his profession of photographic artist in accordance with the terms of the within agreement: And whereas the said Anton Schell has at the request of the said Albert Reindel, and for the considerations hereinafter expressed, agreed with the said Albert Reindel to continue as such assistant for the further term of three years after the expiration of the within term of five years, if both of them the said Albert Reindel and Anton Schell shall so long live: Now, this memorandum of agreement witnesseth, that, in consideration of the said Anton Schell so binding himself to continue as the assistant of the said Albert Reindel as within mentioned for the term of three years from and after the expiration of the said period of five years as within mentioned, he the said Albert Reindel doth hereby agree with the said Anton Schell that he the said Albert Reindel shall and will, on and after the 6th day of September, 1856, during the remainder of the said period of five years, pay to the said Anton Schell, as a remuneration for his services as such assistant, for every portrait, picture, or other article which he shall well and perfectly retouch to the satisfaction of the said Albert Reindel, at and after the rates following, that is to say, for every portrait or picture which he shall well and perfectly colour or retouch as aforesaid between the 6th of September, 1855, and the 6th of September, 1856, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£ s. d.	£ s. d.	£ s. d.
$3\frac{1}{4} \times 4\frac{1}{4}$	0 7 0	0 6 0	0 5 0
4×5	0 9 6	0 7 0	0 6 0
$5\frac{1}{4} \times 7$	0 12 0	0 9 6	0 7 0
7×9	0 15 0	0 12 0	0 9 0

[107] "For every portrait or picture which the said Anton Schell shall so perfectly colour or retouch as aforesaid between the 6th day of September, 1856, and the 6th day of September, 1857, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£ s. d.	£ s. d.	£ s. d.
$3\frac{1}{4} \times 4\frac{1}{4}$	0 9 6	0 6 0	0 5 0
4×5	0 12 0	0 7 0	0 5 0
$5\frac{1}{4} \times 7$	0 15 0	0 9 6	0 7 0
7×9	0 18 0	0 12 0	0 9 0

"For every portrait or picture which the said Anton Schell shall so perfectly colour or retouch as aforesaid during the last year of the within-mentioned period of five years, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£ s. d.	£ s. d.	£ s. d.
$3\frac{1}{4} \times 4\frac{1}{4}$	0 10 0	0 7 0	0 5 0
4×5	0 14 0	0 9 6	0 6 0
$5\frac{1}{4} \times 7$	0 16 0	0 12 0	0 7 0
7×9	1 0 0	0 15 0	0 9 0

"And for all other portraits or pictures of other dimensions, at and after the rates set out in the above scales, the actual amount to be estimated and determined by the said Albert Reindel; such increased rates to be in substitution of the rates or scales set out in the within agreement: And it is hereby mutually agreed, that, during the remainder of the said term of five years, the said Albert Reindel shall be only liable

and bound to pay the said Anton Schell from week to week, as within mentioned, after the rate or scale mentioned in the [108] within agreement, the difference payable to the said Albert Schell on the amended scale being ascertained in every such weekly settlement, and the amount of such difference entered in two memorandum books, one to be kept by each party, and to be signed by each of them; and the total amount of such difference to be payable and to be paid by the said Albert Reindel to the said Anton Schell on the 6th of September, 1858: And the said Albert Reindel doth hereby agree with the said Anton Schell, that, for every portrait, picture, or other article which he shall during the extended period of three years well and perfectly colour or retouch to the satisfaction of him the said Albert Reindel, he the said Albert Reindel will weekly pay to the said Anton Schell after the scale or rate lastly hereinbefore set out, and will guarantee that the said Anton Schell shall during such extended period of three years be continually supplied with photographic portraits or pictures to be retouched and perfected under the direction of the said Albert Reindel: And the said Anton Schell, for the considerations aforesaid, hereby promises and agrees with the said Albert Reindel, that he the said Anton Schell will, during the remainder of the said term of five years, faithfully and truly perform his part of the within agreement, and that he will during the said extended period of three years be and continue the assistant of the said Albert Reindel in his art or profession of a photographic colourer or painter, and upon the same terms and conditions as are mentioned and contained in the within agreement, save so far as the same are hereby varied: And, lastly, it is hereby mutually agreed and declared by and between the said parties, that they shall be respectively subject to the forfeiture of the sum of 500l., to be paid to the other of them, his executors or administrators, as liquidated damages, in case or in the event of any breach being made [109] by either of them in the true performance of the terms and conditions of this agreement. In witness, &c." Averment, that the respective sums of 500l. in the said first and second agreements respectively mentioned were and are penalties, and not liquidated damages; and that he the defendant was not, nor is, liable to pay to the plaintiff the said sum of 500l. as and for liquidated damages, in manner and form as in the declaration alleged.

Fourth plea,—to the plaintiff's claim of 500l. as and for liquidated damages,—that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's said claim, for money payable by the plaintiff to the defendant under and by virtue of the said agreements in the declaration respectively mentioned, as and for liquidated damages for and by reason of divers breaches of the said agreements respectively committed by the plaintiff,—and for the non-performance by the plaintiff of divers terms and conditions in the said agreements respectively contained on his part to be performed,—and for not continually supplying the defendant with photographic portraits or pictures to be retouched and perfected under the plaintiff's direction by the defendant in pursuance of the said agreements, and for neglecting and omitting so to do, contrary to the tenor and effect, true intent, and meaning of the said agreements respectively, and for money found to be due from the plaintiff to the defendant on accounts stated between them; which amount the defendant was willing to set off against the plaintiff's said claim.

The plaintiff demurred to the third plea,—the grounds of demurrer stated in the margin being "that the third plea is bad in substance, upon the following grounds, amongst others, that is to say, that it is a plea to damages merely; that it admits all the breaches, and [110] that the plaintiff had a cause of action in respect of each and every of them sufficient to entitle him to nominal damages at all events: and that it is a plea to a mere conclusion of law deduced from the agreement set out in the declaration, which may be struck out as surplusage, and the declaration would if the same were struck out still shew a good and sufficient cause of action in respect of which the jury might award any amount of damages within the limit of the sum claimed."

He also demurred to the fourth plea, except as to so much thereof as related to the account stated, the grounds of demurrer stated in the margin, being "that it appears on the pleadings that the sum of 500l. mentioned in the agreement was not a subject of set-off."

The defendant joined in demurrer.

Phipson, in support of the demurrer (*a*)[1]. The 500l. mentioned in the two agreements, are clearly not liquidated damages, but a penalty; and the defendant was not justified by the plaintiff's introduction of an **[111]** allegation so idle into his declaration, in pleading to the damages in the way he has done. In *Kemble* v. *Farren*, 6 Bingh. 141, 3 M. & P. 425, it was expressly held that liquidated damages cannot be reserved on an agreement containing various stipulations, of different degrees of importance, unless the instrument specifies the particular stipulation or stipulations to which the liquidated damages are to be confined. And that is confirmed by *Galsworthy* v. *Strutt*, 1 Exch. 659, where Parke, B., says: "The rule is correctly laid down in *Kemble* v. *Farren*: and I said in the cases of *Horner* v. *Flintoff*, 9 M. & W. 678, and *Beckham* v. *Drake*, 8 M. & W. 846, that we were bound by that decision. In the more recent case of *Green* v. *Price*, 13 M. & W. 695, I said, 'The principle is, that, although the parties may have used the term liquidated damages, yet, if the court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only!' And my Brother Alderson there said,—'But, where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in their ordinary sense and cannot be construed to import a penalty!' The law is correctly laid down in that case." The defendant had no right to plead to an immaterial averment: if he chooses to pick it out and plead idle pleas, he must abide the consequences. [Willes, J., referred to *Lush* v. *Russell*, 4 Exch. 637, 5 Exch. 203. The plaintiff has been guilty of the first fault, by including in his declaration a breach which gives him no cause of action.] It is not a breach: it is a mere erroneous per quod,—or an erroneous inference of law. If the defendant found himself embarrassed by this claim, he **[112]** might have gone before a judge at Chambers to get it struck out. As to the distinction between a penalty and liquidated damages, see the authorities collected in the notes to *Gainsford* v. *Griffith*, 1 Wms. Saund. 58 b. 58 c.

John Gray (with whom was W. R. Cole), contrà (*a*)[2]. **[113]** Upon this declaration,

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(*a*)[1] The points for argument on the part of the plaintiff were as follows:—

"That the third plea is a plea to damages merely; that it admits all the breaches alleged in the declaration, but shews no excuse for them; that, upon the said plea and declaration, it sufficiently appears that the plaintiff is entitled to recover some damages against the defendant in respect of every breach, and to have the same assessed by a jury; that the plea is pleaded to a mere conclusion of law adduced from the terms of the agreement set out in the declaration, which conclusion of law, if erroneous, may be struck out as surplusage, without prejudicing the plaintiff's right, as shewn in the declaration, to recover any amount of damages, within the stipulated sum, for the breaches of agreement alleged in the declaration, and admitted by the plea; and that, for the reasons aforesaid, the plea is bad in substance."

And, as to the fourth plea, "that it sufficiently appears in the pleadings, that the sum of 500l. attempted to be set off, is not a subject of set-off, and that so much of the plea consequently is bad in substance."

(*a*)[2] The points marked for argument on the part of the defendant were as follows:—

"As to the third plea,—That the plea shews a good and sufficient answer to that part of the claim to which it is pleaded:

"That the declaration is so framed, that, if the plaintiff be not entitled to recover '500l. as and for liquidated damages,' he is not entitled to recover anything:

"That the plaintiff might have declared for general damages, but he has elected to sue for the forfeiture as and for liquidated damages; and the only breach alleged as a cause of action is, the non-payment of such forfeiture,—*Lowe* v. *Peers*, 4 Burr. 2228; *Hurst* v. *Hurst*, 4 Exch. 571, 579: That the plaintiff must recover, if at all, secundum allegata et probata: that under this declaration he would be entitled to recover the whole 500l. or nothing,—*Farrant* v. *Olmius*, 3 B. & Ald. 692; *Fletcher* v. *Dyche*, 2 T. R. 37; per Buller, J., in *Astley* v. *Weldon*, 2 Bos. & P. 353.

"That, if the plaintiff might claim liquidated damages and also general damages in the same count (which he has not done), it would be impossible for the defendant to plead to it, because almost any plea would be bad either as to the one claim or the other; and that if the plaintiff had newly assigned to the third plea, that he seeks

the 500l. must be treated as liquidated damages. The plaintiff takes upon himself to state the effect of the agreement; and he has chosen to claim the 500l. as liquidated damages. Suppose there is an agreement with such a stipulation as this, so expressed as to make it clear that the penal sum is to be paid in the event of any one breach of the agreement,—how is the plaintiff to declare on it? He may set it out in terms, so that the court may see what it is. But he may also set out the effect of it. [Williams, J. He cannot state the legal effect of it: but he may state what the language amounts to, at his peril. Is not the effect of your argument this, that the third plea amounts to a special plea of non assumpsit?] No doubt. In *Hurst* v. *Hurst*, 4 Exch. 571, the declaration stated that the defendants covenanted that they "would not lop or top any tree without the consent in writing of the plaintiff, under a penalty of 20l. for each tree which should be so lopped or topped, over and above the actual value of the tree:" and alleged for breach that the defendants "lopped divers, to wit, twenty trees without the consent in writing of the plaintiff, which trees so lopped were of great value, to wit, of the value of 80l., and thereupon and thereby the defendants then became liable to pay, and ought to have paid to the plaintiff, certain large sums of money, to wit, the sum of 80l., being the value of the **[114]** said trees, and also the further sum of 20l. for each of the trees so lopped by the defendants, being the amount of penalties then incurred and forfeited by the defendants to the plaintiff for lopping the said trees:" and it was held, that, assuming the 20l. penalty to be liquidated damage, the plaintiff could not recover it on this breach, inasmuch as it did not allege that the penalty was not paid. That shews that the allegation that the defendant "has not paid the said 500l. or any part thereof," is not a mere conclusion of law, but a material averment. [Williams, J. Put it as you will, the plea is nothing more than an informal non assumpsit. Mr. Phipson admits that the 500l. is a penalty, and that it is a misdescription of the agreement to say it is liquidated damages.] The distinction between a penalty and liquidated damages is well illustrated by the judgment in *Lowe* v. *Peers*, 4 Burr. 2225, 2228. [Williams, J. The declaration introduces the agreement with the words "it was witnessed."] It is not necessary to consider the effect of that: it is not so as to the part of the instrument in question; that commences with the words "and it was further mutually agreed," &c. [Byles, J. Does that mean anything more than that the agreement says so?] Lord Mansfield, in *Lowe* v. *Peers*, says: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties. And upon this distinction they proceed in courts of equity. They will relieve against a penalty, upon a **[115]** compensation; but, where the covenant is, 'to pay a particular liquidated sum,' a court of equity cannot make a new covenant for a man: nor is there any room for compensation or relief. As in leases containing a covenant against ploughing up meadow; if the covenant be 'not to plough,' and there be a penalty, a court of equity will relieve against the penalty, or will even go further than that (to preserve the substance of

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to recover general damages, and not liquidated damages, that would have been a departure.*

"That the plaintiff is not entitled to recover the 500l. as and for liquidated damages, because the 500l. mentioned in the contract is in the nature of a penalty, and not liquidated damages,—*Kemble* v. *Farren*, 6 Bingh. 141, 3 M. & P. 425; *Beckham* v. *Drake*, 8 M. & W. 835: *Galsworthy* v. *Strutt*, 1 Exch. 666: that it never could have been the intention of the parties that the plaintiff should actually pay the defendant 500l. as and for liquidated damages, if he neglected to pay him any one of the small sums mentioned in the table of prices contained in the contract: and that, if this were not clearly apparent on the face of the declaration (which suppresses the table of prices, &c.), it is rendered perfectly evident by the third plea, which sets out the contract verbatim:

"That the plaintiff is not entitled to recover."

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* Which since the Common Law Procedure Act, 1852, is no ground of demurrer.

the agreement): but, if it is worded,—'to pay 5l. an acre for every acre ploughed up,'—there is no alternative, no room for any relief against it; no compensation: it is the substance of the agreement. Here, the specified sum of 1000l. is found in damages: it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages." So, here, upon this declaration, the only damages a jury can give is 500l. The plaintiff having chosen to put this allegation into his declaration, and to allow it to come before the court on demurrer, is not at liberty now to turn round and say that the defendant has put in issue an immaterial allegation. [Crowder, J. You might have had it put right by going to a judge at Chambers.] Possibly: but our omission to adopt that course, does not absolve the court from the necessity of giving a legal judgment on the demurrer. *Lush* v. *Russell*, 4 Exch. 637, applies to the fourth plea. There, the declaration stated an agreement whereby the defendant agreed to employ the plaintiff as a journeyman baker for four years, and to pay him certain weekly wages, and also certain additional sums in the three last years of the term; and alleged for breaches, —that the defendant, before the expiration of the term, wrongfully discharged the plaintiff from his employ, —that the defendant did not pay the plaintiff the weekly wages **[116]** for the remainder of the term,—and that the defendant did not pay the plaintiff the additional sums which he would have been entitled to if he had continued in the employ of the defendant. The defendant demurred generally to the last two breaches, and the plaintiff joined in demurrer: and the court held that the proper course was, to have applied to a judge to strike out those breaches, and that, upon this record, they could not be treated as surplusage. Parke, B., giving the judgment of the court, says: "We think that, on this record, we are bound to treat these averments as breaches; and, it being agreed on both sides that they are bad as breaches, our judgment must be for the defendant. The proper course was, to have applied to a judge at Chambers to strike them out of the declaration as surplusage: and, in the event of the party being dissatisfied with the opinion of the judge, application should have been made to the court. By demurring generally, and joining in demurrer, it must be taken that both parties considered them as distinct breaches; and, being bad as breaches, the plaintiff cannot have judgment for contingent damages." If the 500l. is to be treated as liquidated damages, the fourth plea is clearly good as a set-off.

Phipson was heard in reply.

Williams, J. It is much to be regretted that the improvements introduced by the Common Law Procedure Acts have not added more to the lucidity of proceedings. We are called upon here to decide a mere point of pleading. It appears to me that both pleas are bad, as being in substance pleaded to damages only. I cannot admit the correctness of the view presented by Mr. Gray, that the stipulation in question must upon this declaration be taken to be liquidated **[117]** damages, and that the declaration is answered by the plea bringing before the court other parts of the agreement shewing that the plaintiff is mistaken in supposing that the 500l. is payable as liquidated damages for any breach thereof. That being so, there is a question behind upon which the court are not quite unanimous, viz. whether or not the pleas are good as amounting to special pleas of non assumpsit. It has been strongly urged by Mr. Gray that this case should be governed by *Lush* v. *Russell*, 4 Exch. 637, 5 Exch. 203. There, the declaration contained two bad breaches and one good one: the defendant demurred to the former; and, the plaintiff having joined in demurrer, the court held that the defendant was entitled to judgment. I can see no distinction between that case and the case of a declaration containing one good count and two bad ones: if the defendant demurs to the two bad counts, and the plaintiff joins in demurrer, the former is entitled to judgment, no cause of action being disclosed. I do not understand the third plea as being a plea to one of several claims: but it appears to me that the plea is bad, as putting in issue matter which is no answer to the action or to any part of the action, but only goes to the measure of damages. The fourth plea is bad on the same ground. Upon the whole, I am of opinion that the plaintiff is entitled to judgment.

Crowder, J. I am of the same opinion. As to the argument, founded upon the declaration, that there is apparently on the face of it an allegation that the 500l. were to be paid as liquidated damages, it seems to me, that, looking fairly at the declaration, no such result follows. The pleader sets out the agreement, beginning "it was witnessed," &c. It is true that in the latter part the allegation is "And lastly it was

thereby mutually agreed and declared," &c. But I think that [118] must be taken substantially to refer to that which is stated in the agreement. The same language is used with respect to the second breach; the intention being, to set out the agreement, and not to make that an averment of an absolute stipulation that 500l. should be paid for every breach of the agreement. Strong language is necessary to bring about such a result. That being so, the averment at the end of the declaration, — that "by reason of the said several premises, the defendant forfeited and became liable, under and by virtue of the agreements aforesaid, to pay to the plaintiff the said sum of 500l. as liquidated damages," is an immaterial averment, and the plaintiff might recover any portion of the 500l. which the jury might think proper to give. I agree with my Brother Williams in thinking that *Lush* v. *Russell* has no bearing upon this case. I cannot look at this allegation as a separate breach, but merely as a statement of damages.

Willes, J. I own I should have been better satisfied if the rest of the court had arrived at the conclusion that the judgment should be in favour of the defendant. The plaintiff undoubtedly describes the sum due to him as liquidated damages: he states that the events have happened on which, if the 500l. were liquidated damages, it would be payable, and that it has not been paid. That that is in form an averment that the money is due and payable as liquidated damages, no lawyer who had not read the case of *Kemble* v. *Farren*, 6 Bingh. 141, 3 M. & P. 425, could for a moment doubt. But, speaking in legal language, there is a colourable breach of the agreement in terms. If that be so, and if *Lush* v. *Russell* be good law, the defendant selecting a bad breach, and demurring, and the plaintiff joining in demurrer, the defendant would be entitled to judgment, because there would be nothing upon which the court [119] could give judgment for the plaintiff. I have always understood, that, where, if a pleading were demurred to, there would be judgment for the demurring party; and such party, instead of demurring, relies on the matter of fact, and it is found against him; or if there be a demurrer to a plea setting up the answer in fact, and a subsequent demurrer thereto, the other party may obtain judgment in respect of the insufficiency of the former pleading. I do not, therefore, see any substantial distinction between *Lush* v. *Russell* and the present case. For these reasons, I must confess I do not so clearly see my way to the conclusion at which the rest of the court have arrived, though I have not much reliance upon the correctness of my own opinion on the matter.

Byles, J. I am of opinion that the plaintiff is entitled to judgment. It appears to me that the 500l. mentioned in the declaration is a penalty only, and that its non-payment constitutes no breach of any legal duty. The allegation at the end of the declaration is merely a legal consequence wrongly inferred. The pleas, therefore, are bad, as being pleaded to that which is an utterly immaterial allegation.

Judgment for the plaintiff.

[120] Stansfeld and Others, Assignees of the Estate and Effects of Thomas White, the Younger, a Bankrupt, *v.* The Mayor, Aldermen, and Burgesses of the Borough of Portsmouth. Feb. 9th, 1858.

[S. C. 27 L. J. C. P. 124; 4 Jur. N. S. 440; 6 W. R. 296. Distinguished, *Pugh* v. *Acton*, 1869, L. R. 8 Eq. 630. Principle applied, *Cornish* v. *Stubbs*, 1870, L. R. 5 C. P. 337. Referred to, *Ex parte Glegg*, 1881, 19 Ch. D. 12.]

By a lease, the lessee covenanted to erect a steam engine, machinery, and buildings proper for carrying on the business of a shipwright, on the land demised, and to leave the same for the lessors at the expiration or other sooner determination of the term, — "it being by the said indenture declared that all steam and other engines, machinery, &c., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords, and not to the tenant, without any payment being made to him for the same." The lease then went on to provide, "that the last mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term, for any other purpose than that of carrying

on the business of a shipwright; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." The lease then contained a further proviso, that, in the event of the lessee becoming bankrupt, it should be lawful for the lessors to re-enter, "and upon such entry to take possession of, have, &c., as their own property, without paying anything for the same, all steam and other engines, &c. which should be found on the premises, and which should be used or employed in or about the business of a ship-builder thereon." The lessee having become bankrupt, the lessors re-entered for the forfeiture:—Held, that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, and to a reasonable time for that purpose.

The first count of the declaration stated that the said Thomas White the younger, before he became bankrupt, under and by virtue of a certain indenture of lease, bearing date the 21st of December, 1855, became and was tenant to the defendants of a certain building and repairing-slip and ground, with the appurtenances thereto belonging, situate at Portsmouth, in the said indenture particularly described; and it was in and by the said indenture of lease, among other things, covenanted and agreed by the said Thomas White the younger, that he should or would, on or before the 25th of March then next, provide, set up, and erect a good and sufficient steam-engine or other sufficient apparatus, moving carriage, and all necessary machinery and building for the proper carrying on the business of a shipwright on the said slip, ground, and premises demised, to the satisfaction of the defendants, and the said slip, way, ground, buildings, erections, and engines, machinery, tackle, gear, and premises demised, or which [121] should be set up by the said Thomas White the younger during the said term, with their and every of their appurtenances, should and would peaceably and quietly, leave, surrender, and yield up to the said defendants at the end, expiration, or other sooner determination of the said term,—it being by the said indenture declared that all steam and other engines, machinery, tackle, gear, and utensils, set up upon the premises at any time during the said term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords, and not to the tenant, without any payment being made to him for the same: provided, nevertheless, that the last-mentioned stipulation should not be construed to apply to any machinery, tackle, gear, utensils, or other articles which should or might be erected or set up on the said demised premises by the said Thomas White the younger during the said term for any other purpose than that of carrying on the said business of shipwright; but that it should and might be lawful for the said Thomas White the younger at any time during the said term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, gear, utensils, or other articles, from the said demised premises: and it was further provided, that, if the said Thomas White the younger should become bankrupt, then that it should be lawful for the said Mayor, &c. in and upon the said slip, way, ground, erections, buildings and premises demised, or any part thereof in the name of the whole, to re-enter, and the same thenceforth to have again, re-possess, and enjoy as in their former estate and condition; and also upon any such entry to take possession of, have, hold, and enjoy as their own property, without paying anything for the same, all steam [122] and other engines, machinery, utensils, tackle, gear, matters, and things whatsoever which should be found on the said premises, and which should be used or employed in or about the business of a ship-builder, in connection with the said slip, way, and premises demised: Averment, that, whilst the said Thomas White the younger so held the said demised premises as tenant thereof to the defendants, he erected, set up, and fixed in and upon the demised premises certain machinery, tackle, gear, utensils, and other articles, for purposes other than that of carrying on the said business of a ship-wright, the same being fixed and fastened in and upon the said premises in such a manner that the same might and could be separated and removed without causing or doing any material damage or injury to the said demised premises; and that the said machinery, tackle, gear, utensils, and other articles always were used by the said Thomas White the younger for purposes of trade other than for the business of a shipwright: That, during the continuance of the said term, the said

Thomas White the younger became bankrupt, and thereupon all the estate and effects, right, title, and interest whatsoever of the said bankrupt came to and of right belonged to the plaintiffs, as assignees as aforesaid; and that thereupon the plaintiffs, as such assignees as aforesaid, entered upon and took possession of the said demised premises, and of the said machinery, tackle, gear, utensils, and other articles in and upon the said premises: That afterwards, and whilst they continued in possession and occupation of the said demised premises as assignees as aforesaid, for the purpose of realizing the estate and effects of the said bankrupt, and before the expiration of a reasonable time for the separation and removal of the said machinery, tackle, gear, utensils, and other articles from the said premises, the defendants entered upon the said premises; and thereupon, whilst the plaintiffs continued in the possession **[123]** and occupation of the said premises for the purpose of realizing the estate and effects of the said bankrupt: and, although the plaintiffs would, within a reasonable and proper time in that behalf, have separated and removed from and off the said demised premises the said machinery, tackle, gear, utensils, and other articles, had the defendants suffered or permitted them so to do, the defendants then wholly refused to permit the plaintiffs then or at any time to separate or remove the same, and then, before a reasonable time for the separation or removal of the same had elapsed, wrongfully prevented and hindered the plaintiffs from separating and removing the said machinery, tackle, gear, utensils, and other articles from the said premises, and thence continually hitherto have prevented and hindered the plaintiffs from so doing, and the defendants have used and converted the same to their own use.

The defendants demurred to the first count,—the ground of demurrer stated in the margin being, "that it shews no right in the plaintiffs to trespass on the defendants' premises for the alleged purpose, nor any obligation on the defendants to permit the plaintiffs so to do." Joinder.

Coleridge (with whom was Kinglake, Serjt.), in support of the demurrer (*a*). [Willes, J. There is no alle-**[124]**-gation in the declaration of notice to the tenant that the defendants were going into the land for the purpose of taking the fixtures. I do not see how the action could be maintainable without such notice. That should be inserted. Hannen, for the plaintiff, assented to the proposed amendment.] The declaration discloses no cause of action. It avers that the articles in question were used by the bankrupt for purposes of trade otherwise than for the business of a shipwright. Being unsevered from the freehold, they would not pass to the assignees as goods and chattels. The general rule of law is, that fixtures, unless removed during the term, or, at all events, during the period of the tenant's actual possession of the premises under a claim of right, become the property of the landlord: *Penton* v. *Robart*, 2 East, 88, 4 Esp. N. P. C. 33; *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Weeton* v. *Woodcock*, 7 M. & W. 14; *Heap* v. *Barton*, 12 C. B. 274; *Roffey* v. *Henderson*, 17 Q. B. 574; 2 Smith's Leading Cases, 4th edit. 159, 160. Here, the possession of the tenant, and of the assignees, was determined by the re-entry of the lessors. The rule is the same where the term is determined by an act over which the tenant has control, as by a forfeiture: *Minshall* v. *Lloyd*, 2 M. & W. 450; *Storer* v. *Hunter*, 3 B.

(*a*) The points marked for argument on the part of the defendants were as follows:

"1. That the rights of the late tenant or his assignees to remove fixtures no longer exists after the landlords' entry, upon a forfeiture of the term.

"2. That, after the entry of the landlords for a forfeiture, the possession of the late tenant or his assignee was wrongful, and that such possession could give no right to him or them to remove the fixtures.

"3. That the prevention of the landlords of the removal of fixtures after the entry for a forfeiture, can give no right of action to the late tenant or his assignees, in the absence of any express contract on the part of the landlords to allow such removal after the determination of the term.

"4. That the property in fixtures, as fixtures, is always in the landlord, subject to the tenant's right to remove them during the term.

"5. That the law allows to the late tenant no time after the expiration of the tenancy for removal of fixtures, and that a right to remove them after the expiration of the tenancy can be granted only by deed."

& C. 368, 5 D. & R. 340; Amos on Fixtures, 2nd edit. 103. Where a term has determined by the lessee's own act, it has been held that he is not entitled to emblements: *Davis* v. *Eyton*, 7 Bingh. 154, 4 M. & P. 820. That shews the **[125]** principle which ought to guide the court in the decision of this case. In *Heap* v. *Barton*, 12 C. B. 278, Jervis, C. J., suggests that fixtures annexed to the freehold become by the act of annexation the property of the landlord, subject to the tenant's right to remove them during the term. In *Bishop* v. *Elliott*, 11 Exch. 113, by indenture, C. demised to E. an unfinished messuage for the term of ninety-seven years: the indenture contained a covenant by E., that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures and articles in the nature of fixtures, which shall, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging:" E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler, and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures: B. afterwards contracted with E. to purchase from him an underlease of the premises, and the goodwill, and also the furniture, fixtures, stock in trade, &c., at a valuation: in pursuance of this agreement, E. executed to B. an underlease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in his lease: and it was held by the Exchequer Chamber, that the covenant above set forth did not restrain B., the lessee, from disposing either of the tenant's or of the trade fixtures. In delivering the judgment of the court, Parke, B., there says: "It may be, that, by so construing the covenant, we reduce its operation to that merely which the general rule of law would have given the landlord without it. But this is an argument of little weight. No modern lease probably will be found which does not contain **[126]** covenants merely to secure rights subsisting at common law, but perhaps more easily enforced by the help of an express contract. These particular words may have been introduced for greater caution, because of the language of some of the decisions quoted, or to bring an infringement of the right within the clause of re-entry." [Willes, J. The question here depends upon the construction of the contract into which the parties have entered.] The true construction of the contract, it is submitted, is this, that, as to all but the fixtures applicable to the ship-building trade, the common-law rights of the parties are to prevail, but that those which are put up for that purpose, shall be the property of the lessors. The covenant imposes a limitation on the tenant's rights, but leaves the landlord's rights untouched. The proviso that that stipulation should not be construed to apply to any machinery, &c., erected by the tenant during the term for any other purpose than that of carrying on the business of a shipwright, was merely introduced for the purpose of clearing up any doubt which might exist as to the tenant's liability to leave all fixtures he might erect upon the premises at the expiration of the term. [Williams, J. The proviso goes on,—"but that it should and might be lawful for the said T. White, at any time during the said term or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises."] That is merely in affirmance of the common-law right of the tenant.

Hannen, contrà (*a*). There are two questions for the **[127]** consideration of the court in this case,—first, whether the assignees of White had not a reasonable time for the removal of these fixtures after the determination of the term,—secondly, whether there is anything in the terms of the lease to lessen or control that right. 1. The first point has been distinctly raised in two cases,—in *Weeton* v. *Woodcock*, 7 M. & W. 14, where, however, it became unnecessary to determine it,—and in *Heap*

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—"That the declaration discloses a good cause of action; that it does not appear that the term was determined, so as to deprive the assignees of the right, while they continued in occupation of the premises, to remove machinery not erected for the use of the business of a shipwright; that the plaintiffs were entitled to a reasonable time after the bankruptcy to remove all articles in the nature of fixtures to which the bankrupt was entitled: and that, by the terms of the lease, the defendant did not, upon the bankruptcy of the tenant, acquire any right to the machinery, &c. erected for purposes other than that of carrying on the business of a shipwright."

v. *Barton*, 12 C. B. 274, which turned on the special agreement of the parties. In the last-mentioned case, Jervis, C. J., says: "The courts seem to have taken three separate views of the rule,—first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—secondly, as in *Penton* v. *Robart*, 2 East, 88, that the tenant may remove the fixtures notwithstanding the term has expired, if he remains in possession of the premises,—thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz. that the tenant continues to hold the premises under a right still to consider himself as tenant." The second of these propositions, it is submitted, is the correct one. The third is supported only by a dictum of Alderson, B., in *Weeton* v. *Woodcock*, which is based upon something thrown out by Parke, B., in *Minshall* v. *Lloyd*, 2 M. & W. 460. It may be convenient to see what was the **[128]** state of the authorities when *Minshall* v. *Lloyd* came to be decided,—all of which will be found referred to in the notes to *Elwes* v. *Maw*, 2 Smith's Leading Cases, 4th edit. p. 144, beginning with the Year Book, 20 H. 7, fo. 13. In all the earlier authorities, the right of removal is expressly limited to the actual legal tenancy. [Williams, J. Surely it is now settled that the right of the tenant to remove fixtures exists during the period during which he might be considered as tenant.] In *Poole's case*, 1 Salk. 368, Lord Holt says, "that, during the term, the soap-boiler might well remove the fats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade, and to encourage industry: but, after the term, they become a gift in law to him in reversion, and are not removable." In *Penton* v. *Robart*, 2 East, 88, Lord Kenyon says: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. And some of the cases have even gone further in favour of the executor of tenant for life against the remainder man, between whom the rule has been holden stricter: for, it has been determined that the executor of tenant for life was entitled to take away the fire-engine of a colliery." *Elwes* v. *Maw*, 3 East, 38, turned entirely upon the question whether an agricultural tenant was entitled to the same privileges in this respect as a trader: and Lord Ellenborough, in a very elaborate judgment, held that he was not. So, in *Lee* v. *Risdon*, 7 Taunt. 188, 2 Marsh. 495, speaking of fixtures which a tenant might lawfully remove, Gibbs, C. J., says, that, "unless the lessee uses during the term his continuing privilege to sever **[129]** them, he cannot afterwards do it." And that doctrine received the assent of Abbott, C. J., in *Colegrave* v. *Dias Santos*, 2 B. & C. 76, 3 D. & R. 255. The observations of Bayley, J., in *Storer* v. *Hunter*, 3 B. & C. 368, 5 D. & R. 240, also strongly corroborate this view: and there the term was determined, as here, by a forfeiture. Lord Tenterden, in *Lyde* v. *Russell*, 1 B. & Ad. 394, limits the right in the same way. In *Minshall* v. *Lloyd*, 2 M. & W. 450, Parke, B., says, in like manner, that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." And in *Macintosh* v. *Trotter*, 3 M. & W. 184, the same learned judge says: "*Minshall* v. *Lloyd* is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point, that the principle of law is, that whatsoever is planted in the soil belongs to the soil: quicquid plantatur solo, solo cedit; that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my Brother Alderson go; and I think it was a correct decision." That, however, still leaves it doubtful what that excrescence is. The true rule probably is this, that the tenant's right of removal continues whilst he remains in possession of the premises in continuation (whether rightfully or otherwise) of the same holding under the lessor. [Williams, J. Who was in possession at the time the cause of action arose?] The assignees. [Williams, J. No. The lessors had re-entered for the forfeiture, and they were in possession. Willes, J. It would seem that both were in possession. **[130]** If two are in possession at the same time, the law, according to Lord Coke, "accords the possession to him who has title." Crowder, J. The assignees claim no title to the land.] It is submitted that the proper limitation of the tenant's right of removal

exists only whilst he or his representatives continue in possession, without any determination of the tenancy, either actual or constructive. The fair construction of the lease is, that the tenant shall have a reasonable time to remove fixtures other than shipwrights' fixtures (which by the contract were to be left) on the determination of his term. The contrary construction would be giving no effect whatever to the latter part of the covenant.

Coleridge, in reply. The true principle is involved in the three propositions thrown out by Jervis, C. J., in *Heap* v. *Barton*, 12 C. B. 274, -"First, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—Secondly, that the tenant may remove the fixtures notwithstanding the term has expired, if he remains in possession of the premises,—Thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz. that the tenant continues to hold the premises under a right still to consider himself as tenant." Fixtures annexed to the freehold are primâ facie the property of the owner of the soil. In aid of the tenant, and in favour of trade, an exception is engrafted upon that rule, enabling him to sever the fixtures, and so regain his property in them: if he does not avail himself of that right, the fixtures belong to the person to whom the freehold belongs. The law being so, the exceptions are equally clear and simple. Whichever be the rule adopted in the present case, the defendants' right must **[131]** prevail. The lease has expired, the lessors have entered, and the fixtures are theirs. Then, except for the limited purpose of realizing the bankrupt's effects, the assignees have nothing to do with the occupation of the premises: and, even if they had, the term being ended, the re-entry of the lessors was a re-vesting of the freehold in them, with all the rights belonging to it. And, as to the third rule,—whatever be its meaning,—after the re-entry of the lessors, the assignees could have no right to consider themselves as tenants. When a lessor re enters lawfully, he enters upon the full and indisputable possession of that which, subject to the privilege of the tenant, has been his property during the whole of the term. [Williams, J. The re-entry of the lessor can make no difference, if the tenant has by law a reasonable time for the exercise of his right of removal.] Then, as to the covenant,—the language is very peculiar: "it shall and may be lawful for the said Thomas White, at any time during the said term, or at the expiration thereof, to remove," &c. That clearly does not entitle him to remove the fixtures after his term has expired.

Williams, J. I am of opinion that the plaintiffs are entitled to judgment. A number of questions of no little difficulty have been raised in the course of the argument, as to the right of a tenant to remove fixtures at the determination of his term, and as to the period of time when he must exercise his right to disannex them from the freehold. A good deal of discussion has also taken place as to the effect of a determination of the term by the act of the tenant himself,—whether he puts himself in a different position as to his right of removal where the tenancy has been determined by a forfeiture. But, in the view we take, it becomes unnecessary to determine any of these points, **[132]** because it appears that the parties have themselves provided what shall be their respective rights upon the happening of such a state of things as has arisen. It appears that White, the bankrupt, became tenant of the premises under the corporation of Portsmouth under a lease whereby he covenanted to set up a steam-engine and machinery and buildings for the proper carrying on the business of a shipwright on the slip, ground, and premises demised, "and the said slip-way, ground, buildings, erections, and engines, machinery, tackle, gear, and premises demised, or which should be set up by the tenant during the term, with their and every of their appurtenances, should and would peaceably and quietly leave, surrender, and yield up to the defendants (the lessors) at the end, expiration, or other sooner determination of the said term,—it being by the said indenture declared that all steam and other engines, machinery, tackle, gear, and utensils set up upon the premises at any time during the said term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlord, and not to the tenant, without any payment being made to him for the same." Then follows a proviso, "that the last-mentioned stipulation should not be construed to apply to any machinery, &c., which should or might be erected or set up on the demised premises by White during the term for any other purpose than that of carrying on the said business of a shipwright; but that it should and might be lawful for White at any

time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." Stopping here, a controversy is raised as to the meaning of this stipulation. On the **[133]** one hand, it is insisted that it means to express no more than the common law would imply, viz. that the tenant is to have the right to remove the last-mentioned fixtures, provided he exercises that right during the term or at the end of it. But it seems to me that this proviso must be read in conjunction with that which immediately follows it, manifesting that the parties are contemplating the very state of things which has arisen,—that, if the lessee shall become bankrupt, it shall be lawful for the lessors to re-enter, and upon such re-entry to take possession of and enjoy as their own property, without paying anything for the same, all steam and other engines, machinery, &c., which should be used or employed in or about the business of a ship-builder. Surely it is impossible to doubt, that, when the parties have stipulated that the lessors shall have this right, it must be understood that they intended the right to be confined to the fixtures stipulated for, and not to apply to the others. It comes, then, to this, that the lessors are at the expiration or other sooner determination of the term to take the ship-building fixtures, and the tenant is to have the others; and, if so, it follows that the latter is to have a reasonable time for their removal. This right, then, being in the tenant, or his assignees, the declaration avers that they have exercised it within a reasonable time. On the face of the lease, a distinction is made between the two sets of fixtures; it being in effect stipulated that the one set shall go to the lessors, and the other to the lessee; and, the declaration averring that the assignees of the latter were prevented from exercising their right to sever and remove them within a reasonable time after the lessors' re-entry for the forfeiture, the plaintiffs are entitled to the judgment of the court.

CROWDER, J. I also am of opinion that the plain-**[134]**-tiffs are entitled to judgment; and I ground my opinion entirely upon the language of the lease, and consequently it is unnecessary to enter upon the consideration of the somewhat nice and difficult questions to which our attention has been directed in the course of the argument. The lease makes a clear distinction between the two sets of fixtures: as to the shipbuilders' fixtures, there is an absolute prohibition against the tenants' removing them during the term, and an express stipulation that at its expiration they shall belong to the lessors: but, as to any other fixtures which may be set up on the premises during the term, there is this express proviso, — "provided nevertheless, that the last-mentioned stipulation shall not be construed to apply to any machinery, tackle, gear, &c., which shall or may be erected or set up on the said demised premises by the lessee during the said term for any other purpose than that of carrying on the said business of a shipwright; but that it shall and may be lawful for the lessee at any time during the said term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." It is insisted, on the part of the defendants, that this gives the lessee no larger or more extensive right than the common law already gave him. But that proviso, as it seems to me, must be read in conjunction with the important one which follows it, and which stipulates, that, in the event of the bankruptcy of the lessee, the lessors shall have power to re-enter upon the demised premises, and to possess themselves of the fixtures erected for the purpose of the business of a ship builder. Looking at the whole instrument, it appears to me that the lessors have no title to the fixtures erected for purposes other than the business of a shipwright; that the lessee is entitled to these; and that he is to have a reasonable time for removing them. No effect could **[135]** by any other construction be given to the language of the provisos. And, the declaration averring that the re-entry of the lessors took place before the lapse of a reasonable time, it seems to me that a good cause of action is disclosed.

WILLES, J. I am of the same opinion. The true construction of the lease is, that, in case of the bankruptcy of the lessee, the lessors may re-enter and take the shipbuilding fixtures, but no others. That being so, the assignees had a right to enter to take the others, and had a reasonable time for the exercise of that right.

BYLES, J., had gone to chambers.

Judgment for the plaintiffs (*a*).

(*a*) See *Leader* v. *Homewood*, post, T. Vac. 1858, and *The London and Westminster Loan and Discount Company* v. *Drake*, post, vol. v.

In the Matter of the Complaint of Ransome and Another against The Eastern Counties Railway Company. Feb. 25th, 1858.

[S. C. 27 L. J. C. P. 166; 4 Jur. N. S. 282; 6 W. R. 395. See the note, 1 C. B. N. S. 437; 140 E. R. 179.]

A railway company established a system of carrying coals according to assigned districts, comprising certain places on their lines and branches, carrying them within those several districts at certain lower rates for quantities not less than a "train-load" of 200 tons. The complainants, who were coal-dealers at Ipswich, also carried on that business at N., S., E., T., and B., which are places on that branch of the company's lines which conducts to Peterborough, and also at M. & D., which are on another branch line communicating with that first mentioned, and also at H., which is on another distinct branch. These districts were so adjusted that the places where the complainants deal were distributed into three of them, so that, in order to take advantage of the reduced rates, the complainants would have to send from Ipswich three full "train-loads," which was a larger quantity than they could profitably send to those districts; and thus they sustained great injury: whereas, the rival dealers at Peterborough, by reason of one of the assigned districts embracing seven of those places at which the complainants dealt, were enabled to send their coals in such quantities as to avail themselves of the reduction. It being sworn, on the part of the company, that these districts were adjusted, not with a view to give an undue preference to the one set of dealers over the other, but solely with regard to their own convenience, and the wants of the neighbourhood:—Held, that the complaint was not sustained.—The company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favour of the latter a certain portion of the distance between Peterborough and those places:—Held, an undue preference to the Peterborough dealers over those of Ipswich.—The court refused to grant an attachment against a railway company for disobedience to a writ of injunction under the 17 & 18 Vict. c. 31, injoining them to desist from giving an undue preference, in respect of the carriage of coals, to persons carrying coals from P., or other places to or towards certain places mentioned in the rule, the affidavits on the part of the company shewing a bonâ fide endeavour on their part to conform to the order of the court,—although it appeared that the reformed scale of charges still operated in some other respects injuriously to the interests of the complainants, and advantageously to the other parties.

T. Jones, in Michaelmas Term last, obtained a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of injunction should not issue **[136]** against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining the said company "to desist from giving an undue preference in respect of the carriage of coals on the railways of the said company to persons trafficking in coals and sending them by the said railways from Peterborough and other places to or towards Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, or any of them, and from subjecting the complainants to any undue prejudice in respect of the carriage of coals from Ipswich to or towards the said places, or any of them; and injoining the said company to carry coals for the complainants from Ipswich to or towards the said places and every of them on equal terms with persons trafficking in coals and sending them by the said railways from Peterborough and other places to or towards the said places or any of them,—having due regard to the circumstances, if any, which render the cost to the said company of carrying for the one party less than the cost of carrying for the other."

The material parts of the affidavit upon which the rule was obtained, were as follows:—

1. The complainants are dealers in coal at Ipswich and at Needham Market, at Stowmarket, at Elmswell, at Thurston, at Bury St. Edmunds, at Hadleigh, at Mellis, and at Diss.

2. The Eastern Counties Railway Company are in possession of and work and have the management and [137] control of certain railways forming a main line of railway commencing at London and running thence to and past Ipswich, Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Newmarket, Cambridge, and Ely, and running thence to Peterborough, where it joins the Great Northern Railway; and the company are also in possession of and work and have the management and control of two branch lines of railway, one of such branch lines being a branch line running from the said main line from a point south of Ipswich to Hadleigh, and the other of such branch lines being a line running from the said main line at Haughley, near Stowmarket, to and past Mellis and Diss.

3. The coal in which the complainants trade is brought by sea to Ipswich, and is delivered to them at Ipswich, and by them sold to their customers at the several places at which they so deal; and it is also sent by them to those places to be sold to their customers there; and the only mode by which they are able to convey such coal from Ipswich to those several places is by the main line and branch lines respectively belonging to the company.

4. The company are desirous of preventing the complainants from dealing at the several places at which they so deal, and are desirous of excluding from the several places at which the complainants so deal in coal all such seaborne coal, and of suppressing and destroying the trade in seaborne coal at several places at which the complainants so deal in coal as aforesaid.

5. Certain traders in coal residing and carrying on business for the most part at Peterborough, or at places to the north and north-west of Peterborough, trade at the places at which the complainants so deal in coal, in a similar description of coal brought from the north of England by the Great Northern Railway from Peterborough, and also in another kind of coal brought from [138] the counties of Derby and York by the Midland railway to Peterborough.

6. The company have given and do give undue and unreasonable preferences and advantages in the carriage of such landborne coal on their railway to and in favour of such dealers in landborne coal, and to and in favour of the traffic in landborne coal, at such places, and subject the complainants and other traders in seaborne coal at the said places in which the complainants deal in coal as aforesaid, and the trade in seaborne coal at such places, to undue and unreasonable prejudice and disadvantage, in the carriage of such seaborne coal.

7. The company do not carry coals for the complainants and for other merchants residing at Ipswich and dealing in seaborne coal as aforesaid, on equal terms with such dealers in landborne coal, although there are no circumstances to justify such irregularity.

8. The company having on and previous to the 29th of January, 1857, given an undue preference to Messrs. E. & A. Prior, who were then dealers in landborne coal, and carrying on business at Peterborough, and dealing in landborne coal at the places at which the complainants so deal in seaborne coal as aforesaid, for and in respect of the carriage of coals on the main line of their railway, a rule was pronounced by this court on the 29th of January, 1857, at the instance of the complainants, whereby it was ordered that a writ of injunction should issue injoining the company thenceforth altogether absolutely to desist from giving an undue preference to the said Messrs. E. & A. Prior for or in respect of the carriage of coals on their railways, and injoining and commanding them thenceforth to carry coals for the complainants on equal terms with the said Messrs. E. & A. Prior, having due regard to the circumstances, if any, which rendered the cost to the [139] company of carrying for the one party less than the cost of carrying for the other party; which said writ of injunction was afterwards duly issued and served on the secretary and directors of the company.

9. In February, 1857, a correspondence took place between the attorneys of the complainants and of the company, in which the former complained of being still charged the same rates as before the rule, and which ended with a letter of the 1st of May, in which the latter wrote, "The company consider the rates now charged are in strict accordance with the rules laid down by the court" (*a*).

10. At the time the former motion was made, the charges made to the Messrs.

(*a*) See *Re Ransome and The Eastern Counties Railway Company*, 1 C.B. (N.S.) 437.

Prior were made under an agreement which was put an end to before the date of the last-mentioned letter.

11. On the 1st of May, 1857, the company issued new regulations for the conveyance of coal, and a new scale of rates. The paper marked A. contains the regulations and rates of the company for the carriage of coal from Peterborough under the circumstances therein expressed.

12. The paper marked B. contains the regulations and rates of the company for the carriage of coal from Ipswich, under the circumstances therein expressed.

13. The dealers in landborne coal have been charged, since the 1st of May, 1857, under the circumstances and conditions therein expressed, according to the paper marked A., or at lower rates.

14. The district numbered 8 in the printed paper marked A., includes Ipswich, Needham Market, Stowmarket, Elmswell, Thurston, Mellis, and Hadleigh, being seven of the principal places at which the complainants deal in coals.

[140] 15. The district numbered 1 in the printed paper marked B., includes only (exclusive of Wisbech) three of such principal places at which the complainants deal, viz. Needham Market, Stowmarket, and Mellis.

16. The district numbered 2 in the said printed paper marked B. includes only two of such principal places at which the complainants deal, viz. Elmswell and Thurston.

17. The district numbered 3 in the said paper marked B. includes none of the principal places at which the complainants deal, except Hadleigh.

18. The district numbered 4 in the said paper marked B. includes none of the principal places at which the complainants deal.

19. The effect of this adjustment of the districts mentioned in the papers marked A. and B. respectively, and of the regulations and rates mentioned therein respectively, is, that, in order to enable the complainants to supply all their customers at Thurston, Elmswell, Mellis, Stowmarket, Needham Market, and Hadleigh, at the lower rates mentioned in the paper marked B., it is necessary for them to send from Ipswich three train-loads of 200 tons or 35 trucks each, viz. 200 tons or 35 trucks into the district No. 1, in order to supply Needham Market, Stowmarket and Mellis, being the said last-named places included in the district No. 1,—200 tons or 35 trucks into the district No. 2, to supply Elmswell and Thurston, being the said last-named places included in the said district No. 2,—and also 200 tons or 35 trucks into the district No. 3, to supply Hadleigh, being the said place included in the said district No. 3; whereas, according to the said regulations and rates, the said dealers in landborne coal are enabled to supply all their customers at Thurston, Elmswell, Mellis, Stowmarket, Needham Market, and Hadleigh, at the said lower **[141]** rates, by sending from Peterborough only one train-load of 200 tons or 35 trucks.

20. The complainants' traffic in coal at the places before mentioned as comprised in the said districts Nos. 1, 2, and 3, respectively, is not such as to admit of their sending a train-load of 200 tons or 35 trucks of coal at any one time into each of the said districts; and the consequence is, that they are unable to deal in coals at the said places in the districts Nos. 1, 2, and 3, with a reasonable profit.

21. The complainants believe the said districts and regulations and rates mentioned in the papers marked A. and B. respectively have been adjusted for the express purpose of preventing them and other merchants in the same trade at Ipswich from availing themselves of the lower rates mentioned in the said papers marked A. and B. respectively, by rendering it impossible for them, for the reasons aforesaid, to avail themselves of the said lower rates, so as to gain a reasonable profit; and to give to the said dealers in landborne coal an undue advantage, by enabling them to avail themselves of the said lower rates,—the demand for coals at the said places in the district No. 8 being such as to admit of the said dealers in landborne coal sending into the said district at one time a train-load of 200 tons or 35 trucks of coal at a considerable profit.

22. The prices per ton estimated according to the rates mentioned in the said papers A. and B. for carrying from Ipswich to the places in the district No. 8 in which the complainants so deal, are out of all proportion greater than the prices per ton for carrying from Peterborough to such places: thus, Bury St. Edmunds is distant from Ipswich 27 miles, and from Peterborough 74 miles; according to the rates in the paper marked B., the price for the carriage of coal in quantities of 200 tons or 35

trucks from Ipswich to **[142]** Bury St. Edmunds is 2s. 5d. per ton, inclusive of terminals, and the price according to the rates in the paper marked A. for carrying coals from Peterborough to Bury St. Edmunds under the same circumstances, is 4s. 3d. per ton only, inclusive of terminals, and from Peterborough viâ Bury St. Edmunds, to Ipswich, a distance of 101 miles, 4s. 7d. per ton only. Thurston is distant from Ipswich 23 miles, and from Peterborough 78 miles; and the price according to the paper marked B., for the carriage of coal from Ipswich to Thurston is 2s. 2d. per ton, inclusive of terminals: whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Thurston under the same circumstances, is 4s. 4d. per ton only. Elmswell is distant from Ipswich 18 miles, and from Peterborough 83 miles; and the price, according to the paper marked B., of carrying coal from Ipswich to Elmswell, is 1s. 10d. per ton, inclusive of terminals; whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Elmswell under the same circumstances, is 4s. 5d. per ton only. Diss is distant from Ipswich 27 miles, and from Peterborough 98 miles; and the price, according to the paper marked B., for carrying coal from Ipswich to Diss is 2s. 5d. per ton, inclusive of terminals; whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Diss under the same circumstances is 4s. 6d. per ton only. Mellis is distant from Ipswich 23 miles, and from Peterborough 95 miles; and the price, according to the said paper marked B., of carrying coal from Ipswich to Mellis is 2s. 2d. per ton, inclusive of terminals; whereas, the price, according to the said paper marked A., of carrying coals from Peterborough to Mellis is 4s. 6d. per ton only. Stowmarket is distant from Ipswich 13 miles, and from Peterborough 88 miles; and the price, according to the paper marked **[143]** B., of carrying coal from Ipswich to Stowmarket is 1s. 6d. per ton, inclusive of terminals; whereas, the price, according to the paper marked A., of carrying coal from Peterborough to Stowmarket under the same circumstances, is 4s. 5d. per ton only. Needham Market is distant from Ipswich 9 miles, and from Peterborough 92 miles; and the price, according to the rates mentioned in the paper marked B., of carrying coal from Ipswich to Needham Market is 1s. 6d., inclusive of terminals; whereas, the price, according to the paper marked A., of carrying coal from Peterborough to Needham Market under the same circumstances, is 4s. 5d. per ton only. Hadleigh is distant from Ipswich 13 miles; and the price, according to the paper marked B., of carrying coal from Ipswich to Hadleigh is 1s. 6d. per ton, inclusive of terminals; whereas the price, according to the paper marked A., of carrying coal from Peterborough to Hadleigh [a distance of 113 miles] under the same circumstances, is 5s. 1d. per ton only.

23. There are no circumstances which render the cost to the company of carrying for the said dealers in landborne coal from Peterborough to the places in the district No. 8 less than the cost to the company of carrying for the complainants from Ipswich to the said places; or, at all events, there is no such difference of cost as to justify such a difference of charge.

24. It being, in consequence of the said adjustment of districts, and having regard to the limited quantity of coal required at the places at which the complainants trade, impossible for them in the ordinary course of business, or with a reasonable profit, to carry their coals in train-loads of 200 tons or 35 trucks, so as to avail themselves of the lower rates which according to the papers marked A. and B respectively are charged when coals are sent in train **[144]** loads of 200 tons or 35 trucks, the complainants are obliged to send their coals by the ordinary goods trains; and the company consequently charge them for the carriage of their coals from Ipswich to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Mellis, Diss, and Hadleigh, at the rate of 1d. per ton per mile, together with 6d. per ton for waggons, 4d. per ton for terminals, and 4d. per ton for tramway.

25. There are no circumstances which render the cost to the company of carrying quantities of 200 tons or 35 trucks so much smaller than the cost of carrying quantities of less than 200 tons or 35 trucks as to justify the last mentioned charges; and the complainants believe the said difference of charge has been devised for the express purpose of giving to the dealers in landborne coal an undue preference over them.

The affidavit then set out comparative scales of charges made by the company to the complainants and to others trading from Peterborough, as well prior to the issuing of the injunction in January, 1857, as of the charges now made,—for which see next page. It also contained an allegation, that, notwithstanding the regulations and

[145] SCALE OF CHARGES MADE TO THE COMPLAINANTS, PRIOR TO JAN. 29, 1857, FOR THE CARRIAGE OF COALS FROM IPSWICH—

To	Per ton.	Per ton per mile.
Needham Market	1s. 10d.	$2\frac{5}{8}$d.
Stowmarket	2s. 11d.	$2\frac{9}{16}$d.
Elmswell	2s. 10d.	$1\frac{5}{8}$d.
Thurston	3s. 1d.	$1\frac{3}{4}$d.
Bury St. Edmunds	3s. 6d.	$1\frac{1}{2}$d.
Hadleigh	2s. 2d.	2d.
Mellis	3s. 1d.	$1\frac{3}{4}$d.
Diss	3s. 6d.	$1\frac{1}{2}$d.

SCALE OF CHARGES, UNDER EXISTING REGULATIONS, FOR THE CARRIAGE OF COALS FOR THE COMPLAINANTS FROM IPSWICH—

To	Per ton.	Per ton per mile.
Needham Market	2s. 4d.	3d.
Stowmarket	2s. 4d.	$2\frac{1}{16}$d.
Elmswell	2s. 8d.	$1\frac{5}{8}$d.
Thurston	3s. 1d.	$1\frac{3}{4}$d.
Bury St. Edmunds	3s. 5d.	$1\frac{1}{2}$d.
Hadleigh	2s. 4d.	$2\frac{1}{16}$d.
Mellis	3s. 1d.	$1\frac{3}{4}$d.
Diss	3s. 5d.	$1\frac{1}{2}$d.

SCALE OF CHARGES MADE TO MESSRS. PRIOR, PREVIOUSLY TO JAN. 29, 1857, FOR THE CARRIAGE OF COALS FROM PETERBOROUGH—

To	Per ton.	Per ton per mile.
Needham Market	4s. 6d.	$\frac{9}{16}$d.
Stowmarket	4s. 6d.	$\frac{9}{16}$d.
Elmswell	5s. 0d.	$1\frac{1}{8}$d.
Thurston	5s. 0d.	$\frac{3}{4}$d.
Bury St. Edmunds	5s. 0d.	$1\frac{5}{16}$d.
Hadleigh	4s. 8d.	$\frac{1}{2}$d.
Mellis	5s. 0d.	$\frac{3}{4}$d.
Ipswich	4s. 0d.	$\frac{1}{2}$d.

SCALE OF CHARGES, UNDER EXISTING REGULATIONS, FOR CARRIAGE OF COALS FOR OTHER PERSONS THAN THE COMPLAINANTS, FROM PETERBOROUGH—

To	Per ton.	Per ton per mile.
Needham Market	4s. 5d.	$\frac{9}{16}$d.
Stowmarket	4s. 5d.	$\frac{9}{16}$d.
Elmswell	4s. 5d.	$\frac{19}{32}$d.
Thurston	4s. 4d.	$\frac{19}{32}$d.
Bury St. Edmunds	4s. 3d.	$\frac{11}{16}$d.
Hadleigh	5s. 1d.	$\frac{13}{16}$d.
Mellis	4s. 6d.	$\frac{19}{32}$d.
Diss	4s. 6d.	$\frac{19}{32}$d.
Ipswich	4s. 7d.	$\frac{9}{16}$d.

rates in the papers marked respectively, A. and B., the company had on various occasions carried landborne coal from Peterborough to places in the district No. 8 in less quantities than 200 tons or 35 trucks, and by ordinary goods trains, at the lower rates. It further proceeded to allege that the difference of charge had the effect of entirely destroying the trade of the complainants at the places named. The relative distances of the places referred to were given as follows:—Between Peterborough and Bury St. Edmunds, 74 miles,—Bury St. Edmunds and Thurston, 4 miles,—Thurston and Elmswell, 5 miles,—Elmswell and Mellis, 12 miles,—Mellis and Diss, 3 **[146]** miles,—Elmswell and Stowmarket, 5 miles,—Stowmarket and Needham Market, 11 miles,—Stowmarket and Ipswich, 9 miles—Ipswich and Hadleigh, 12 miles,—Ipswich to London, 69 miles. The affidavit then concluded with a general allegation that the complainants had in consequence of the inequality of charges been wholly deprived of their trade with the places enumerated.

Bovill, Q. C., and Sharpe, shewed cause upon affidavits of the traffic-manager and the principal engineer of the company. These commenced with a general denial that the company in fixing the districts and the charges for carrying coals had any intention to prejudice the one set of dealers or to give any undue advantage to the other. They then proceeded to state that the quantity of 200 tons or 35 trucks, has been fixed upon as the quantity to be dispatched by each coal train from any of the several points of dispatch, as that quantity is an ordinary train load of coal; and that, if a less quantity were carried by a separate train, the cost to the company in the carriage of such less quantity per ton per mile would be so increased that the scales of rates published on the 1st of May, 1857, would not realize to the company any remuneration or return for such carriage of coal beyond or in addition to the actual cost incurred by the company in the working expenses of such trains, and consequently the less the quantities carried in separate trains the greater in proportion would be the cost to the company of conveyance of such trains, and the less the returns: That, in reference to the adjustment of the districts for coal-traffic upon the lines of railway under the management of the company, and the regulating and fixing the scale of coal-rates issued by the company on the 1st of May, 1857, the actual cost or amount of working expenses to the company are not in direct proportion to **[147]** the number of trains run, neither are such expenses directly proportioned to the number of miles run, but are dependent upon the two conditions of number of trains and number of miles run; and that, in estimating the actual cost or amount of working expense incurred by the company in the carriage of coals, it may be assumed, for all practical purposes, that about one-half of the expenses of the company are caused by the number of trains, and are not affected by the number of miles run by those trains, and that the other half of such expenses are caused by the number of miles run, and are not altered by the number of trains, notwithstanding such trains may be few or many in number, so long as the aggregate mileage run by such trains remains the same: That the regulations and the scales of rates for the carriage of coals were made by the traffic-manager of the company in pursuance of the instructions of the directors given to him to carry into effect the injunction issued by this court in the matter of the former complaint made by the complainants against the company (*a*), and deponent believed that the regulations so made and the scales of rates so fixed as aforesaid for the carriage of coal do bonâ fide carry into effect the said injunction: That, from the 1st of May, 1857, the company, their agents and servants, had altogether absolutely desisted from giving an undue preference to any person or persons whatsoever for or in respect of the carriage of coals on their railways, and that the company had from that day carried coals for the complainants on equal terms with all persons whatsoever, having due regard to the circumstances (if any) which rendered the cost to the company of carrying for the one party less than the cost of carrying for **[148]** the other party: That the districts mentioned in the regulations marked A. and B. respectively, and the other regulations referred to, were fixed and assigned by the traffic-manager, having regard to the quantity of coals carried along the lines of the company, and the places from and to which coals were carried, at the time of the revising of the said scale of rates, and also having regard to the consumption of coal which would be required for the use of the population of the several places comprised within the districts mentioned in the said regulations; and that the said districts had not been fixed or assigned or

(*a*) See *In re Ransome and The Eastern Counties Railway Company*, ante, vol. i., p. 437.

the said regulations for the conveyance of coal made to give any undue preference or advantage to any persons whatever, or to give any undue preference or advantage to landborne coal over seaborne coal, or of preventing the complainants from dealing at the several places at which they so deal as aforesaid, or of excluding seaborne coal from those places, or of interfering with the trade of the complainants, for that, by the revised scale of rates, the profit accruing to the company for the carriage of a given quantity of seaborne coal from Ipswich to the several places at which the complainants so deal in coal, is greater than for the carriage of the same quantity of landborne coal from Peterborough to those places: That the cost to the company of the carriage of large quantities of coals for long distances is proportionately less per ton per mile than the cost of the carriage of small quantities for short distances, and consequently the profit to the company is greater per ton per mile for the carriage of large quantities for long distances than for the carriage of small quantities for short distances, and therefore that the company can afford to carry coal for long distances at a less rate per ton per mile than they can afford to carry coal for short distances. The affidavits, after enumerating the seve-[149]-ral places, with the amount of their population respectively, whose supply of coal was derived from the several stations within the districts mentioned in the regulations marked A. and B., proceeded to allege,—that there are circumstances which render the cost per ton per mile to the company of carrying coal from Peterborough to the places in the district No. 8, mentioned in the paper marked A., less than the cost of carrying coal for the complainants from Ipswich to the said places, and that there is such a difference of cost as to justify such a difference of charge as mentioned in the complainants' affidavit, because the distance from Peterborough to the places to which the complainants trade are as follows, that is to say,—from Peterborough to Thurston, 78 miles, to Mellis, 95 miles,—to Stowmarket, 88 miles,—to Needham Market, 92 miles,—to Hadleigh, 113 miles,—to Elmswell, 83 miles, to Bury St. Edmunds, 74 miles,—to Diss, 98 miles,—whereas, the distances from Ipswich to the places at which the complainants trade are as follows, —to Thurston, 23 miles,—to Mellis, 23 miles,—to Stowmarket, 13 miles,—to Needham Market, 9 miles,—to Hadleigh, 13 miles,—to Elmswell, 18 miles,—to Bury St. Edmunds, 27 miles,—to Diss, 27 miles; because the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances. The affidavits then went on to allege that the costs to the company of getting ready a coal-train of 35 trucks or 200 tons alone, is about one-half the costs to them of carrying a similar coal train a distance of 100 miles, and that the cost to the company of carrying a similar train of coals the distances hereafter mentioned is as follows, viz. for a distance not exceeding 10 miles, 55·100ths of the cost of carrying coals in a similar train a distance of 100 miles,—for a distance not exceeding [150] 20 miles, 60 100ths, for a distance not exceeding 30 miles, 65 100ths,—for a distance not exceeding 40 miles 70 100ths,—for a distance not exceeding 50 miles, 75 100ths,—for a distance not exceeding 60 miles, 80 100ths,—for a distance not exceeding 70 miles, 85 100ths,—for a distance not exceeding 80 miles, 90 100ths,—for a distance not exceeding 90 miles, 95 100ths; that the rates charged by the company in the scales referred to for the carriage of a coal-train of 200 tons the distances hereafter mentioned, are as follows, viz. for a distance not exceeding 10 miles, 28 100ths of the charges for carrying coals in a similar train a distance of 100 miles,—for a distance not exceeding 20 miles, 40 100ths,—for a distance not exceeding 30 miles, 54 100ths,—for a distance not exceeding 40 miles, 62 100ths,—for a distance not exceeding 50 miles, 78 100ths,—for a distance not exceeding 60 miles, 86 100ths,—for a distance not exceeding 70 miles, 92 100ths,—for a distance not exceeding 80 miles, 96 100ths,—for a distance not exceeding 90 miles, 98 100ths; and that, from a comparison of the above results, it appeared that the charges made by the company for the carriage of coals in train-loads of 200 tons from Peterborough to the places at which the complainants trade, was greater in proportion to the cost to the company of the carriage of coals in such trains, than were the charges made by the company for the carriage of coals in such trains from Ipswich to the places at which the complainants trade, in proportion to the cost to the company of the carrying of a similar coal-train from Ipswich to those respective places, and consequently that the profit to the company upon carrying coals in such trains from Peterborough to the last-mentioned places, was greater than the profit to the company upon carrying coals in such trains from Ipswich to the last mentioned

[151] places; and thus, so far from the scale of rates set out in the papers marked A. and B., and the other regulations referred to, tending to destroy the complainants' trade in coals, such scales of rates were more advantageous to the complainants, as compared with the cost to the company, than is such scale of rates as aforesaid to the persons trading in coals from Peterborough: That it was not true that the difference between the rates charged for the carriage of seaborne coals from Ipswich to the several places before mentioned, and those charged for the carriage of landborne coals from Peterborough to the same several places, tended to create a monopoly in the trade in coals in favour of landborne coals, inasmuch as the complainants, residing at Ipswich, and, on account of their local and geographical position, nearer to the said several places at which they trade, have an advantage over the traders in landborne coals to and at the same several places from Peterborough, since the gross cost of the carriage of such landborne coals from Peterborough to Bury St. Edmunds, the nearest of the said several places from Peterborough, is 4s. 3d. per ton (in the owners' waggons or trucks), while the gross rate of charge from Ipswich to Bury St. Edmunds, the farthest of the said several places from Ipswich, is only 2s. 5d. per ton: And that the scale of rates for the carriage of coals since the 1st of May, 1857, charged on the principle of proportionably lowering the rates for a larger than for a shorter distance, tended greatly to the advantage of the public, in extending the area of the supply of coal, and in diminishing the cost of coal to the consumer.

It was insisted, on behalf of the company, that the above affidavits completely negatived any intention on their part to evade or disregard the injunction of the court on the former occasion; that the arrangement [152] of districts was shewn to have been bonâ fide made, partly with a view to the convenience of the company themselves, and partly with a view to the benefit of the neighbouring places, and without any intention to prejudice or interfere with the trade of the complainants: that it was absolutely impracticable to frame a scale of charges so as to avoid the imposition of some disadvantage upon particular individuals; and that the difference of cost to the company had already been recognised,—in *Ransome's case*, ante, vol. i., p. 437, and in *Oxlade's case*, ante, vol. i., p. 454, —as a justifiable ground for making differences of charge.

Byles, Serjt., and T. Jones, in support of the rule. The districts have evidently been studiously adjusted and arranged for the express purpose of prejudicing the complainants; for, the result is, that, in order to enable them to have their coals carried at the lower rate, they must send a separate train-load of 200 tons into each of the three districts, —which is a greater quantity than their trade at the several places therein demands; whereas, the same arrangement places all or nearly all the places at which the Peterborough dealers trade in one district, and so gives them an advantage which is withheld from the Ipswich dealers. Then, the rates charged for the carriage of coal from Ipswich are out of all proportion higher than those charged for the carriage of coals from the contrary direction, —as appears from the comparative scales of charges at p. 145. The only answer which is offered on this part of the complaint is, that there are circumstances which justify the difference of charge, inasmuch as the cost of carrying coal for long distances and in large quantities is less in proportion than the cost of carrying it for shorter distances and in smaller [153] quantities. But that does not account for the circumstance of the scale of charges for the carriage of train-loads of coal from Peterborough diminishing precisely at the point where the landborne coal comes into competition with the seaborne coal, —thus depriving the complainants and the other dealers in the last-mentioned coal of a considerable portion of the natural advantage of their geographical position. There is no pretence for saying that the cost of carriage to the company is less in this intervening space.

Cur. adv. vult.

Williams, J., now delivered the judgment of the court:

The rule in this case calls on the Eastern Counties Railway Company to shew cause why an injunction should not issue against them, injoining them to desist from giving any undue preference in respect of the carriage of coals, to dealers sending them from Peterborough towards certain places on the railway at which the complainants deal in coals, and from subjecting them to any undue prejudice in respect of the carriage of coals from Ipswich to those places, and injoining the company to carry coals thither for the complainants on equal terms with the dealers sending coals from

Peterborough, having due regard to the circumstances, if any, which render the cost of carrying for the one party less than the costs of carrying for the other.

The complainants charge the company with having contrived a scale of charges for the carriage of coals on their railroad with a view to give the traders in landborne coals brought along it from Peterborough, an undue advantage over the seaborne coals brought along it from Ipswich.

On the argument, before my Brothers Crowder and **[154]** Willes and myself, the complaint was rested by the counsel for the applicants mainly on two grounds contained in the affidavits. The first was, that the company, since May 1st, 1857, have established a system of carrying coals according to assigned districts, comprising certain places on their lines and their various branches, and within these several districts the company carry coals at certain lower rates for quantities not less than what is called a train-load, i.e. 200 tons, or 35 trucks. The complainants, who are coal-dealers at Ipswich, also carry on that business at Needham Market, Stowmarket, Elmswell, Thurston, and Bury, which are places on that branch of the company's lines which conducts to Peterborough; and also at Mellis and Diss, which are on another branch line communicating with that first mentioned; and also at Hadleigh, which is on another distinct branch. These districts, the complainants assert, have been so adjusted that the places where they deal, instead of being put into one district, are distributed into three; so that, in order to take advantage of the reduced rates, it is necessary to send from Ipswich three train-loads, one into each district,—which is a greater quantity than their traffic demands. They say, therefore, that it is thus rendered impossible for them to avail themselves of the lower rates: whereas, the districts are so arranged, that, for dealers sending coals from Peterborough, instead of from Ipswich, a single district is constituted, which comprises, besides other places, seven of those at which the complainants deal, and so affords a traffic requiring such a quantity of coals as enables the Peterborough dealers to take advantage of the lower rates.

On the part of the company, the greater part of these suggestions is denied by affidavit: and, particularly, it is sworn by Mr. Moseley, the traffic-manager, that the company would make no profit at all, if they were to **[155]** carry a less quantity than a train-load, in a separate train, at the lower rate; and that, as to the adjustment of the districts, they were fixed and assigned by himself, having regard to the quantity of coals carried along the lines, and the places to and from which they were carried, and the consumption of coal which would be required for the use of the population of the places comprised in the districts: and he goes on to deny positively that they were fixed or adjusted in order to give any undue preference to the landborne coal-traders, or work any prejudice to the seaborne. And it is also sworn that the districts into which the places where the complainants deal are distributed, comprise also other places containing a large population.

On the whole, therefore, we think that this ground of complaint has not been sustained; for, although we think the company have failed to shew that the district system, arranged as it now stands, is not disadvantageous to the complainants, yet, looking at the affidavits on both sides, we cannot find sufficient to justify us in coming to the conclusion that the complainants are unduly subjected to this disadvantage, or that it is caused by any undue preference or partiality, as suggested. It is their misfortune, which we cannot remedy, if the state of their trade is such that it happens not to accommodate itself to a scale and system of rates which does not appear to be disadvantageous to the public at large, or objectionable in other respects.

The second ground of complaint is, that the company charge rates for carrying coals from Ipswich to places where the complainants deal, which, it is alleged, are out of all proportion greater than the rates charged for carrying coals from Peterborough to those places; inasmuch as the company charge for carrying a train-load from Ipswich to Bury, which is only 27 miles, the sum of 2s. 5d., and from Peterborough to the same place, **[156]** which is 74 miles, the sum of 4s 3d.,—from Ipswich to Thurston, which is 23 miles, the sum of 2s. 2d., and from Peterborough to the same place, which is 78 miles, the sum of 4s. 4d.,—from Ipswich to Elmswell, which is 18 miles, the sum of 1s. 10d., and from Peterborough to the same place, which is 83 miles, the sum of 4s. 5d., —from Ipswich to Diss, which is 27 miles, the sum of 2s. 5d., and from Peterborough to the same place, which is 98 miles, the sum of 4s. 6d.,—from Ipswich to Mellis, which is 23 miles, the sum of 2s. 2d., and from Peterborough to

the same place, which is 95 miles, the sum of 4s. 6d.: and a similar disproportion between the distances over which the coals are carried, and the prices charged for carrying them, is shewn as to the other places where the complainants deal.

In answer to this, it is sworn, on the part of the company, that there are circumstances which render the cost to the company per ton per mile of carrying coal from Peterborough to the places where the complainants deal, less than the cost of carrying coal from Ipswich, so as to justify the difference of charge: because the cost of carrying coal for long distances is proportionably less than the cost of carrying it for short distances. It is further sworn, that, on an analysis of the comparative cost of carrying for various distances ranging from 10 to 90 miles, and of the rates charged by the company for those distances, and a comparison of those results, it appears that the charges made by the company for carrying coals from Peterborough to the places where the complainants deal, are greater in proportion to the cost of carrying than the charges made by the company for carrying coals from Ipswich to those places; and, consequently, that the profit to the company is greater with respect to the former than the latter. It is also sworn that the adjustment of districts, and the scale of rates for the car-[157]-riage of coals, are not confined to Peterborough and Ipswich, but extend on precisely the same footing to other places on the company's lines, viz. the ports of Wisbeach, Lynn, Yarmouth, Lowestoft, Harwich, and Colchester.

But there is a portion of the scale of rates as to which we think no satisfactory explanation has been given by the company. The scale for train-loads of coals in the owners' waggons begins to increase at the distance of 14 miles. From thence up to the point of 20 miles it increases at the rate of 1d. per ton per mile. It then goes on increasing (with some exceptions) at the rate of 1d. for every two miles, till it reaches the point of 60 miles. Then it increases at the rate of 1d. for 3 additional miles, and then at the rate of 1d. for 4 additional miles, till it reaches the point of 75 miles. Then it increases only 1d. for 6 additional miles, till it reaches the point of 81 miles: and then it increases only 1d. for the additional distance of 12 miles, till it reaches the point of 93 miles; and then it increases only 1d. for the additional distance of 6 miles, till it reaches the point of 100 miles. The scale then reverts to the earlier ratio of increasing at the rate of 1d. for every 2 miles, and continues invariable at that rate of increase till it reaches the maximum distance, viz. 137 miles.

It is therefore obvious, that, on this scale, the charge is the same to the Peterborough dealers, whether they send their coals, in the direction of the place where the complainants deal, 76 or 81 miles, and whether they send them 82 or 93 miles, and whether they send them 95 or 100 miles. In effect, as far as respects the cost of carriage, the distance from Peterborough is abridged, in these instances, to the extent of 5, 11, and 5 miles respectively: and the Peterborough dealers are only charged 2d. per ton for the journey of 24 miles which intervenes between the point of 76 miles distance from Peter-[158]-borough and the point of 100 miles distance from that place. And it will be found that between these points lie all the places (except Bury and Hadleigh) where the complainants deal, and where the landborne coal is alleged to be brought into competition with the seaborne. And thus the carriage from Peterborough to Stowmarket and Needham Market (two of the places where the complainants deal), which are distant respectively 88 and 92 miles from Peterborough, is charged the same as if they were distant only 82 miles. And the distance from Bury to Diss, -including in its course Thurston, Elmswell, and Mellis, and amounting to 24 miles, only increases the charge to the Peterborough dealers by 3d. But, as soon as the distance reaches 100 miles, that is, as soon as the places where the competition exists are passed, the scale resumes the increasing ratio of 1d. for every 2 miles.

This anomalous part of the scale is not accounted for by the company, as far as we can discover. It is true that it pervades all the districts, and is applied to Lynn and Yarmouth and all the other ports on the company's lines, and is not peculiar to that portion of them which conducts from Peterborough to Ipswich. If it had been so, the pressure on the complainants would have been so transparent that it would have been a palpable evasion of the injunction already obtained in this court by the same complainants against this company: see *In re Ransome*, ante, vol. i., p. 137.

But the question remains, whether the rate, even thus guarded, must not necessarily be deemed, when closely considered, as in reality a disguised infringement of the principles on which the judgment of this court on that occasion was founded. The effect of such a scale of charges is, to diminish the natural advantages which the

position of the dealers at Ipswich, by reason of its greater proximity, gives them over the dealers at [159] Peterborough, in respect of the traffic at Thurston, Elmswell, Stowmarket, Needham Market, Mellis, and Diss, by annihilating, in point of expense of carriage, a certain portion of the distance between Peterborough and those places. And just in the proportion by which the natural advantage is diminished, an undue preference is given to the Peterborough dealers, and an undue disadvantage is brought upon the complainants and the other Ipswich dealers.

We are, therefore, of opinion that a writ must issue, injoining the company to desist from giving an undue preference, in respect of the carriage of coals, to persons sending coals from Peterborough or other places to or towards the places mentioned in the rule. And we think the company ought to pay the costs of this application.

The rule was drawn up as follows:—"It is ordered that a writ of injunction do issue against the said company pursuant to the Railway and Canal Traffic Act, 1854, injoining the said company to desist from giving an undue preference in respect of the carriage of coals on the railways of the said company to persons sending coals by the said railways from Peterborough or other places to or towards Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, or any of them,"—with costs.

T. Jones, in Easter Term, 1858, obtained a rule calling upon six persons (named), directors of the Eastern Counties Railway Company, to shew cause why a writ or writs of attachment should not issue forth against them as such directors, for disobedience of the above [160] writ of injunction, on the ground that, professing to obey the writ, the company had altered their rates of charges in such a manner as to leave the substantial grievance complained of still existing. The affidavits upon which the motion was founded, after referring to the former application and to the writ issued in pursuance thereof, proceeded to state, that, on the 26th of March, 1858, the company issued new regulations for the conveyance of coals from Ipswich and from Peterborough, and a new scale of coal-rates of which the following is a copy:—

Miles.	Rate per ton, inclusive of terminals.		Miles.	Rate per ton, inclusive of terminals.	
	s.	d.		s.	d.
1 to 7	1	0	43	3	4
8 to 14	1	6	44	3	4
15	1	7	45	3	5
16	1	8	46	3	5
17	1	9	47	3	6
18	1	10	48	3	6
19	1	11	49	3	6
20	2	0	50	3	7
21	2	1	51	3	7
22	2	1	52	3	8
23	2	2	53	3	8
24	2	3	54	3	9
25	2	4	55	3	9
26	2	4	56	3	10
27	2	5	57	3	10
28	2	6	58	3	10
29	2	7	59	3	11
30	2	7	60	3	11
31	2	8	[161] 61	4	0
32	2	9	62	4	0
33	2	10	63	4	0
34	2	10	64	4	1
35	2	11	65	4	1
36	2	11	66	4	1
37	3	0	67	4	1
38	3	1	68	4	2
39	3	1	69	4	2
40	3	2	70	4	2
41	3	2	71	4	2
42	3	3	72	4	3

Miles.	Rate per ton, inclusive of terminals.		Miles.	Rate per ton, inclusive of terminals.	
	s.	d.		s.	d.
73	4	3	106	4	11
74	4	3	107	4	11
75	4	3	108	5	0
76	4	4	109	5	0
77	4	4	110	5	0
78	4	4	111	5	0
79	4	4	112	5	1
80	4	5	113	5	1
81	4	5	114	5	1
82	4	5	115	5	1
83	4	5	116	5	2
84	4	6	117	5	2
85	4	6	118	5	2
86	4	6	119	5	2
87	4	6	120	5	3
88	4	7	121	5	3
89	4	7	122	5	3
90	4	7	123	5	3
91	4	7	124	5	4
92	4	8	125	5	4
93	4	8	126	5	4
94	4	8	127	5	4
95	4	8	128	5	5
96	4	9	129	5	5
97	4	9	130	5	5
98	4	9	131	5	5
99	4	9	132	5	6
100	4	10	133	5	6
101	4	10	134	5	6
102	4	10	135	5	6
103	4	10	136	5	7
104	4	11	137	5	7
105	4	11			

[162] The affidavits then went on to state, that, up to the 26th of March, 1858, the company charged the same rates for the carriage of coals from Peterborough to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, as they did prior to the application for and the granting of the injunction; and up to the 26th of March, 1858, the company charged the same rates for the carriage of coal from Ipswich to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss, as they did before the injunction: That, since the injunction, the company have charged the complainants the same rates for the carriage of coal from Ipswich to the places last mentioned as they did prior thereto: That, since the 26th of March, 1858, the company have charged for the carriage of coal from Peterborough and Ipswich the rates mentioned in certain new scales: That, according to the new scale, the charge for the carriage of coal a distance of 137 miles (being the maximum distance mentioned in such new scale) is 5s. 7d. per ton, whereas, prior to the injunction, the charge for a similar dintance was 6s. 1d.: That Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, are the principal places at which the complainants trade in coal, and they all lie between 74 and 113 miles from Peterborough; and the company now charge the same rates for the carriage of coal for the said distance of 113 miles from Peterborough as they did prior to the injunction: —thus, before the injunction, the rates charged for the carriage of coal between Peterborough and Bury St. Edmunds, a distance of 74 miles, was 4s. 3d. per ton, and between Peterborough and Hadleigh, via Bury and Ipswich, a distance of 113 miles, was 5s. 1d. per ton; according to the new scale, the **[163]** charge for the carriage of coal from Peterborough to Bury St. Edmunds is 4s. 3d. per ton, and from Peterborough to Hadleigh, via Bury St. Edmunds and Ipswich, 5s. 1d. per ton, —being in fact a charge of 10d. per ton, or ½d. per ton per mile for the

distance of 39 miles between Bury St. Edmunds and Hadleigh; and the company, according to the new scale of coal-rates, charge for the carriage of the complainants' coal from Ipswich, under the same circumstances, the said distance of 39 miles, 3s. 1d. per ton: That since the injunction, the company had not made any alteration in the rates for the carriage of coals from Peterborough to Bury St. Edmunds, Elmswell, Thurston, and Hadleigh, or from Ipswich to those places; and that, with regard to such places, the company had not in any way obeyed the writ, but gave exactly the same undue preference in respect of the carriage of coals to persons sending coals from Peterborough to those places as they did before, and subjected the complainants and their traffic to the same undue disadvantage in respect of the carriage of their coal from Ipswich to those places as they did before: That the company, by their new scale, had made certain alterations in their charges for the carriage of coals from Peterborough to certain other of the places at which the complainants deal, that is to say, from Peterborough to Needham Market, a distance of 92 miles, the rate prior to the injunction was 4s. 5d. per ton, now 4s. 8d.,—to Stowmarket, a distance of 88 miles, the rate prior to the injunction was 4s. 5d. per ton, now 4s. 7d.,—to Mellis, a distance of 95 miles, the rate prior to the injunction was 4s. 6d. per ton, now 4s. 8d., to Diss, a distance of 98 miles, the rate prior to the injunction was 4s. 6d. per ton, now 4s. 9d., —and to Ipswich, a distance of 101 miles, the rate prior to the injunction was 4s. 7d. per ton, now 4s. 10d.: That, by the new scale, the **[164]** company had between the distance of 64 miles and 101 miles, that is, between 10 miles north of Bury and Ipswich, made an uniform rate of charge of ¼d. per ton per mile, which increases the charge per ton to the Peterborough dealer of carriage of coal between those two places in the aggregate by the sum of 3d. per ton: That, between the said distance of 64 miles and 137 miles from Peterborough, the whole of the seaborne coal traffic arriving at the port of Ipswich and the ports south thereof on the company's line of railway, comes into competition with the landborne coals from Peterborough; and whilst by the new scale of rates an additional charge in the aggregate of 3d. per ton over and above the charge previous to the injunction was made to the dealer in coal from Peterborough between the distance of 64 miles and 101 miles, the aggregate charge was diminished by 9d. per ton to such dealer in coal from Peterborough between the said distance of 101 miles and 137 miles: That Hadleigh is distant from Peterborough 113 miles, and from Ipswich 12 miles; and that, previous to the injunction, the charge for the carriage of coal to the dealers from Peterborough, viâ Ipswich, to Hadleigh, was 5s. 1d., or 6d. per ton, or ½d. per ton per mile, for the excess distance of 12 miles between Ipswich and Hadleigh,—the charge then being from Peterborough to Ipswich 4s. 7d. per ton; whereas, by the new scale, the charge for the carriage of such coal from Peterborough, viâ Ipswich, to Hadleigh, is, for such excess distance of 12 miles, 3d. per ton only, or ¼d. per ton per mile,—being an additional advantage or preference of ½d. per ton per mile in the carriage of coal from Ipswich to Hadleigh given by the company to or in favour of persons sending coal from Peterborough, viâ Ipswich, to Hadleigh, than existed prior to the injunction. The affidavits then set out a **[165]** scale of the rates charged to the Peterborough dealers previously to the first application against the company, and also the charges made previously to the second application, and since the issuing of the injunction to the several places named:—

From Peterborough.	Miles.	Previous to first application for writ of injunction.	Previous to second application and service of the writ.	Since the service of the writ, and according to new scale.
To Needham Market	92	4s. 6d. per ton.	4s. 5d. per ton.	4s. 8d. per ton.
Stowmarket	88	4s. 6d. „	4s. 5d. „	4s. 7d. „
Elmswell	83	5s. 0d. „	4s. 5d. „	4s. 5d. „
Thurston	78	5s. 0d. „	4s. 4d. „	4s. 4d. „
Bury St. Edmunds	74	5s. 0d. „	4s. 3d. „	4s. 3d. „
Hadleigh	113	4s. 8d. „	5s. 1d. „	5s. 1d. „
Mellis	95	5s. 0d. „	4s. 6d. „	4s. 8d. „
Diss	98	5s. 0d. „	4s. 6d. „	4s. 9d. „
Ipswich	101	4s. 0d. „	4s. 7d. „	4s. 10d. „

The affidavit then went on to state that the rates charged by the company according to the new scale for carrying coal for the complainants from Ipswich to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, were out of all proportion greater than the rates charged for carrying coals from Peterborough to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, under like circumstances; and that there were no circumstances which rendered the cost to the company of carrying coal from Peterborough to those places less than the cost of carrying coal from Ipswich to the same places.

The affidavit then proceeded to refer to and observe upon a report of the directors of the Eastern Counties Railway Company containing statements as to the ex [166] penses of the locomotive department, from which deductions were drawn which were at variance with some of the statements in the affidavits used on the part of the company on the former occasion; and, in particular, referring to the affidavit of the traffic-manager, wherein he stated that "he had carefully calculated the cost to the company of the working of the trains for the carriage and conveyance of coals, and that he found from experience and calculation that the cost to the company of preparing and getting ready to start a coal train of 35 trucks or 200 tons, without carrying or conveying the said coals any distance whatever, was about one-half, or 50 per cent., of the cost to the company of carrying and conveying a similar coal-train a distance of one hundred miles," alleged, that, if such statement were correct, the actual cost to the company (according to the said report) of preparing and getting ready to start one of such train-loads would be the sum of 2l. 12s., or about 3d. per ton only.

The affidavit further proceeded to allege, that, according to the new scale of rates, the company charge the persons sending coal from Peterborough, for the carriage of such coals 91 miles, that is to say, from Cambridge to Maldon, Cambridge being forty-five miles from Peterborough, and Maldon 136 miles,—the sum of 2s. 2d. per ton; whereas, by the said new scale, the company charge the complainants for sending such coals 27 miles, -that is, from Ipswich to Bury St. Edmunds, -the sum of 2s. 5d. per ton: That, according to the said new scale, the company charge the complainants for the carriage of coal a distance of 37 miles, the sum of 3s. per ton; whereas, they charge the other dealers from Peterborough 2s. 7d. per ton only for the carriage of their coal the further distance of 100 miles: That, according to the new scale, the company charge for the carriage of coals for the first 32 miles 2s. 9d. per ton, [167] for the second 32 miles 1s. 4d. per ton (or, less than half), for the third 32 miles 8d. per ton only (or, nearly three fourths less than the amount charged for the first 32 miles), and for the fourth 32 miles 8d. per ton only, that is to say, they charge 1d. per ton more for the first 32 miles than they do for the following 96 miles; or more than three times as much for the first 64 miles as they charge for the next 64 miles: That the whole of the places at which the complainants deal in coal lie within a distance of 32 miles from Ipswich; and, in consequence of the natural position of Ipswich, the merchants or dealers in coal there (which is seaborne to Ipswich) are limited to about that distance, and they cannot advantageously send coal a greater distance; that, if they were to send coal by the company's railway a further distance than 32 miles towards Norwich, they would come into close competition with the coals which are seaborne to the ports of Lowestoft and Yarmouth; that, if they were to send coal by the company's railways a further distance than 32 miles towards London, they would then come into close competition with the coals which are seaborne to the ports of Maldon and London; and that, if they were to send coal by the company's railways a further distance than 32 miles towards Cambridge, they would then come not only into close competition with the inland coal from Peterborough, but also into close competition with the coals which are seaborne to the ports of Lynn and Wisbeach; that the effect of the new scale of coal rates was, to give the same preference or advantage to persons sending coals from Peterborough to the said places at which the complainants dealt, as existed prior to their application and the issuing of the writ of injunction, and entirely deprived them of the natural advantages which their position by reason of the proximity of Ipswich to the sea gave them; that, unless the grievance they [168] complained of was altered, the trade in seaborne coal to Ipswich would be utterly superseded and destroyed, and the prosperity of the port and their trade ruined; and that the object of the company in making the said scale of rates was for the purpose of competing with and destroying the trade in seaborne coal: That the

company carry coals for the persons sending them from Peterborough to or towards the places at which the complainants deal, and charge to such persons the rate specified in the new scale of coal-rates for the carriage of full train-loads, although the said coals are not conveyed from Peterborough for such persons to such places in full train-loads of 200 tons or 35 trucks: That the said coals start from Peterborough to such places and the other districts in which such persons sending coals from Peterborough deal, in full train-loads of 35 trucks or 200 tons; that, when the train reaches Cambridge, and sometimes Bury St. Edmunds (which are distant from Peterborough respectively 45 miles and 74 miles), the train no longer remains a special or full coal-train; and that such coals stay either at Cambridge or Bury St. Edmunds, or are taken on from Cambridge and Bury St. Edmunds to such places and districts by different engines, and generally form part of the ordinary goods trains: That, in order to get such coals from Peterborough to Mellis, they have to be brought to the Haughley junction, and at the Haughley junction they are conveyed to Mellis by a different train and a different engine than that by which they are brought from Peterborough or Cambridge: That the coals carried by the company from Ipswich to Mellis for the complainants and other merchants at Ipswich, are conveyed from Haughley junction to Mellis by the same trains and engines as convey the coals from Haughley junction to Mellis of the persons so sending them from Peterborough to Mellis: That, in **[169]** order to get coals from Peterborough to Hadleigh, they have to be brought through Ipswich to Bentley junction; and from Bentley junction they are conveyed by a different train and by a different engine than that by which they were brought to Bentley from Peterborough or Cambridge: And that the coals carried by the company from Ipswich to Hadleigh for the complainants and other merchants at Ipswich, are conveyed by the same train and engine as the coals of the persons so sending them from Peterborough to Hadleigh.

Bovill, Q. C., and Sharpe, shewed cause, upon affidavits by the engineer and traffic-manager, and the several directors of the company, the former of whom deposed in substance as follows:—That, immediately after the delivery of the judgment upon the former motion, the chairman of the board of directors caused a copy of such judgment to be delivered to the traffic-manager, with instructions honestly, fairly, and bonâ fide to alter and amend the scale so as to carry out the judgment according to its true intent and meaning, and so that no undue preference should be given to the Peterborough dealers, and no undue disadvantage should be brought upon the complainants and the other Ipswich dealers in coal: That the traffic manager altered and amended the scale accordingly, and that the directors, after carefully considering the altered scale, and consulting their legal advisers thereon, adopted it in the bonâ fide belief that they were thereby fairly and honestly carrying out the judgment of the court, and that no undue preference was thereby given to the Peterborough dealers, and no undue disadvantage brought upon the complainants and other Ipswich dealers: That the rates and charges for the conveyance of coal for distances between one mile and 75 miles, as contained in the former scales, were, as the deponents **[170]** believed, sanctioned and allowed by the judgment of this court as rates or charges by which no undue preference was given to the Peterborough dealers, and no undue disadvantage was brought upon the complainants and other Ipswich dealers, and therefore that no alterations or amendments were made in the said rates or charges, but that they remained as before. The affidavits then went on to state that there were circumstances which rendered the cost per ton per mile to the company of carrying coal from Peterborough to the places in the district No. 8 in the paper marked A. referred to in the complainant's affidavit, less than the cost to them of carrying coal for the complainants from Ipswich to those places, and that there was such difference of cost as to justify such a difference of charge as mentioned in the complainants' affidavit: and, after giving, as before, the relative distances of those several places from Peterborough and from Ipswich respectively, they assigned for reason that the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances. The affidavits then went on to allege that it had been found by experience and calculation that the cost to the company of preparing and getting ready to start a coal-train of 35 trucks or 200 tons, without carrying the said coals any distance whatever, was about one half of the cost to the company of carrying a similar coal-train a distance of 100 miles. They then gave tables shewing the proportion which the cost to the company, and the sums charged by them respec-

tively, for the conveyance of a full train distances varying from 10 to 90 miles, bore to the cost of carrying coals in a similar train a distance of 100 miles. They then alleged, that, from a comparison of those results, it appeared that the charges made by the company for the carrying of coal in trains of 35 [171] trucks or 200 tons from Peterborough to the places at which the complainants trade, was greater in proportion to the cost to the company of the carrying of coal in such trains than were the charges made by the company for carrying coals in such trains from Ipswich to the places at which the complainants trade, and consequently that the profit to the company upon carrying coals in such trains from Peterborough to the last-mentioned places was greater than the profit to the company upon carrying coals in such trains from Ipswich to the last-mentioned places; and thus, so far from the new scale tending to suppress and destroy the trade in coals of the complainants, it was more advantageous to the complainants compared with the cost to the company than to the persons trading in coals from Peterborough: That it was impossible so to construct scales of rates for the carriage of coals for a distance so long as 137 miles, without making the same rate or charge for the carriage of coals for different distances, or, in other words, "annihilating in point of expense of carriage" a certain portion of distance; and therefore, when the distance along which coals are carried increases considerably, and consequently the cost per ton per mile diminishes considerably, the greater will be the different distances in respect of which the same total rate is charged, or, in other words, the greater must necessarily be the distance annihilated or destroyed in point of expense of carriage: That, since the service of the writ of injunction, the company had charged to the dealers in coal at Peterborough for the carriage of their coal from Peterborough to Ipswich an increased rate of 3d. per ton,—to Needham Market, an increased rate of 3d. per ton,—to Stowmarket an increased rate of 2d. per ton,—to Mellis an increased rate of 2d. per ton,—and to Diss an increased rate of 3d. per ton: That, according to [172] the new scale, the sum charged by the company for the carriage of coal a distance of 137 miles (being the maximum distance mentioned in such new scale) is 5s. 7d. per ton, and is 6d. per ton less than the sum formerly charged by them for the carriage of coal a similar distance, because the rates have been increased at an uniform rate of four miles for 1d. from 75 miles to the end of the scale, in order to carry out the judgment of this court; that no complaint had been made by the complainants as to the charges made by the company to the Peterborough dealers, or any other dealers in coals whatsoever, for the carriage of coal a distance of 137 miles; and that none of the towns of Thurston, Mellis, Stowmarket, Needham Market, Hadleigh, Bury St. Edmunds, Diss, and Ipswich are distant from Peterborough 137 miles: That, although it is true that the company charge for the carriage of coal from Peterborough to Bury St. Edmunds 4s. 3d. per ton, and from Peterborough to Hadleigh, viâ Bury St. Edmunds and Ipswich, 5s. 1d. per ton, being (as alleged in the complainants' affidavit) a charge of 10d. per ton or ¼d. per ton per mile for the distance between Bury St. Edmunds and Hadleigh, yet it is only after the coals have been conveyed from Peterborough to Bury St. Edmunds as a part of the journey from Peterborough to Hadleigh, and after the company have become entitled to the charge of 4s. 3d. as aforesaid for the carriage from Peterborough to Bury St. Edmunds, that they charge for the part of the said journey from Bury St. Edmunds the sum of 10d. per ton, and that the company would not have received the said charge of 4s. 3d. per ton for the carriage of the said coals, unless they had afterwards been proceeding onwards to Hadleigh; and that the company would charge to the dealers in coal at Peterborough, and all other per [173] sons whatever, the same charge per ton per mile for the carriage of coal from Bury St. Edmunds to Ipswich as they do to the complainants and other dealers in coal at Ipswich for the carriage of coal from Ipswich to Bury St. Edmunds, if the coals passing from Bury St. Edmunds to Ipswich had not been conveyed from Peterborough to Bury St. Edmunds as a portion of a longer distance from Peterborough to Hadleigh along which the said coals had been or were to be carried by the company; and that the reason why the company charge the rate of 5s. 1d. for 113 miles, is, because the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances, as shewn in the former part of the affidavit: That, since the issuing of the injunction, the company had not made any alteration whatever in the charges for carriage of coals to persons sending coals from Peterborough to Bury St. Edmunds, Elmswell, Thurston, and Hadleigh; nor had they made any alterations in the charges for the carriage of coal

from Ipswich to such places, for the reasons already stated: That the alteration in the scale of rates for the carriage of coal a distance of 113 miles, viz. the distance from Peterborough to Hadleigh, was made upon the principle of increasing the rates for the carriage of coal per ton between the distances of 75 miles and 137 miles, at the rate of 1d. for every four miles, as before stated. The affidavits then adverted to the half-yearly report to the directors to the shareholders, and entered into a calculation of the cost to the company of conveying trains to the different places mentioned, and concluded with a general allegation that the introduction of landborne coal into the districts referred to operated beneficially to the public, by inducing competition, and so keeping down the price of seaborne coals. The affidavits of [174] the chairman and directors disclaimed all intention to evade compliance with the injunction, and stated the instructions which they had given to their engineer and traffic-manager with a view to the carrying out the order of the court, and their belief that this had been done.

Atherton, Q. C., and T. Jones, were heard in support of the rule.

The arguments consisted entirely of observations upon the affidavits filed on the one side and on the other, and references to the former judgments upon the contests between these parties.

Williams, J. I am of opinion that this rule must be discharged. The order of the court upon which the present application for an attachment is founded, was a general order that a writ should issue injoining the company to desist from giving an undue preference, in respect of the carriage of coals, to persons sending coal from Peterborough towards the places mentioned in the rule which was made absolute on that occasion. But the rule was explained by the judgment which accompanied the grant of it, to be founded upon certain anomalous charges in the scale of rates which had been adopted by the company,—those anomalous charges being not only perfectly unaccounted for in the affidavits used by the company on that occasion, but also having in their nature a direct tendency to give an undue preference to the Peterborough dealers over the Ipswich dealers. Now, with respect to those particular features in the old rates, the company have substantially reformed all these. They have in the new scale which they have published adopted the suggestions which fell from the court with refe-[175]-rence to what would have been the proper mode of framing that scale: and this is accompanied by a most explicit affidavit that they have done their best to carry into effect the order of the court, and to construct a scale of rates that should be in all respects, to the best of their judgment and opinion, conformable to the order of the court. As far, therefore, as that goes, there is no doubt that this application for an attachment has entirely failed. But it has been contended, —and I will take it for granted that it has been properly contended,—on behalf of the applicants, that, looking at the general terms of the rule, notwithstanding the judgment was founded upon certain items in the scale of rates which have been reformed, it was open to them to contend that there had been a violation of the injunction generally by the new scale of rates giving an undue preference in other respects to the Peterborough dealers over the Ipswich dealers. And the main argument in support of that view of the case was based upon this:—It unquestionably appears upon the face of the new scale of rates that the charges made to the Peterborough dealers who sent coals to the places where they enter into competition with the Ipswich dealers, beginning with Bury St. Edmunds, is not at all in an equal ratio with the scale of charges imposed upon the Ipswich dealers. But then, on behalf of the company, it is said, that, though that is so, they account for it and justify it upon the ground that there is what has been called the expense of preparing and starting the train, which falls upon the company in respect of every train which leaves the station, whatever be the distance it has to travel: so that the same expense is incurred by the company in that respect, whether the train goes 27 miles, or 100 miles, or any other distance that might be suggested. And it is said, that, taking that into account, the dis [176]-proportion in the charges, having reference to the distances, is fully accounted for. After a careful consideration of the affidavits on both sides, I am of opinion that that is a correct view of the case. It is admitted that there is such a general charge incurred by the company upon the starting of every train, whatever the distance it has to travel; and that circumstance, in my opinion, sufficiently accounts for the difference of charge which is complained of. But then it is urged, on behalf of the company, that, assuming that principle to be one upon which they are justified in

acting, although it may justify the diminished scale of rates beyond a distance of 74 miles, it does not satisfactorily account for the rates up to that point for the shorter distances. It certainly must be admitted that the earlier part of the scale is not framed strictly in accordance with the principle suggested. For some reason, which is not apparent on the face of the affidavits, so far from their being based upon that principle, the rates are considerably lower: the increase is upon a different footing altogether: and it would appear that the company charge a great deal less than would be the proper charge if that principle had been adopted. But the question is, whether that affords any ground for making this rule absolute for an attachment against the company. I am of opinion that it does not. In the first place, I must observe, that, although I find nothing in the affidavits made by the company's officers to justify or explain this anomalous rate of charge for the earlier distances, yet the observation of Mr. Bovill is perfectly true, that neither on the former occasion nor on this were the company at all challenged to account for this anomalous part of their scale: and in addition to this, it must be observed that it is not now shewn that this diminished rate of charge is at all detrimental to the complainants, or **[177]** has in any way the effect of preferring the Peterborough dealers. Indeed, if the principle above suggested were carried out on all parts of the transit, the consequences would be still more injurious to the Ipswich dealers than the rates of which they now complain, by raising the rates considerably within the distance of twenty-seven miles, which comprises all the places where their coal enters into competition with that of the Peterborough dealers. I therefore think that no sufficient ground has been laid for an attachment, and consequently that the rule must be discharged, and discharged with costs.

CROWDER, J. It seems to me also that the complainants have failed to establish any ground for calling upon us to make this rule absolute. In consequence of the judgment pronounced by the court upon the former occasion, it became necessary for the company to reform their scale of rates: and it appears that they have done so in the points to which their attention was particularly directed by the judgment. Looking at the affidavits produced before us in answer to this rule, I can find nothing in them which shews that there has been any wilful contempt of the order of the court, or any intention on the part of the company to evade a compliance with its injunction. On the contrary, it seems that they have bonâ fide endeavoured to the best of their judgment and ability to comply with it. The affidavit of the company's engineer and traffic-manager shews that they have gone into very minute calculations as to the expense of running trains of 200 tons or 35 trucks, and have endeavoured to establish a principle upon which to found their rates of charge. They say that the cost of preparing a coal-train of 200 tons or 35 trucks amounts to one half the entire expense of conveying a train of that description a distance of 100 **[178]** miles. Upon that foundation they appear to have proceeded so far as regards the greater part of the scale; and they shew that all the charges which are particularly objected to as being too favourable to the Peterborough dealers have been adjusted upon that principle. But, on the part of the complainants, it is said that that principle presses heavily and unfairly upon the Ipswich dealers, who carry on the whole of their trade within a distance far short of 100 miles from that place. It may be that that is so: but, assuming that the company are right in their estimate of the comparative cost to them of the transit of a full train-load for the longer or the shorter distance, it is obvious, that, if the cost of starting the train were taken into the account, the charges for the shorter distances would be even larger than they now are. An observation to this effect having been made by the court in the course of the argument, and the counsel for the company being asked how they could afford, regard being had to the cost of preparing and starting a train, to charge such low rates as they do for the shorter distances, the answer I think was sufficiently suggestive, viz. that there are many circumstances which may induce a railway company to charge on parts of their line rates which leave them little or no remuneration, — as, the proximity of rivers or canals or other lines of railway which may enter into competition with them, and materially affect their interests. This seems to be the ground upon which, in all probability, the rates have been settled in the earlier portion of the scale which is complained of. If this were to be altered, the alteration, so far from benefiting, would very materially prejudice the interests of the Ipswich dealers. Looking, then, at the scale of charges, as reformed by the company in pursuance of the judgment of this court on the former motion, I see no reason for thinking that there **[179]** has

been any design on their part to evade compliance with the injunction, or to give the Peterborough dealers an undue advantage at the expense of those of Ipswich; and therefore I agree with my Brother Williams that this rule must be discharged with costs.

WILLES, J. I am of the same opinion. Assuming that the average cost of preparing and starting a train-load of 200 tons or 35 trucks of coal is 2s. 5d. per ton, as is sworn to on the part of the company, and not controverted on the part of the complainants, the latter have failed to make out that the cost with the mileage (which is admitted to be correctly charged) would make a tonnage-rate less than the charges of which they complain. Unless they establish this,—and they certainly have not done so,—they have no locus standi; and consequently they must bear the usual penalty of an unsuccessful experiment, by having their rule discharged with costs.

Rule discharged, with costs.

[180] WARNER, *Appellant*, RIDDIFORD, *Respondent*. Feb. 12th, 1858.

[S. C. 6 W. R. 326 (sub. nom. *Ward* v. *Reddifer*).]

The defendant, the owner of a beer-house, placed the plaintiff therein to carry on the business as his servant at weekly wages, with an agreement for a month's notice to determine the service. Having given him a week's notice, the defendant made up the account and required the plaintiff to pay him the balance; and, on the plaintiff's refusal to accede to this request, on the ground that he had not received the stipulated month's notice, the defendant brought in a superintendent and a serjeant of police, one of whom, on the plaintiff's attempting to go up stairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, and the plaintiff's again refusing to hand it over at the request of the superintendent, the latter asked the defendant if he should take him: it did not appear what answer the defendant made, but the officer took the plaintiff into custody, and entered a charge of embezzlement against him at the station-house, and afterwards carried him before the magistrates, by whom he was discharged.—In an action in the county-court for the false imprisonment, the judge told the jury that there were three questions for their consideration,—first, whether there was any imprisonment,—secondly, by whom it was committed,—thirdly, whether there was any legal ground for it. Upon the first point, he told them that "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained in his own house and the restraint put upon his person by refusing him permission to leave the room and go up stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate;" upon the second, "that, if they found the defendant was the moving party in causing the imprisonment, he was responsible for it;" and, upon the third, "that the plaintiff, as tenant or as lawful occupier, under an agreement not then terminated, of the premises, was not legally liable to be ejected by compulsion and without notice, and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession, and that there was no evidence whatever to support or justify the charge of embezzlement."—The jury having found for the plaintiff,—Held, upon an appeal, that, although the latter part of the summing-up (which seemed to assume that there was a tenancy or quasi tenancy) was somewhat inaccurate, it did not amount to a misdirection in point of law.—Semble, that the county-court judge has (under the 15th section of 13 & 14 Vict. c. 61, and the 145th of the rules of practice issued under the authority of the 19 & 20 Vict. c. 108, s. 32), no power to alter or add to an appeal case after it has been agreed on and signed by the parties or by their attorneys.

This was an action brought to recover damages as stated in the particulars of the plaintiff's claim, "For that the defendant assaulted the plaintiff and imprisoned and detained him in prison without any reasonable or probable cause."

The cause was tried (with a jury) in the county court of Wiltshire holden at Swindon, on the 10th of November, 1857.

The first witness for the plaintiff was the plaintiff himself. He stated, that, in the beginning of the year, the defendant, who kept a beer house at New Swindon, proposed to him to come and manage his business there, offering to pay him as wages 30s. a week, or 6l. per month,—a month's notice to be given **[181]** either way; which offer was accepted by the plaintiff, and he accordingly came to New Swindon in April last. He further stated, that, on the 9th of September last, the defendant (Warner) had said that he could not pay him the wages he had hitherto paid; and that, after some discussion, the defendant offered the plaintiff 1l. a week, which the plaintiff refused. "We had," said the plaintiff, "a main bother." He further stated that the defendant and his wife slept under his roof; that, on the morrow morning, the defendant gave him a week's notice to leave his service; that he (plaintiff) merely smiled, and said "thank you;" that, on the following Wednesday, the 16th of September, the defendant and his wife drove up; that he then told the defendant that he should take no notice of the week's notice which the defendant had given him; that the defendant and one Monk went into the cellar at six o'clock, and the defendant called the plaintiff to take stock; that the plaintiff refused to have stock taken that night; that they had a regular bother; that the plaintiff requested Monk to come the following morning, when he said he had promised the defendant to do so; that defendant and his wife slept there that night; that, on the next day, plaintiff was engaged in making up the books, when the defendant came in with one Vallis; that plaintiff went through with defendant and Vallis in the cellar, and when they came out they began to take account of glass and cigars; that the keys were in the till; that defendant and Vallis went upstairs to cast up accounts; that they did not call upon plaintiff to know what money he had in hand; that they went out, and he remained as usual; that, between five and six o'clock, defendant and Vallis came back with the police superintendent and serjeant; that many persons were about; that plaintiff put the keys of the till in his pocket, saying **[182]** they were his yet; that the superintendent said they were come for plaintiff to give up defendant's money, and that plaintiff then said, "Very well; if Warner will give me warning, I'll go on the 12th of October, but, if this is not done, I'll stick to what I've got;" that Mr. Haynes (the superintendent) then said, "Now, Mr. Warner, you are at liberty to break open anything there is in the house;" that, as Warner was going towards the till, as plaintiff thought, to break it open, he (plaintiff) said, "You need not do that, here's the keys;" that defendant pulled out of his pocket a receipt for five weeks, and said, "Thee beest only a weekly servant, and I'll give thee a week's wages, and no more;" that plaintiff then gave them the keys of the till; that they took out the money; that plaintiff's wife, with the superintendent and defendant went up stairs, and, when they came down, plaintiff was called into the parlour and asked for 30l. 0s. 9d.; that plaintiff said he would not give it without his right, his month's money; that the serjeant watched the plaintiff, and would not allow him to go up stairs; that plaintiff went to see his child; that he said to the superintendent, he hoped, if he was in custody, he would permit him to go and change his clothes; that one Bullock (the officer) went up with the plaintiff; that the superintendent took him to the station-house; that he was in the station-house three hours, and at nine at night was taken before the magistrate and bailed; and that Bullock, the officer, and Haynes, the superintendent, were there. The plaintiff further stated, that, on the 24th of September, he attended before the magistrate again, with Mr. Browne his solicitor; that Mr. Browne, who appeared for him, opened the case; that Haynes, the superintendent of police, said defendant did not wish to press the case; that the magistrate said there was no case against him, and he was discharged; that **[183]** he paid Mr. Browne 1l. 11s. 6d., witnesses, 10s., and summons, 3s.; that, on the Saturday following, defendant wanted him to go to his lawyer's to have a receipt for the money he had paid, viz. 30l. 0s. 9d., deducting the 6l. for his month's wages, and leaving 24l. 0s. 9d.; and that he wished him to go back at 1l. per week, which plaintiff refused.

On cross-examination, the plaintiff stated, that, on the 9th of September, he and defendant had a main bother; that defendant told him to give up the money to Mrs. Warner, and that he (plaintiff) refused; that the stock had been taken; that, on the 9th of September, the defendant said he could not afford to give plaintiff more than 1l. a week; that, on the 16th he (plaintiff) refused to let stock be taken; that he did not recollect swearing that night; that next morning Vallis and defendant came again, and plaintiff went round the cellar with them; that Vallis did not immediately ask

for money, not until plaintiff was called upon for 30l. 0s. 9d.; that that was after they had taken the cash from the till; that plaintiff produced an account for certain small moneys; that he claimed 6l. for a month's wages; that Vallis never said he should require a receipt for four weeks; that, in the evening, they said he wanted 30l. 0s. 9d., and plaintiff said "Very well, give me my month's wages, and you may do what you like;" that Haynes (the superintendent) said defendant was at liberty to break open the locks in the house; that plaintiff did not hear defendant or any one else tell the police-officer to take him (plaintiff) into custody; that four friends came to him (plaintiff) at the station-house, and he had a talk that night about an action for false imprisonment; that Haynes advised him to give up the money, and he refused; that he did not say he "would not give up the money;" that he went to Mr. Browne when he was **[184]** liberated on bail; and that the charge was entered on the sheet as "embezzlement."

Millicent Riddiford, wife of the plaintiff, said that she was present at the agreement between her husband and defendant; that there was to be a month's notice given either way; that she was present when the police-officer came, and when her husband went away, and when he (the officer) went up stairs; that plaintiff wanted to go up stairs, and they would not let him; that they searched the room and boxes, and left the things as they were, scattered about; that there were many persons about; that she heard them ask for the money, and her husband said, provided they gave him his month's wages, he would give it up.

On cross-examination, the witness said that she unlocked the boxes; that she would not give them the keys; that they found some small coin belonging to the little girl; that Haynes, the superintendent, asked Warner (the defendant) whether he was to take Riddiford, the plaintiff, and that she did not hear any answer by defendant; and that her husband was taken off by Bullock.

John Short said that he had taken stock, being employed by defendant, and that plaintiff was never unwilling to pay over the money; that, previous to the 10th of April, defendant said to him, "I have a man coming from the country: I have made an arrangement that I can get rid of him at any time at a month: that is our agreement."

Edwin Monk said that he remembered the 9th of September, and the parties coming to his house; that defendant said to plaintiff, "I give you a week's notice;" that plaintiff said nothing at the time, but afterwards, when defendant was gone, said something about a month's notice.

The counsel for the defendant thereupon submitted **[185]** to the court that there was no evidence to go to the jury of the plaintiff's alleged causes of action. The judge was of opinion that there was, and thereupon the following witnesses were called for the defendant:—

Henry Edward Haynes, the superintendent of police of the district, said, that, on the 17th of December, he went to defendant's premises between five and six o'clock. Mrs. Riddiford, the plaintiff's wife, was in the bar: she called her husband. Witness said defendant had called him to settle some dispute between them. He asked plaintiff to give up the keys. He said to defendant, "You are quite at liberty to break open your own locks." Riddiford was asked for the money, about 30l. He said he should not give it up on a week's notice. Witness said to plaintiff, "You are liable to be turned out at a minute's notice." We went up and searched: we found 6d. He advised Riddiford, the plaintiff, to give up the money: the plaintiff said, "Never, unless he went before a magistrate." Witness said, "You know the consequence." He said, "Yes, I shall go to Devizes." He kept repeating that he would never give up the money till he had been before a magistrate. Plaintiff went out with Bullock (the officer) near an hour afterwards. Witness followed, and said, "This is very foolish." Plaintiff said, "I never will give up the money until going before a magistrate." Witness directed Bullock to take him into custody. Witness took him before Mr. Goddard, and got him liberated upon bail. When defendant came to witness, he said that plaintiff would not leave the house, and he wanted him (witness) to eject him from the house. Witness took Bullock with him.

Cross-examination. [The charge-book was called for and produced, and the witness was desired to read the entry relating to this transaction, from which it appeared that the plaintiff was charged by Warner **[186]** with embezzlement, and that the witness in support of the charge was Haynes.] The witness admitted that

the entry was in his handwriting. He further said that Warner did not make any direct charge of embezzlement; but, as plaintiff was bound to appear on the 24th, and witness then expected Warner would be present and prefer the charge, he entered it in the charge-book. He was then asked, should he have laid the charge before the magistrates if Mr. Warner had not charged Riddiford with embezzlement; to which he answered, "I put Warner's name as a matter of course." He was then asked if the entry was true; to which he also answered, "Yes." He further added, "Warner, the defendant, fetched me to the house." I gave plaintiff into custody to Bullock. Bullock before that had gone up stairs. I did not allow plaintiff to go up stairs, because I thought he would secrete money up stairs. Plaintiff said he would not leave without a month's notice. The account was made out in my presence. He admitted the correctness of the account, but refused to deliver it.

Bullock, the police-officer, said, that, on the 17th of September, he accompanied the superintendent. He did not hear Warner give any direction Haynes said to plaintiff, "You had better give up the money" He said, "I'll do no such thing, unless I have my month's wages."

The defendant, Warner, was then examined. He stated that he engaged plaintiff at 30s. per week as a weekly servant; that accounts were rendered satisfactorily until the last week; that he came and took stock on the 9th of September, and then gave notice that he should reduce the wages to 1l. per week; that, on the following morning, he gave the plaintiff a formal notice; that he (plaintiff) said nothing about being a monthly servant; that, on the 16th of September, defendant [187] went to the premises, and plaintiff would not allow him to take stock; that, on the next morning, he (defendant) went to Haynes; that Haynes came about six o'clock; that Vallis took stock, the items of the account being agreed to by Riddiford; that defendant took Haynes to give him possession of the house; that he heard Haynes apply for the money; that plaintiff refused, and then Haynes took him in custody.

On cross-examination, defendant said that he remained in the beer trade; that he had got a person at 24s. a week; that he fetched Haynes to give him possession; that he slept at the house the night before; that plaintiff said nothing about notice; and that he (defendant) did not authorize Haynes to take plaintiff.

Edward Vallis said that plaintiff put in a claim for a month's wages; that a balance was struck, and entered on Warner's book by him; that the claim for 6l. did not appear in the account; that he (witness) applied to plaintiff for the money, which he refused; and that he accompanied plaintiff to the police-station.

In summing-up, the judge stated to the jury that the first question for them was, —Was there any imprisonment? And he told them, that, to constitute an act of imprisonment, it was not necessary that the person should be locked up within four walls; but that, if the person was constrained in his freedom of action by another, that was an act of imprisonment; that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person by refusing him permission to leave the room and go up stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate; and that there was an act of imprisonment of some duration, there could be no doubt either in fact or law.

The judge then told the jury that they would next [188] have to consider, by whom was the imprisonment. And he directed them, that if, in doing this, they found that the defendant was the moving party in causing the imprisonment, he was responsible for the act so caused; and that they would, he thought, have but little difficulty in arriving at the conclusion that there had been an imprisonment, and that such imprisonment was caused by the direct act of the defendant.

The judge stated that the next question for the jury was,—Was the imprisonment legal or illegal? And he directed them that there were two grounds upon which it was argued that the arrest and detention of the plaintiff was justifiable, and legal, first, that he was merely the servant of the defendant, and that, refusing to deliver over the money of his employer, and to quit his house, it was lawful to eject him by force,—secondly, that he was guilty of embezzlement, and lawfully taken and held in custody on that charge. Upon these points, the judge's observations were to the effect,—first, that the plaintiff, as tenant, or as lawful occupier (under an agreement not then terminated) of the premises, was not legally liable to be ejected by compulsion and without notice; and that, if he refused to leave the house, the defendant

could only eject him by adopting the proper legal proceedings to obtain possession,—secondly, that, as to embezzlement, there was no evidence whatever to support or justify the charge.

The jury having retired to consider their verdict, the counsel for the defendant took exception to the judge's direction to the jury, and pointed out the alleged misdirection relied upon by the defendant, and hereinafter set out as his second and third grounds of appeal.

The jury found for the plaintiff, and judgment was given accordingly.

[189] A notice of appeal was in due time served on the plaintiff,—the grounds of appeal being,—first, that the judge was wrong in ruling that there was evidence to go to the jury of the causes of action insisted on by the plaintiff,—secondly, that the jury were misdirected, in being told that the plaintiff was imprisoned in his own house when prevented from going up stairs,—thirdly, that the jury were misdirected when told that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession.

Subsequently to the notice of appeal being given by the defendant, the defendant, by his attorney, on the 30th of November, 1857, gave a notice of an application to be made to the judge at the then next court, for a new trial, on the grounds of misdirection and excessive damages.

At the next court, the case of appeal was tendered to the judge, by the defendant's counsel, to settle and sign; and he refused to settle or sign the case for the appeal, until the motion for a new trial was disposed of. The counsel for the defendant said he would abandon the ground of misdirection, and move on the ground of excessive damages alone. It was objected by counsel for the plaintiff that the defendant should not be heard in support of his motion for a new trial, until he abandoned his notice of appeal, or unless the motion was adjudged by his Honour to be of itself an abandonment and virtual supercession of the notice of appeal.

The judge said he was ready to hear the application for a new trial, considering the other notice for the appeal was not before him; and he declined taking cognizance of the notice of appeal until the motion for a new trial was either disposed of or withdrawn.

The defendant's counsel, as he said, under protest, and still contending that he had a right first to call on **[190]** the judge to settle and sign the case of appeal, then moved for a new trial, on the ground of excessive damages, which the judge, after hearing the plaintiff's counsel, refused, with costs; after which, the defendant's counsel again tendered the case of appeal to be settled and signed, and the judge ordered that a case should be agreed on by the attorneys for the plaintiff and defendant, and should be forwarded to him in the event of their not agreeing, and, in the mean time, and until the next court, he would consider whether he could sign the case or not.

The case was accordingly settled and agreed to by the respective attorneys, and signed by the judge, who added thereto the following observations:—

"By the rules of practice in county-courts (rule 145), the judge is required to sign a special case in appeal from his decision or summing-up, when agreed upon by the litigant parties or their attornies. I have accordingly signed the above case.

"But I respectfully submit to Her Majesty's court having cognizance of this appeal, that, unexplained, the judge's signature would be taken to signify his approval and adoption of the statement. In the present instance, the consequence would be that I should stand committed to statements of my own judicial language and conduct which are defective and erroneous, and which (it is possible, at least), if left without correction, might affect the issue of the appeal. I therefore wish to append to my signature the following statement:—

"In summing-up, I directed the jury that the points for their consideration were,—first, was there any imprisonment?—secondly, by whom was the plaintiff imprisoned?—thirdly, was the imprisonment lawful or unlawful? As to the first point, I stated, that, to constitute imprisonment, it was not necessary that the party should be locked up within four walls; that, if **[191]** he were controlled or restrained in his freedom of action by another, that was an act of imprisonment; that, accordingly, preventing the plaintiff leaving the sitting-room and going up stairs to his bed-room, might itself be held to be an imprisonment; but that it was unnecessary to dwell upon that, as it was not disputed that the plaintiff had been taken to the police-station, and detained

in custody several hours, until he found bail for his appearance in a court of criminal judicature to answer a charge of felonious embezzlement.

"As to the second point, I told the jury, that, if they found that the defendant was the moving party in causing the imprisonment, he would be responsible for the act so caused.

"As to the third point, I commenced by saying, that 'as tenant,'—but, upon the counsel for the defendant interposing the words 'not tenant,'—I added, 'If not strictly tenant, yet, as legal occupier under an agreement not then terminated, and which entitled him to either a week's or a month's notice,' he was not liable to be forcibly ejected; and that, if the defendant wished to obtain possession, he should have resorted to legal measures for that purpose; that, as to the charge of embezzlement, upon which he had been taken before the magistrates and held to bail, it was entirely unsupported by evidence.

"At the next court, after the motion for a new trial had been heard and refused, a special case was handed to me, not to settle and sign, but as an agreed case to be signed only; and, as the business in hand did not admit of my then reading it, I proposed to take it home with me for that purpose; to which the parties by their attorneys readily assented. Some alterations were afterwards made, but not to the extent required; and the case was then transmitted to me in its present form, for my signature."

[192] Kingdon, for the appellant. The statement appended by the county court-judge cannot be looked at as part of the case. He might have declined to sign the case if presented to him in a form of which he might reasonably disapprove: but, having signed it, his duty was completely done. The 15th section of the 13 & 14 Vict. c. 61, enacts that the appeal "shall be in the form of a case agreed on by both parties or their attorneys, and, if they cannot agree, the judge of the county-court, upon being applied to by them or their attorneys, shall settle the case and sign it." [Williams, J. It has been thought that the judge has no discretion if the parties agree on a case (*a*). I cannot conceive that to be so. Willes, J. It is the 145th rule, and not the statute, that requires the judge to sign the case as settled by the parties or their attorneys. Williams, J. It may in the result become unnecessary to consider this. Take the case without it.] The judge was clearly wrong in telling the jury that there was any evidence of an imprisonment of the plaintiff by the act or procurement of the defendant. [Williams, J. Was there not evidence that he set the police in motion?] It is true that the defendant brought the superintendent to the house; but that was for the purpose of obtaining possession of the house. [Crowder, J. And of the money.] There was no evidence upon the plaintiff's case, that the act of Haynes in taking him into custody was authorized by the defendant, or that he was in any way party to it. [Williams, J. It appears upon the plaintiff's evidence that he was denied (by the police, in the defendant's presence) permission to go up stairs, when he refused to give up the balance claimed of him. Then, the plaintiff's wife afterwards hears the superintendent ask the defendant if he shall take the plaintiff **[193]** into custody. She does not hear the answer: but the plaintiff is taken away and charged with embezzlement. Surely that was evidence for the jury.] That must be taken in conjunction with what the defendant himself swears, viz. that he did not authorize the superintendent to take him: and in this he is corroborated by the superintendent, who says that the defendant did not attend at the station or make any direct charge. [Crowder, J. He brings the police: he sees all that is done, and is silent. It was a fair question for the jury who was the moving cause.] In *Brown* v. *Chapman*, 6 C. B. 365, the plaintiff went voluntarily before a police magistrate to meet a charge of embezzlement which was there about to be made against him by the defendant: the magistrate declining to entertain the matter, unless a charge were formally made, the defendant said, "Well, then, I charge him with embezzling 30s.:" the plaintiff was then ordered by one of the constables in attendance to go into the dock. [Crowder, J. That is a very different case. There was no trespass there by or under the authority of the defendant.] If the evidence of the plaintiff's wife, followed by the arrest, had stood unexplained, there might have been a case for the jury: but, her evidence being in itself ambiguous, and that ambiguity being removed by the evidence of Haynes, who stated that he never was authorized by the defendant

(*a*) See *Furber* v. *Sturmey*, 3 Hurlst. & N. 521.

to act as he did, there was nothing to submit to the jury upon which they could reasonably act. The second objection to the summing-up was clearly a valid one, and was a matter that must very materially have enhanced the damages (*a*). The jury were told that the plaintiff was imprisoned in his own house when prevented from going up stairs. [Williams, J. If your **[194]** first point fails, surely there was a continuous imprisonment by the policeman throughout.] The plaintiff did not occupy the house as tenant: he was there merely as a servant, and might have been turned out at any moment. [Willes, J. The judge did not mean to say that the relation of landlord and tenant subsisted between the parties: and, though it is true that the plaintiff might have been turned out of the house at any moment, the defendant by so doing would have been guilty of a breach of his contract, in an action for which the jury would certainly have given the same amount of damages as if he had really been tenant.] At all events, the judge was wrong in telling the jury that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession of the house. [Williams, J. There was certainly some inaccuracy in that: but it was altogether an irrelevant matter: the jury could not possibly have been diverted by it from that which was the real substance of the case.] It had a direct and evident tendency to inflame the damages. [Willes, J. You might have some ground of complaint, if we could see that the jury gave damages in respect of the expulsion. Williams, J. It was not such an erroneous statement of the law as to amount to a misdirection. Byles, J. The judge evidently speaks of an occupation in the popular sense, and not of a strict legal occupation as tenant.] The jury are told that the plaintiff had such a legal right to the possession of the house as to make the act of preventing him from going up stairs an imprisonment. [Williams, J. Upon consideration, we think we should not be doing justice to the learned judge not to look at the explanation which he has appended to the case. If you have anything to object to that course, we will hear it.] The right to appeal is given by the 14th section of the 13 & 14 Vict. c. 61; **[195]** and the 15th section enacts "that such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and, if they cannot agree, the judge of the county-court, upon being applied to by them or their attorneys, shall settle the case and sign it." The 145th of the rules made under the authority of the 19 & 20 Vict. c. 108, s. 32, provides that "all cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court holden next after the expiration of twelve clear days from the day on which judgment was pronounced, and shall then be signed by the judge, and be sealed with the seal of the court; and, when signed and sealed, one copy thereof shall be deposited with the registrar, and another sent, by post or otherwise, by the appellant, to the successful party within three clear days next after the time of signing and sealing the same; and, if the appellant do not comply with this rule, the successful party may proceed on the judgment, unless the judge shall otherwise order." The rule requires the judge to sign all cases; but the statute only authorizes him to settle the case if the parties cannot agree. [Byles, J. Suppose two ignorant persons choose to agree upon a case, and incorrectly represent the judge's summing-up, is he nevertheless bound to authenticate it by his signature?] Probably not. [Byles, J. Does it matter where his signature is put,—whether before or after the additions?] It is submitted that he has no right to make alterations or additions to a case which the parties have agreed on in the absence of the parties. A judge of one of the superior courts never settles a bill of exceptions or a special verdict without having the parties before him.

Gray, contrà. The fair meaning of the statute and the rule, taken together, is, that the judge shall be the party who is to inform the court as to what are the **[196]** facts of the case, and what was his direction to the jury. Manifest inconvenience would result from a contrary course.

Williams, J. We have great difficulty in seeing how we can look at the supplemental statement added to the case by the county-court judge after it has been agreed to and signed by the parties or their attorneys. But we entertain some doubt whether as the case stands without it there was not some misdirection.

Gray. The defendant was clearly responsible for the whole imprisonment. The plaintiff never was asked to leave the house: the object of the defendant evidently

(*a*) The case does not state the amount of damages. It was stated, however, that they were 50*l*.

was, to restrain the plaintiff's freedom there, as a means of compelling him to produce the money. There was nothing to shew that the plaintiff did not continue lawfully possessed of the house until he left it in custody. Assuming that there was some slight inaccuracy in what the judge said upon that point, it has no substantial bearing upon the case, and could not in any degree have influenced the minds of the jury. It seems to have been assumed that the imprisonment was all one; and in substance it clearly was so. What the jury are told substantially amounts to this, that, in order to constitute an imprisonment, it is not necessary that the party shall be kept within four walls: but that it is enough if he is restrained in his freedom of action. Without, therefore, adopting the whole of Lord Denman's opinion in *Bird* v. *Jones*, 7 Q. B. 742, there clearly was abundant evidence here from which the jury were warranted in inferring that the plaintiff had been imprisoned, and that by the act and procurement of the defendant.

Kingdon, in reply. If the legislature had intended **[197]** that the judge of the county-court should have control over the case though agreed to by the parties, they knew how to say so. By the 42nd section of the 6 & 7 Vict. c. 18, it is provided that, where a party is dissatisfied with the decision of the revising-barrister, and gives notice that he is desirous to appeal, the revising-barrister "shall state in writing the facts which according to his judgment shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against;" "and the said barrister shall read the said statement to the appellant in open court, and shall then and there sign the same." There was no evidence of any imprisonment of the plaintiff by the defendant. All that was done that could be construed to amount to an imprisonment, was done by the superintendent. [Byles, J. The refusal to permit the plaintiff to go up stairs was an instance of the general restraint of his person brought about by the act of the defendant.] There is no complaint that the plaintiff was not permitted to leave the house. [Willes, J. It is obvious that the plaintiff would not have been permitted to leave the house without giving up the money.]

Williams, J. I am of opinion that our judgment must be for the respondent. The case involves a question of no little importance, viz. as to how far we can look at the protest or appendix which the county-court judge has annexed to the case he has signed. It is unnecessary to give any opinion whether he was bound to sign the case or not. Looking at the statute it is difficult to avoid coming to the conclusion, that, when the attorneys for the respective parties have agreed upon what was the case at the trial, and have ratified that **[198]** agreement by affixing their signatures to the document, by force of the statute and the rule the judge is bound to put his signature to it also. It is unnecessary to determine whether or not the judge is bound to sign a case which grossly misrepresents that which took place at the trial. But, where the judge has signed a case so prepared and agreed upon by the parties, I think we are not at liberty to look at any additions or explanations which he may think fit to make to the case, but must look only at that which appears above his signature. So looking at this case, it seems to me to be impossible to doubt that the learned judge in presenting the case to the jury, in some respects inaccurately stated the law. But the question is whether these inaccurate statements of the law bore so directly upon the important points which were before the jury and upon the law which was to guide them in coming to a conclusion as to amount to a wrong direction in point of law, and induce us to send the case down again. I am of opinion that these inaccuracies are not of such a nature as to constrain us to take such a course. It appears to have been objected by the defendant's advocate, at the close of the plaintiff's case, that there was no evidence to go to the jury. The judge, however, was of a different opinion, and the defendant's case was gone into. In his summing-up, the judge told the jury that the first question for their consideration was, whether there had been any imprisonment: and then he proceeds to say, that, "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was constrained in his freedom of action by another, that was an act of imprisonment; that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by refusing him permission to leave the room and go up stairs in his own **[199]** house, was in itself an imprisonment, independent of his being conveyed before a magistrate; and that there was an

act of imprisonment, and a continued imprisonment of some duration, there could be no doubt either in fact or law." In substance, the judge leaves it to the jury to say whether there is anything in the objection urged on the part of the defendant, that there had been no imprisonment. He goes on to lay down the law generally, and to illustrate his meaning by reference to the facts and the conduct of the parties,—the refusal (the policemen being present) to permit the plaintiff to go up stairs lest he should hide the money, coupled with the charge before the magistrate,—all of which seems to have been sanctioned by the defendant. I cannot see that there has been any misdirection upon this point: and I agree with the learned judge that there was beyond all doubt an imprisonment. The next question left, was, by whom was the imprisonment; and the jury were told, that, "if they found that the defendant was the moving party in causing the imprisonment, he was responsible." Upon this point, the question is whether there was not some evidence to connect the defendant with the restraint put upon the plaintiff's person, and his subsequent detention and conveyance before the magistrate. I think there was. The defendant himself says he took the superintendent to give him possession of the house. That he first put the police in motion, therefore, is clear. Then it appears from the evidence of the plaintiff's wife, that the plaintiff refusing to give up a sum of money which was claimed by the defendant, the latter was asked by the superintendent whether he was to take the plaintiff. It does not appear what the answer given was: but the fact is, that the policemen do take the plaintiff into custody, professing to act at the instigation of the defendant, upon a charge of embezzlement. [200] Now, it is obvious that the duty of the police was not to take the defendant into custody unless charged with an offence. I therefore think there was abundant evidence of the defendant's having sanctioned their proceedings; and that the judge was right in leaving that to the jury. The remaining objection is, that the judge misdirected the jury in reference to the defendant's justification. After stating that two points were urged on the part of the defendant,—first, that the plaintiff was merely his servant, and that his refusal to deliver over the money of his employer, and to quit his house, rendered it lawful to eject him by force,—secondly, that the plaintiff was guilty of embezzlement, and lawfully taken and held in custody on that charge; the judge proceeds to observe, upon the first, that the plaintiff, as tenant, or as lawful occupier under an agreement not then terminated, of the premises, was not legally liable to be ejected by compulsion and without notice, and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession; and, as to the second, he tells the jury that there was no evidence whatever to support or justify the charge of embezzlement. The first ground clearly affords no defence to the action. We must now assume that the defendant was guilty of false imprisonment; and the question is whether he had anything to urge in defence. It clearly was no answer to say that the plaintiff was in possession of his house, and refused to quit; and, though the judge in his summing-up treats that part of the case somewhat inaccurately, I do not think that amounts to a misdirection. The substance of the defendant's contention was, that the plaintiff had brought the charge upon himself by his refusal to give up possession of the premises, and to pay over the balance claimed. The judge, in answer to that, says that the plaintiff was not [201] in the wrong. It certainly was not quite accurate to say that the plaintiff had a right to keep possession; and it would be wrong in the jury to give effect to that; but still I do not think it was such a misdirection in point of law as to justify us in sending the case down to a new trial.

CROWDER, J. I also am of opinion that our judgment must be for the respondent. The first question is, whether or not we are justified in looking at that which the judge has annexed to the case after the signature. I am clearly of opinion that we are not. When the 15th section of the 13 & 14 Vict. c. 61, and the 145th rule, are looked at, it seems to me to be clear, that, where the parties agree upon a case and sign it, all that remains for the judge to do, is, to attach his signature in order to authenticate it as the document which is to be brought before the superior court. Having signed the case here, all that the judge has subsequently added amounts to nothing. Then, looking at the case as settled and agreed to by the parties, the matter for our consideration is, whether or not the jury were misdirected. The alleged misdirection was threefold,—first, in ruling that there was evidence to go to the jury in support of the plaintiff's cause of action,—secondly, in telling the jury that the plaintiff was

imprisoned in his own house, when prevented from going up stairs, thirdly, in telling them that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession. Now, was the defendant the moving cause of the plaintiff's imprisonment? I think there cannot be any reasonable doubt that he was the author of it. He goes to the premises with a superintendent and a serjeant of police, his object evidently being to get the money. The plaintiff, conceiving that he is entitled to a month's notice, refuses to [202] give up the money. He is at this time in a room with the two police-officers, and wishes to go up stairs, but is prevented from doing so, and ultimately only permitted to go accompanied by a policeman. The wife hears the superintendent ask the defendant if he is to take the plaintiff into custody: but she does not hear the answer. The plaintiff, however, is carried to the station house, and afterwards before a magistrate, and a charge of embezzlement made against him. The whole was one tran-action: and I think there was ample evidence whence a jury might fairly conclude that the defendant was the author of the imprisonment. That there was some imprisonment, is clear: but it is said that the judge was wrong in telling the jury that the mere restraining the plaintiff from going up stairs amounted to an imprisonment. We must, however, look at all the circumstances to which the summing-up has reference. It seems that the plaintiff was not allowed to go up stairs without a policeman. The judge tells the jury that that constitutes an act of imprisonment: and that is very like what is said by Patteson, J., in *Bird* v. *Jones*, 7 Q. B. 742. He was dealing with a portion of the imprisonment. Then it is said that the judge further misdirected the jury, in telling them that the plaintiff was imprisoned in his own house. In one sense it was his own house whilst he was in it: and it can hardly be doubted that he would equally have been restrained from quitting the house without first giving up the balance claimed. I therefore think the judge was right also in that. But, so far as regards the statement that the plaintiff was tenant, I think the learned judge was mistaken. The plaintiff had no right to remain in the house a moment after the defendant chose to order him to quit. But what the judge really meant, was, that the defendant had no right to rely upon this as a justification, because he [203] would be breaking his agreement. Then it is urged that the damages might have been enhanced by this incorrect way of presenting the case to the jury. I cannot, however, see how that could be so. The complaint in substance is, that the plaintiff was arrested and taken before a magistrate upon an unfounded charge of embezzlement. That is a grave charge, and one which would well warrant a jury in giving very considerable damages. Upon the whole, I see no sufficient ground to justify us in sending the case down to a new trial, and therefore the respondent must have judgment.

Willes, J. I am of the same opinion. There are, undoubtedly, some expressions in the course of the summing up which taken by themselves could hardly be justified. It would, however, be unfair to apply a strict construction to those expressions, when it is considered that they are remarks made in reference to the facts. The judge took a strong view in favour of the plaintiff, in consequence of the breach of agreement by the defendant; and it was in reference to that the expressions complained of were used. The first statement of law which is objected to, is, as to whether or not there was an imprisonment of the plaintiff in his house, whether the imprisonment commenced when he was told that he could not go up stairs. I cannot doubt that the imprisonment did commence at or immediately after the time of the refusal to permit the plaintiff to go up stairs. It appears that the defendant wished to obtain a settlement of accounts with the plaintiff; and that a disagreement arising between them as to the notice the plaintiff was entitled to, and the plaintiff refusing in consequence to hand over the balance claimed by the defendant, the latter went away, and shortly afterwards returned [204] accompanied by two policemen. His object clearly was to intimidate the plaintiff. The superintendent demanded the money, and, upon the plaintiff refusing to part with it, on the ground that he had not received due notice, he is taken into custody and carried before a magistrate charged with embezzlement. It would be asking one to come to a conclusion quite contrary to one's common sense, to suppose that the police took upon themselves to arrest the plaintiff, and to enter such a charge against him, without being desired by the defendant to do so. Whilst in the house in a room with the two policemen, he was refused permission to go up stairs; and ultimately he seems to have been allowed to go, but accompanied by an officer. I think it is impossible that, upon these facts,

any one can doubt that it was meant to be conveyed to the mind of the plaintiff that he should not go out of the presence or control of the officers. That in my opinion clearly amounts to an imprisonment. There is a great deal of learning in the books as to whether or not there can be an arrest and imprisonment without actually touching the party. In *Arrowsmith* v. *Le Mesurier*, 2 N. R. 211, it appeared that a warrant having been granted by a magistrate for apprehending the plaintiff upon a charge of a conspiracy to sue out a fraudulent commission of bankrupt, a constable went with the warrant to the plaintiff's house and shewed it to him; that, after conversing some time with the constable, the plaintiff desired to have a copy of the warrant, which the constable permitted him to take, after which the plaintiff attended the constable to the magistrate, and, after being examined upon the subject of the charge, was dismissed, about six hours after the warrant was first shewn to him; and that the constable never touched the plaintiff. The jury having found for the defendant, in discharging a rule for a new trial, **[205]** Sir J. Mansfield said: "I can suppose that an arrest may take place without an actual touch, as, if a man be locked up in a room (*a*); but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested? I think that the jury have done justice." I notice that case in order to express my dissent from the doctrine it lays down. It appears to me that the later case of *Grainger* v. *Hill*, 4 N. C. 212, 5 Scott, 561, states the law upon this subject more accurately. The facts of that case were shortly these: In September, 1836, the plaintiff by deed mortgaged to the defendants for 80l. a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was in the mean time to retain the register of the vessel, in order to pursue his voyages. In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and, for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a capias indorsed for bail in the sum of 95l. 17s. 6d. in an action of assumpsit, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away, leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that, if he failed to deliver the register, or to find bail, they must **[206]** either take him or leave one of the officers with him. The plaintiff being unable to procure bail, and being much alarmed, gave up the register: and the court held that this amounted to an arrest. Tindal, C. J., there said,—"Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shews that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's Nisi Prius, p. 62, goes the full length. 'If the bailiff who has a process against one, says to him, when he is on horseback or in a coach, You are my prisoner, I have a writ against you; upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.'" In the present case, if the door of the room had been locked, nobody could doubt that that would have been an imprisonment. The defendant coming to the house with two officers, the plaintiff being there, and submitting to their control, it was the same as if he had actually been locked up in the room. That being the proper view of the facts, the judge observes that "the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by refusing him permission to leave the room and go up stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate." I think the judge must be considered as having here adopted the view of the case taken by the defendant's advocate: and, though it would have been more correct to have told the jury, that, if the substance of the transaction was that the plaintiff was restrained from leaving the room without permission or without the attendance of a constable, it amounted to an imprisonment, yet, giving a fair and reasonable con-**[207]**-struction to the summing-up, it seems to me that it is not open to exception. The judge does

(*a*) See per Lord Hardwicke, in *Williams* v. *Jones*, Cas. temp. Hardw. 301.

not profess to be laying down a principle, but rather to be discussing and explaining the law with reference to the facts of the case. The other exception to the summing-up is, that the judge was wrong in telling the jury that the plaintiff had such an interest in the premises that he could not be turned out without recourse being had to the proper legal proceedings. In this respect, I think the judge was mistaken. The plaintiff was not in any sense tenant to the defendant. He might have been put out at any time. But it does not follow, that, because a judge in the course of his summing-up lays down a wrong proposition, that there must necessarily be a new trial. This was not a matter by which the jury could have been misled, and therefore no ground for setting aside the verdict. With regard to the statement added to the case by the judge, I entirely agree with my learned Brothers that we ought not to look at it.

Byles, J. I am glad the court has been enabled to come to the conclusion that there ought to be no new trial in this case. It appears that the defendant was the owner of a beer-shop, and that he let the plaintiff in as his servant at certain weekly wages, subject to a month's notice. It may be that under this agreement the plaintiff was not in any sense the defendant's tenant. But, in popular language, he was the occupier of the house; and it may be said to have been "his own house" whilst he so occupied it. The plaintiff would clearly have no right to continue in possession after the relation of master and servant between him and the defendant had been severed. But the observations of the judge are not to be scanned with the same strictness as on a bill of exceptions. In the first place, the [208] jury were told that the circumstances proved before them amounted to an imprisonment: and I am clearly of opinion that there was ample evidence of all the acts of imprisonment insisted upon. The second objection to the direction was, that the judge told the jury that the plaintiff was imprisoned, not by "being," but when prevented from going up stairs. I think, for the reasons given by my learned Brothers, and especially those given by my Brother Crowder, that there was abundant evidence that the plaintiff was imprisoned in his own house. As to the third point, it seems to me, that, in one sense, the direction was too favourable to the defendant. And, at the most, the judge was guilty of a mere inaccuracy of expression in a matter not at all affecting the damages which the jury would be likely to award upon a new trial. I therefore agree with the rest of the court in thinking that there should be judgment for the respondent. And I cannot help observing that the defendant was guilty of a very reprehensible abuse of criminal process for the purpose of enforcing a civil right.

Appeal dismissed, with costs.

[209] Hybart *v.* Parker. Feb. 10th, 1858.

[S. C. 27 L. J. C. P. 120; 4 Jur. N. S. 265; 6 W. R. 364. Principle applied, *Gray* v. *Pearson*, 1870, L. R. 5 C. P. 575.]

It is not competent to the adventurers or shareholders in a cost book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to the purser.

This was an action against a shareholder in a cost book mine to recover calls.

The first count of the declaration stated, that, before and at the time of the making of the several calls thereinafter mentioned, the defendant and others were adventurers and shareholders of and in a certain company of adventurers and shareholders for working certain mines, formed upon the cost book principle, and called the East Birch Tor Tin Mining Company, and that, by the rules and regulations of the said company before and at the time of the making of the said calls and still in force for and agreed to by the defendant as such adventurer and shareholder and the other adventurers and shareholders therein, authority was and is given to the adventurers present at any general or special general meeting of the adventurers and shareholders of and in the said company, held pursuant to the said rules, to make any call or calls they might think necessary for working the said mines, upon the said adventurers and shareholders in respect of their several shares therein; and that by the said rules and regulations it was and is further agreed that all calls should be paid into such bank as the committee for the time being appointed pursuant to the said rules for the

management of the said company might direct, within fourteen days after such calls should have been made, and that, for the better enforcing payment of any call or calls made pursuant to the said authority, and found to be in arrear, the same should be considered, and was thereby declared to be, a debt or debts due from the shareholders or respective shareholders so in arrear to the purser of the said company, who should have power to recover the **[210]** same as a simple-contract debt or debts due to him from such defaulter or respective defaulters, by action at law in any or either of Her Majesty's superior or inferior courts; and that, upon the hearing or trial of any such action, the production of the register of shareholders in the cost-book, with the minute of the resolution making such call or calls so in arrear should be primâ facie evidence of the defendant in any such action being a shareholder, and of the call or calls being made: and that, in any such action, the defendant should not be at liberty to set up or plead a partnership with the purser as a defence: Averment, that, while the defendant and the said others were such adventurers and shareholders as aforesaid, and while the said rules were so in force and agreed to, three general or special general meetings of the said adventurers and shareholders were held, at each of which a call of a certain sum of money was duly made by the adventurers present, on the defendant and the other adventurers and shareholders of and in the said company, in respect of each of their shares therein, which said calls were severally thought to be necessary for working the said mines, by the said adventurers present at the said meetings respectively; and that, at the time of the making the said several calls, there was a committee appointed pursuant to the said rules, and that the said committee appointed a bank into which the said moneys were to be paid, and that notice was given to the defendant and the several adventurers for payment of the said moneys, and that the moneys due from the defendant in respect of the said several calls were unpaid and found to be in arrear, and that the plaintiff was the purser of the said company, and that all things had happened and been done necessary to entitle the plaintiff, as such purser, to have the said moneys paid him by the said defendant, and to maintain this action.

[211] There were also counts for money payable by the defendant to the plaintiff for moneys found to be due from the defendant to the plaintiff upon accounts stated between them as such shareholder and purser respectively.

The defendant demurred to the first count. Joinder.

M. Smith, Q. C. (with whom were Tapping and Kingdon), in support of the demurrer. This is an attempt on the part of the shareholders in a cost-book mine, without the aid of an act of parliament, to appoint a public officer to sue and be sued on their behalf: it is in effect a breach of the principle laid down by the House of Lords in *Scott* v. *Avery*, 5 House of Lords Cases, 811, that parties cannot by contract oust the courts of their jurisdiction. There is no privity between the plaintiff and the defendant, and no consideration for the alleged promise. The intention was, that the calls should be recoverable by the individual who might happen to be purser at the time of the making of the call or at the time of bringing the action. In *Pigott* v. *Thompson*, 3 Bos. & P. 147, where A. agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners,"—it was held that no action for the rent could be maintained in the name of the treasurer. Lord Alvanley there says: "The manifest intention of the agreement was, that the defendant should pay the money to any person whom the commissioners should choose to make their treasurer for the time being; but by law a debt is not so assignable." And Chambre, J., adds: "The contract is, to pay the commissioners through the medium of their officer."

The court called on,—

Collier, Q. C. (with whom was Prideaux), to support **[212]** the declaration. This is a question of vital importance to cost-book mining companies. They cannot have deeds of settlement, for that would be an abandonment of the cost-book principle; and it is impracticable for each company of adventurers to obtain an act of parliament. The only mode by which a recusant shareholder has hitherto been compelled to pay calls has been, by getting a creditor of the company to sue him. This declaration in substance means, that a cost-book company was formed pursuant to certain rules and regulations, that a purser was appointed who by virtue of one of those rules was impowered to sue for calls, that the defendant became a subscriber and thereby assented to the rules,—and, amongst others, that the amount of the call should be a

debt due from him to the purser. [Willes, J. Does the rule mean the purser at the time of the contract, at the time of the making of the call, at the time of bringing the action, or purser for the time being?] At the time the action is brought. It is said that there is no privity between the plaintiff and defendant, and no consideration moving from the plaintiff. The declaration, however, discloses this consideration, — the defendant becomes a subscriber and thereby agrees to be bound by the rules and regulations in the cost-book; and the plaintiff becomes purser upon the faith of those rules and of the defendant's having by subscribing them agreed that calls shall be recovered from him as a debt due from him to the purser. The question is not as to the adequacy of the consideration, but whether there is not some consideration. By this arrangement, the debt due to the co-adventurers is extinguished. In Chitty on Contracts, 6th edit., pp. 60-62, where the authorities are collected, there seems to be some conflict between the ancient and the more recent decisions upon the question whether a stranger to a contract may sue upon it: and the **[213]** opinion of Lord Alvanley in *Pigott* v. *Thompson*, 3 Bos. & P. 147, is referred to (*a*)[1], and also a dictum of Buller, J., in *Marchington* v. *Vernon*, 1 Bos. & P. 101, n., to the effect, that, "if one person make a promise to another for the benefit of a third, that third may maintain an action upon it." So, in *Starkie* v. *Milne*, 1 Rol. Abr. Action sur Case, 32, pl. 13, it is said, "It has been decided, that, if A. give goods to B. of the value of 80l., on condition that he pay 20l. to C., the latter may sue B. for the 20l., for it became a debt to C." It may be said that this is not a promise to the co-adventurers for the benefit of the purser. It would, however, be a good answer to an action at the suit of the co-adventurers.

Williams, J. I am of opinion that there must be judgment for the defendant upon this demurrer. In order to get over the difficulty of want of consideration, Mr. Collier puts the case of a man accepting the office of purser, in consideration of the shareholders undertaking to pay their calls to him. It is not necessary, however, to decide that. All that appears here is, that, there being a difficulty in enforcing the payment of calls by the shareholders in cost-book mines, the adventurers, in order to get rid of that difficulty, agree amongst themselves that the amount of calls due from any one of them shall be considered as a debt due to the purser, who shall have power to sue for it,—thus violating the law in two respects, first, by agreeing that **[214]** one partner may sue his co-partner (*a*)[2], secondly, by agreeing that an action shall be brought upon a contract by one who is no party to it, and between whom and the person sued there is no privity. They might as well agree that no plea shall be pleaded except payment. This is neither more nor less than the case of an action brought for a debt due to the company by a person who is a mere servant of the company, and who has no connection whatever with the cause of action in respect of which he is suing. It may be, as Mr. Collier suggests, that the law operates hardly in the case of these companies: but, if it be a hardship, the remedy must be sought at the hands of the legislature; and I know no one so fit to advocate such a measure as the learned counsel who has made the suggestion (*b*).

Crowder, J. I am of the same opinion.

(*a*)[1] "It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my Brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C. In case of marriage, it is often necessary to make contracts in this manner, and the personal action is given to the trustee for the benefit of the feme covert."

(*a*)[2] It did not appear on the trial of *Hybart* v. *Evens*, post, 215, whether or not the purser was a subscriber.

(*b*) M. Smith observed that these cost-book mining companies were not entitled to much sympathy, inasmuch as they had struggled successfully to get themselves excluded from the Joint Stock Companies Act, 7 & 8 Vict. c. 110, the 63rd section of which provides "that nothing in this act contained shall extend or be construed to extend to any partnership formed for the working of mines, minerals, and quarries of what nature soever, on the principle commonly called the cost book principle."

Willes, J. I agree with the rest of the court in thinking that this declaration cannot be supported, and for this additional reason, that, if we were to hold that the purser might maintain this action, it would be trenching upon the prerogative of the Crown, by making a new species of corporation,—a corporation sole for the purpose of bringing actions.

Judgment for the defendant.

[215] Another action which had been brought by the same plaintiff against one Evens, and in which the declaration was the same as that in *Hybart* v. *Parker*, was tried before Coleridge, J., at the Bristol Summer Assizes, 1857, when the plaintiff was nonsuited, with liberty to move to enter a verdict for the plaintiff for the sum claimed, on the ground, that, assuming the facts stated in the declaration to be proved, they disclosed evidence of a debt. A rule nisi was accordingly obtained by Collier, Q. C., in Michaelmas Term last, and that rule was ordered to stand over until the demurrer was argued.

David Keane now shewed cause, referring to the case of *The Feltmakers' Company* v. *Davis*, 1 Bos. & P. 98.

Rule discharged.

End of Hilary Vacation.

[216] Cases Argued and Decided in the Court of Common Pleas, in Easter Term, in the Twenty-First Year of the Reign of Victoria.

The Judges who usually sat in banco in this Term, were,—Cockburn, C. J., Crowder, J., Willes, J., and Byles, J.

Willis, Merry, and Smith *v.* De Castro. April 28th, 1858.

[S. C. 27 L. J. C. P. 243; 6 W. R. 500.]

To an action for goods sold and delivered, the defendant pleaded that the causes of action accrued to the plaintiffs against the defendant and A., B., and C., jointly, and not otherwise, and not separately against the defendant, and that the defendant and A., B., and C., were jointly liable to the plaintiffs in respect of the causes of action in the declaration, and not otherwise; and that, after the accruing of the causes of action, and before suit, the plaintiffs by deed released A., B., and C. from the said causes of action, &c.—Replication, that the deed in the plea mentioned was a deed of assignment by A., B., and C., of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another and earlier part of the same deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof;" and that all the creditors who executed the deed, executed the same without prejudice as aforesaid; and so the plaintiffs said that the defendant was not released as in and by the plea supposed:—Held, on demurrer, that, taking the plea and replication together, the deed appeared to amount only to a covenant not to sue A., B., and C., and not to a release; and, consequently, that the liability of the defendant,—whether joint only, or joint and several,—was not thereby discharged.

This was an action for goods bargained and sold and sold and delivered, for work and materials, money lent, money paid, interest, and money found due upon accounts stated.

[217] The defendant pleaded,—first, never indebted,—secondly, payment,—thirdly, that the causes of action accrued to the plaintiffs against the defendant and G. S. Miller, E. Thompson, and W. C. Miller, jointly, and not otherwise, and not separately against the defendant, and that the defendant and G. S. Miller, E. Thompson, and W. C. Miller, were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and

the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiffs by deed released the said G. S. Miller, E. Thompson, and W. C. Miller from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said G. S. Miller, E. Thompson, and W. C. Miller, fourthly, that the said causes of action accrued to the plaintiffs against the defendant and E. Thompson jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said E. Thompson were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiffs by deed released the said E. Thompson from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or de-[218]-mand against the said E. Thompson, —fifthly, that the said causes of action accrued to the plaintiffs against the defendant and G. S. Miller, E. Thompson, and W. C. Miller jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said G. S. Miller, E. Thompson, and W. C. Miller, were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiff Merry by deed released the said G. S. Miller, E. Thompson, and W. C. Miller, from the said causes of action, and all suits, claims, and demands, which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said G. S. Miller, E. Thompson, and W. C. Miller,— sixthly, that the said causes of action accrued to the plaintiffs against the defendant and E. Thompson jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said E. Thompson were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiff Merry by deed released the said E. Thompson from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said E. Thompson.

The plaintiffs joined issue upon the first plea, took issue upon the second, and to the third, fourth, fifth, and sixth, replied that the deed in each of those pleas respectively mentioned was one and the same deed, to wit, a deed of assignment from the said G. S. Miller, [219] E. Thompson, and W. C. Miller, of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the same pleas respectively was pleaded,—but that, in another and earlier part of the same deed, it was and is agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof;" and that all the creditors who executed the said deed executed the same without prejudice as aforesaid; and so the plaintiffs said that the defendant was not released as in and by the said pleas respectively was supposed.

To this replication the defendant demurred, the ground stated in the margin being "that the deed released the debt notwithstanding the clause in question, and that, when one of two joint debtors is released, there being no separate liability, the whole debt is gone." Joinder.

Milward (with whom was M. Chambers, Q. C.), in support of the demurrer. The question is whether one of several joint debtors can be released, the liability of the other being reserved. In 2 Wms. Saund. 47 gg., n. (1), it is said, that "a release to one of several obligors, whether they are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all: 2 Rol. Abr. 412 (G.), pl. 4, 5; *Clayton* v. *Kynaston*, 2 Salk. 574." Primâ facie, the release of one discharges all: the debt is gone. In *Cocks* v. *Nash*, 9 Bing. 341, 2 M. & Scott, 434, to a plea that the plaintiff had released one of two joint obligors, the [220] plaintiff replied that the release was given with an undertaking on the part of the defendant, the other obligor,

that the release should not operate in his discharge: and the replication was held ill. [Williams, J. The general words of a release may be restrained by other parts of the instrument: *Solly* v. *Forbes*, 2 B. & B. 38, 4 J. B. Moore, 448.] Where the parties are jointly and severally bound, the several liability may be preserved though the joint liability is released: *North* v. *Wakefield*, 13 Q. B. 536; *Stevens* v. *Stevens*, 5 Exch. 306. The ground of the distinction is very clearly put by Channell, Serjt., in *Thompson* v. *Lack*, 3 C. B. 540, 549. It was there held that a release to one of two sureties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them: and it was held that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release. [Willes, J. What would be the effect of a covenant not to sue one of two joint debtors, which would be a release of the one only?] To avoid circuity, it might be pleaded as a release of both.

John Henderson, contrà (*a*). It is clear that a covenant not to sue one of two joint debtors is not a release of the other: *Hutton* v. *Eyre*, 6 Taunt. 289, 1 Marsh. 603. [Byles, J. Might not the one to whom the covenant not to sue is given plead it as a release?] No. A release in terms given to one, and guarded and restrained so as not **[221]** to release the other, is a mere covenant not to sue: *Solly* v. *Forbes*, 2 B. & B. 38, 4 J. B. Moore, 448. [Crowder, J. In order to give effect and operation to the deed as intended between the parties.] The observations of the court in *North* v. *Wakefield*, 13 Q. B. 536, shew that the principle of the thing applies just as much to the case of a joint and several liability as to that of a joint liability. Patteson, J., in giving judgment, says: "The reason why a release to one debtor releases all jointly liable, is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released: but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor. Neither does such a clause qualifying the release operate as a fraud on other creditors; for, as it appears on the face of the deed, all who execute that deed are aware of it and agree to it." The argument urged on the other side would tend very materially to impair many securities. [Watkin Williams, Amicus Curiæ, mentioned a case of *Currey* v. *Armitage*, which had been decided in the court of Queen's Bench on the preceding day, where this point had been decided. It was an appeal from the decision of the judge of the county-court of Durham. The action was brought to recover 47*l.* 10*s.* for goods supplied to the ship "Céleste," of Hartlepool, of which the defendant Armitage and one Drysdale were the owners The defendant lived at some distance from Hartlepool, and left the entire management of the ship to his co-owner, who appointed the master. The goods for which this action was brought had been ordered by the master, with the authority of Drysdale. Drysdale became insolvent, and was indebted to the plaintiff, in addition **[222]** to the above sum of 47*l.* 10*s.*, in the sum of 54*l.* 10*s.* for goods supplied to ships in which the defendant had no interest, making in the whole 102*l.* Drysdale compounded with his creditors, paying 10*s.* in the pound: a composition deed was entered into, containing in terms the usual release, followed by a proviso that nothing therein should prejudice or affect any claim, demand, or remedy which the creditors had upon any person who might be liable for any of the debts in the character of surety or otherwise. The plaintiff signed this deed, but did not insert the amount of the claim, stating at the time that he did not intend to include the 47*l.* 10*s.*: afterwards, however, without the plaintiff's authority, the whole sum of 102*l.* was filled in. Three questions arose,—first, whether the defendant as part-owner, and taking no part in the management of the ship, could be made liable on the contract of the master appointed by Drysdale,—secondly, whether the deed was the plaintiff's deed quoad the 47*l.* 10*s.*—thirdly, whether, if the deed was the plaintiff's deed, it amounted to a release or merely to a covenant not to sue. The judge decided that the defendant was liable on the contract, and that the deed was the plaintiff's deed, but that it amounted only to a covenant not to sue, and therefore

(*a*) The point marked for argument on the part of the plaintiffs was,—"that the deed pleaded, as qualified by the words set out in the replication, does not in law operate to discharge the defendant."

did not operate as a bar to the action. Lord Campbell, in giving judgment, said: "The first point turns entirely upon whether there was a contract on the part of the defendant; and we think there was sufficient to justify the judge in determining that Drysdale had authority to bind the defendant jointly with himself, so as to bring him within the rule laid down by us in *Mitcheson* v. *Oliver*, 5 Ellis & B. 419. Upon the second point, we think it is clear, that, if the amount was filled in without the authority of the plaintiff, the deed, although signed by him, was not his deed, so as to release the debt of 47*l.* 10*s.* Upon **[223]** the third point, looking to the whole deed, and giving effect to the obvious intention of the parties, apparent on the deed itself, it must be treated as a covenant not to sue, and not as a release. This case is not distinguishable in principle from *Solly* v. *Forbes*, 2 B. & B. 38, 4 J. B. Moore, 448. It is clear that an absolute release in terms, followed by a clause saving remedies against certain parties, cannot be treated as a release, if the effect of so doing, is, to prevent the operation of the saving clause: the whole must be taken together, and effect given to the intention of the parties."]

Milward, in reply. In the case just referred to, there was no joint liability in the first instance: part-owners of ships are not ordinary partners. This is not to be treated upon this record as a mere covenant not to sue: it is pleaded as a release; and the replication admits it to be so. [Willes, J. The replication sets out a part of the deed which controls the effect of it as stated in the plea. It may be that the replication is only an argumentative denial of the plea: but argumentativeness is not now an objection.]

Crowder, J. I am of opinion that the plaintiffs are entitled to judgment. The plea in terms shews a joint liability in the defendant and three other persons, and a release by the plaintiff of those three. Had that stood alone, the plea would have shewn that which in law would operate as a release of all. But the replication shews that that is not the true effect of the deed; for that, in another part of it, was contained a provision that it should be lawful for the creditors to execute the same without prejudice to any mortgage, lien, or security which they might have for their respective debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who **[224]** might be liable for the payment thereof, and that all the creditors who executed the deed executed the same without prejudice as aforesaid. It is insisted on the part of the plaintiffs that the true nature and operation of the deed as disclosed by the replication, is, that it amounts only to a covenant not to sue the parties released. In order to be an answer to the declaration, the plea must allege a release. Then, to meet that, the replication introduces the words which qualify and control the operation of the deed. To hold that the deed thus disclosed upon the whole record enured as a release, would be manifestly giving it an effect contrary to the intention of the parties. It is common knowledge that every deed must, if possible, be so contrued as to give effect to all its parts, and to effectuate the intention of the covenanting parties. So construing this deed, the covenant in question amounts only in my opinion to a covenant not to sue the persons mentioned in the plea, and not to a release, and consequently the right to sue the defendant remains. If so, *Hutton* v. *Eyre*, 6 Taunt. 289, 1 Marsh. 603, where it was held that a covenant not to sue one of two joint debtors does not operate as a release of the other, is quite conclusive. Most of the cases referred to in the judgment certainly were cases of joint and several liability. Gibbs, C. J., says: "The principle on which the covenant not to sue is held to operate as a release, is, to avoid circuity of action; but it goes no further. Eyre says it goes much further; it is a release as between me and those to whom I and Hutton were jointly indebted, and, being a release to me, it is a release to Hutton, who was jointly with me obliged for payment of that debt: and he relies on certain authorities, which, however, shew that the rule is not universal that a covenant not to sue is a release of those jointly with whom the covenantee may be **[225]** sued. *Doan* v. *Newhall*, 8 T. R. 168, is cited. There, an issue was joined on the release of another party with whom the defendant was jointly and severally bound: and it was contended that a covenant not to sue, and the covenant that those presents should be a sufficient release of the other obligor, would operate as a release to the defendant who was bound with him: but the court were of opinion that the rule how far a covenant not to sue should operate as a release, was limited to the parties themselves. Certainly that case in all its parts is not like the present: there, the party was jointly and severally answerable

to the plaintiff, who might sue the one obligor without the other: and in the case of *Lacy* v. *Kinaston*, 12 Mod. 548, 552, 1 Ld. Raym. 688, on which that case of *Dean* v. *Newhall* is much founded, it was stated as the reason of the judgment, that, the bond being joint and several, the obligee might sue one without the other. The fact is not so here, therefore the same doctrine is not applicable, and we must consider it on principle, whether the law applies to the present case. In the case of a creditor suing a single debtor whom he has covenanted not to sue, it not only promotes the doctrine which prevails so strongly in the law, of preventing circuity of action, but it falls in with the intent of the parties, to hold that the covenant shall operate as a release; but it is impossible that it should here be in the contemplation of the parties, that, in covenanting not to sue Eyre, the insufficient debtor, he meant to release Hutton, who was sufficient. It was as easy to insert in the deed a release, as a covenant not to sue, and it would have been shorter: it must be inferred that the parties did not insert a release, because it would release Hutton also; but it is this day contended that a covenant not to sue has the same effect. Where the words, by being extended beyond their obvious intent, would, [226] as it seems, go beyond the intent of the party, the court ought not to put that construction on them." There is, therefore, no foundation for the distinction suggested by Mr. Milward; and no case can be found where it has prevailed. The result of all the authorities, as it seems to me, is, that, if, looking at the whole deed, we can see that it amounts only to a covenant not to sue, and not to a release, the right of action against those who are no parties to the covenant is preserved. That being, in my opinion, the effect of this deed, I think the plaintiffs are entitled to judgment on this demurrer.

Willes, J. I am of the same opinion. It is the duty of the court, in construing a deed or other written instrument, to give, if possible, effect to every word. The part of this deed which is set out in the replication plainly indicates the intention of the parties to be that it shall not enure as a discharge of the solvent partner. That intention could not be carried into effect if the covenant were held to amount to a release. The only way in which full effect can be given to the deed, so as to carry out the intention of the parties, and to avoid doing violence to any part of the language they have used, is, to construe it as a covenant not to sue or molest those who were intended to be discharged by it. By so construing the deed, the three are effectually discharged, and the liability of the fourth (the defendant) preserved. Mr. Milward has raised a question upon the pleadings, which seems to deserve a word. The plea sets up the deed as a release. It appears to me that the point relied upon by Mr. Henderson might be taken on a simple traverse, when the plea would be answered by the production of the deed at the trial: and that, perhaps, would have been the safer course. The plaintiffs, however, have [227] chosen to reply specially matter which amounts to an argumentative denial of the release alleged in the plea. To make the replication a good answer, it must be good in omnibus. As at present advised, it appears to me that the replication is sufficient. But, if the defendant should be minded to take the opinion of a court of error upon the point, it may be worth the plaintiffs' while to consider whether they will not now adopt the course suggested.

Byles, J. I also am of opinion that the replication is a good answer to the pleas. We have in this case to endeavour to arrive at the intention of the parties from the four corners of the instrument, so far as it is disclosed upon the face of the record. Now, the deed appears to contain an express covenant that all obligations on land, and all claims against sureties or other persons liable for the respective debts, should stand unprejudiced thereby; and yet it has been contended on the part of the defendant that the obligation of a joint principal debtor is discharged by the technical words of the release of his co-debtors. That clearly was not the meaning of the parties: and I think we are bound to make subordinate though stubborn words bow and incline themselves before the supreme and paramount intention manifested by the whole of the deed. We must, therefore, construe the instrument as a covenant not to sue, and nothing more.

Judgment for the plaintiffs.

[228] TEAR *v.* FREEBODY. April 28th, 1858.

[S. C. 6 W. R. 520. See *Simpson* v. *Smith*, 1871, L. R. 6 C. P. 95. Distinguished, *Manners* v. *Johnson*, 1875, 1 Ch. D. 677. See *St. Mary, Islington Vestry* v. *Goodman*, 1889, 23 Q. B. D. 162.]

By the 143rd section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate:"– Held, that this does not mean a strict mathematical line, but a substantially regular line.—A building is not an "old building" within this statute and the 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, unless the "inclosing walls" (which expression is not satisfied by two mere boundary walls, at either side of the ground) were carried higher than the footings before the 1st of January, 1856.—By the 28th section of the 18 & 19 Vict. c. 120, the duties of vestries are to be performed by the majority present. By a bye-law made pursuant to the 202nd section, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded:"—Held, that the division or poll might take place after a show of hands.—The plaintiff having erected a building in contravention of the 143rd section of the 18 & 19 Vict. c. 120, a resolution of a vestry was passed directing their surveyor to demolish the portion which incroached beyond the line. The surveyor having taken down the offending building, placed the materials within a hoarding on the carriage-way, and afterwards removed them to the parish stone-yard, and detained them there as a security and pledge for the costs and expenses of so taking down the building, in the bonâ fide belief that he was entitled so to do under the resolution of the vestry; and the case (settled by an arbitrator) found that the plaintiff could not have obtained the said materials back, without paying the said costs and expenses:—Held, a conversion.

This cause came on for trial before Crowder, J., at the sittings at Westminster after Trinity Term, 1857, when an order was made as follows:—"It is ordered by the court, with the consent of all parties, their counsel and attorneys, that a verdict be entered for the plaintiff for the claim in the declaration, costs 40s., and that it be referred to D. K. Esq., barrister-at-law, to state a special case for the opinion of the court, and to find the damages (if any) to which the plaintiff is entitled; all questions of law, and mixed questions of law and fact, to be reserved for the consideration of the court; the court to have the power of drawing all inferences from the facts which a jury might have drawn: And, by the like consent, it is also ordered that the witnesses to be examined before the said arbitrator touching the matters referred shall be examined upon oath, &c.: And, by the like consent, it is also ordered that the said arbitrator shall have all the powers as to certifying, amending, and otherwise, of the court and of a judge of nisi prius and of a judge at chambers: And, by the same consent, it is also ordered that the costs of the cause, to be taxed, and of the reference and case, to be taxed, shall abide [229] the event: It is also ordered, that, in the event of the said arbitrator declining to act, or dying before he shall have made his award, the said parties may, or, if they cannot agree, the Lord Chief Justice of the court of Common Pleas may, on application by either side, appoint a new arbitrator: It is also ordered that the court may, if they think fit, from time to time remit the case back to the arbitrator for amendment, alteration, or re-statement, wholly or in part: And lastly, it is ordered that either of the said parties shall be at liberty to move Her Majesty's court of Common Pleas that this order may be made a rule of the same court."

In pursuance of this order, the following case was stated for the opinion of the court:—

This was an action of trespass for pulling down part of a house of the plaintiff in Victoria Road, Dalston, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, one of the parishes in Schedule A. to the 18 & 19 Vict. c. 120, "An act for the better local management of the metropolis," and also for the conversion of the building materials of the part of the house so pulled down.

The first count of the declaration stated that the defendant broke and entered certain land of the plaintiff situate at Victoria Road, Dalston, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, between a row of houses there called Priory

Terrace and houses called the Marlborough Road, and pulled down and prostrated a great part of a house and building of the plaintiff erected on his said land, and the materials, to wit, bricks, timber, wood, slates, and other building materials of the plaintiff of which the same was built. The second count stated that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of his goods, to wit, bricks, [230] slates, timber, wood, and other materials: *and by reason of the premises one Hutchings, who otherwise would have become tenant of the said house and building of the plaintiff for a term of seven years from the 24th day of June*, 1858, *at a rent of 35l. per year, refused to become tenant of the same, and the said house and building of the plaintiff had from thence hitherto remained untenanted* (*a*). Claim, 500l.

The defendant pleaded, —first, not guilty, —secondly, as to the first count, that the said land, house, building, and materials, were not the land, &c., of the plaintiff, as alleged, —thirdly, as to the first count, that the said parish of St. Leonard, Shoreditch, in the declaration mentioned, was and is one of the parishes mentioned in the schedule A. to an act of parliament passed, &c. [18 & 19 Vict. c. 120]; that the said house and building was erected and built by the plaintiff on the said land after the passing and coming into operation of the said act of parliament; that the said part of the said house and building alleged to have been pulled down and prostrated, was erected and built on the said land contrary to the provisions of the said act of parliament, that is to say, the said part was, without the consent in writing of the Metropolitan Board of Works, erected beyond the regular line of buildings in the street in which the same was situate, to wit, the said Victoria Road in the declaration mentioned, the distance of such line of buildings from the high road not exceeding thirty feet; wherefore the defendant, as the servant and by the command of the vestry of the said parish of St. Leonard, Shoreditch, did demolish the said part of the said [231] house and building, and, in so doing, did necessarily and unavoidably commit the alleged trespasses in the first count mentioned, doing no unnecessary damage to the plaintiff; and that, before and at the time of the committing by the defendant of the said alleged trespasses, all things had happened and did exist to render it lawful for the said vestry and the defendant to demolish the said part of the said house and building of the plaintiff under and by virtue of the said statute,—fourthly, as to the said first count, the defendant repeats all the allegations of his third plea, except that, instead of alleging that he committed the alleged trespasses in demolishing the said part of the said house and building as in the said third plea alleged, he in this plea alleges that he committed the alleged trespasses in order to set back and in setting back the said house and building of the plaintiff according to the true intent and meaning and under the provisions of the said statute, —fifthly, as to the second count, that the goods were not the plaintiff's as alleged, —sixthly, as to the second count, the defendant repeats the allegations of his third plea, and he further says, that, because he could not demolish the said part of the said house and building within the true intent and meaning of the said act of parliament in the third plea mentioned without removing the materials thereof to a short and convenient distance in that behalf, and there leaving the same for the plaintiff, he the defendant did remove the said materials to a short and convenient distance in that behalf for the plaintiff, as he the defendant lawfully might for the causes aforesaid; that the goods in the second count mentioned were and are the said materials so removed by him as aforesaid; and that the said removing thereof as aforesaid was and is the alleged grievances in the second count mentioned,—seventhly, as to the second count, the defendant repeats [232] the allegations of his fourth and sixth pleas respectively, except that, instead of alleging that he could not demolish the said part of the said house and building within the true intent and meaning of the said act of parliament without removing the materials thereof as in the sixth plea alleged, the defendant in this plea alleges that he could not set back the said house and building within the true intent and meaning of the said act of parliament without removing the said materials as in the sixth plea alleged.

The plaintiff joined issue on the defendant's pleas; and, as to the third, fourth, sixth, and seventh pleas, the plaintiff new-assigned that he sued not only for the

(*a*) The words in italics were added by the arbitrator by way of amendment at the request of the plaintiff's counsel. His right to make such amendment was denied by the defendant's counsel.

grievances in those pleas admitted, but also for trespasses and grievances committed by the defendant in excess of the alleged rights, and on other occasions, and for other purposes than those referred to in the said pleas.

To the new-assignment, the defendant pleaded not guilty.

Before and on the 1st day of January, 1856, the plaintiff was and still is the occupier of a piece of ground on the north-eastern side of Victoria Road, Dalston, in the parish of St. Leonard, Shoreditch, having a frontage to the said road of 18 feet 6 inches, extending back from that road a distance of 90 feet to 100 feet northwards, and bounded on the west by a wall commencing at the north eastern footpath of Victoria Road, and extending back northwards to nearly the whole depth of the piece of land, and on the east by a similar wall parallel to the former, but commencing with a pier at a distance of three feet from the said footpath.

Both the said walls had been carried higher than the footings thereof before the said 1st of January, and had so been at all times since.

On the 1st of January, 1856, the said western wall **[233]** was about six feet high, and for a distance of about fifty feet northwards from the said footpath separated and still separates the plaintiff's said land from the garden of a house then and still belonging to one Adcock, which house was and is situate at the north-eastern corner of Victoria Road aforesaid, and another road there called Marlborough Road, fronts Marlborough Road, and has no opening whatever on Victoria Road, from which it was and is separated by a blank wall about six feet high and about 83 feet in length. The said eastern wall, at a distance of three feet from the said pathway, touched the north-western fence of the forecourt of the first of a row of nine houses on the same side of Victoria Road, running eastwards from the said piece of land, and called Priory Terrace. Each of the said nine houses has a forecourt in front of it, separated from the said north-eastern footpath by a railing.

The houses No. 1, 2, 8, and 9, are built at a distance of 11 feet 6 inches from the said footpath; the houses No. 3, 4, 5, 6, and 7, are built at a distance of 12 feet 3 inches from the said footpath.

The forecourts of these nine houses are separated from one another by railings, and are of the same width. At the eastern end of Priory Terrace, there is a piece of land, in the centre of which is a block of two cottages of equal size, called Boundary Cottages, having before them, towards Victoria Road, forecourts of equal size, which forecourts are separated from the north eastern footpath of Victoria Road by a railing of the same description as and continuing in a straight line with the said railing in front of Priory Terrace. The western side of the block is distant from the eastern wall of No. 9 Priory Terrace, about four feet; and the eastern side of the block is exactly the same number of feet distant from the western wall of the **[234]** first of a row of houses extending eastward, called Portland Terrace. The last-named terrace consists of twelve houses. Nos. 1, 2, 6, 7, 11, and 12, being distant from the said footpath 11 feet 6 inches, and Nos. 3, 4, 5, 8, 9, and 10, being 12 feet 3 inches distant from the same. The forecourts of Nos. 1 and 12 are somewhat wider than those of the other houses; yet, in all other respects, Portland Terrace resembles Priory Terrace, and it is separated from the said footpath by a railing which is a continuation of the railing in front of Priory Terrace and Boundary Cottages.

A straight line may be drawn horizontally eastwards from the edge of the south-western corner of No. 1 Priory Terrace, which is at a perpendicular distance of 11 feet 6 inches from the north-eastern footpath of Victoria Road, through the edge of the south-eastern corner of the last house in Portland Terrace, which is also at a perpendicular distance of 11 feet 6 inches from the said north-eastern footpath: and the several houses in Priory Terrace, Boundary Cottages, and Portland Terrace, are built in symmetrical blocks close up to, or at a distance of nine inches from the said supposed straight line, from No. 1 Priory Terrace, to No. 12 Portland Terrace. Next to Portland Terrace, eastward, there is a large open and uncultivated piece of ground, which, measured by the north-eastern footpath of Victoria Road, its boundary to the south east, is, and on the 1st of January, 1856, was, about 450 feet in length.

This portion of the footpath of Victoria Road describes an irregular curve; the eastern extremity of it being at a perpendicular distance of about 100 feet from the supposed horizontal line drawn eastward through the south-west corner of No. 1 Priory Terrace, and the south-eastern corner of the last house eastward in Portland Terrace. Eastward, and next to the **[235]** said irregular piece of ground, is a row of

three houses built in the same manner in every respect as the houses in Priory and Portland Terraces, one of them having a forecourt in front 12 feet 3 inches deep, and two having forecourts 11 feet 6 inches deep. These three houses are separated from the said north eastern footpath by a railing similar to that in front of Priory Terrace and Portland Terrace. Next to the most eastern of these three houses, is a house used as a shop, built flush up to the said north-eastern footpath, at a spot where the Victoria Road takes such a direction from south-east to north-east that the commencement of a new street is suggested; and the last-mentioned house becomes a corner, though not an extreme corner, of Victoria Road.

Thus, on the 1st of January, 1856, the north-eastern footpath of Victoria Road, between Marlborough Road and the said corner, was bounded on the north-east by a dead wall about 80 feet long; then by a hoarding, flush with the said dead wall, in front of the said piece of land of the plaintiff; then by a continuous line of rails in front of Priory Terrace, Boundary Cottages, and Portland Terrace; then by the said irregular piece of ground; then by the line of rails in front of the three houses next to the house at the said corner; then by the shop-front and wall of the house at the said corner.

At the same date, the buildings on the north side of Victoria Road were Adcock's house at the corner, having neither door nor window opening into Victoria Road, the two walls one on the east and the other on the west of the plaintiff's piece of land, then Priory Terrace, Boundary Cottages, and Portland Terrace, forming one regular line of buildings, unless the regularity was prevented by the fact that some of them recede some inches from the others, in the manner above [236] described: then followed the said irregular piece of ground, and then the said row of three houses, the houses of which are of the same description as, and, measured by perpendicular distance from the said north eastern footpath, are in a regular line of building with, those in Priory Terrace and Portland Terrace.

If it was a question of fact for him, the arbitrator found that Priory Terrace was a regular line of buildings; that Boundary Cottages were in a regular line of buildings; that Portland Terrace was a regular line of buildings; and that Priory Terrace, Boundary Cottages, and Portland Terrace, formed one regular line of buildings.

The width of the footpath in Victoria Road is about six feet; the width of the carriage-way is about twenty-eight feet.

The south-western side of Victoria Road, between Marlborough Road and Pownall Road, which runs into Victoria Road opposite the said row of three houses, is, and on the 1st of January, 1856, was, divided into three compartments by Brownlow Road and Broke Road, which also run into Victoria Road, on the south-eastern side thereof. The first compartment consists of a wall with one window in it flanking the house at the south west corner of Marlborough Road and Victoria Road, and then of a row of houses flush up to the south-eastern footpath, of an entirely different description from those in Priory Terrace, ending with a house at the corner of Brownlow Road differing in form from the others on that side, and from those in Priory Terrace. From Marlborough Road to Brownlow Road, none of the houses in Victoria Road project beyond any of the rest. Between Brownlow Road and Broke Road, on the south-eastern side of Victoria Road, there is a row of four houses similar to those in Priory Terrace, but only 8 feet 6 [237] inches distant from the footpath; then follows a piece of vacant ground having 200 feet of frontage towards the road; then two houses like the last, but built at a distance of ten feet from the footpath; and then a corner house, used as a shop, built about four feet from the line of footpath, and projecting about six feet beyond the line of buildings immediately to the east of it. Between Broke Road and Pownall Road there is first a vacant piece of ground about sixty feet in length, then a row of eight houses like those in Priory Terrace, 11 feet 6 inches from the road, and then a piece of vacant ground about forty feet long.

Sir William Middleton is the owner in fee of all the land hereinbefore mentioned, which so far as the same is covered is let by him on building leases for terms of ninety-nine years.

The said piece of ground of the plaintiff has been occupied by him for the last seven years, and he now holds it under an agreement with one Clarkson, the intermediate lessee of Sir William Middleton, which agreement is as follows:—

"Memorandum of agreement made this 23rd of January, 1856, between George Clarkson, of, &c., of the one part, and J. M. Tear, of, &c., of the other part: the said

G. Clarkson doth for himself, his executors, &c., once for all, hereby covenant, promise, and agree with and to the said J. M. Tear, his executors, &c., and the said J. M. Tear doth for himself, his executors, &c., once for all, hereby covenant, promise, and agree with and to the said G. Clarkson, his executors, &c., in manner and form following, that is to say, —

"1st. That, in consideration of the expense the said J. M. Tear will incur in making the erections hereinafter mentioned, and the rents and covenants hereinafter agreed to be paid and performed, the said G. Clarkson shall demise unto the said J. M. Tear, at [238] the time and in the manner hereinafter mentioned, all the pieces or parcels of ground situate, lying, and being on the north side of Victoria Road, leading from the Marlborough Road to Pritchard's Place and Duncan Place, in the parish of St. Leonard's, Shoreditch, and county of Middlesex, containing the several quantities and abutting on the respective directions more particularly described in the plan drawn in the margin thereof, and coloured green, -to hold the same unto the said J. M. Tear, his executors, &c., from the 25th of December, 1846, for the term of ninety-nine years, at the rent of a pepper-corn till the 25th of March, 1856, and at the yearly rent of 5l for the remainder of the term, payable quarterly, clear of all rates, taxes, or deductions whatsoever, whether the lease shall have been granted or not; the first quarterly payment to be due and payable on the 24th of June, 1856.

"2nd. That all the erections and buildings shall be in accordance with the building act, and be erected under the direction and to the satisfaction of G. Clarkson, and also of Sir W. Middleton, or their surveyor for the time being; and all plans, elevations, and sections shall be approved by such surveyor previous to the commencement of the work: and no addition to or alteration in the said intended erections shall at any time be made without the license of the said surveyor in writing first had and obtained.

"3rd. That the said J. M. Tear shall erect on the said ground one good and substantial messuage or dwelling-house of the fourth rate of building, and of the value of not less than 250l., and to be fronted with second malm bricks and pickings; the said messuage to be carcased in on or before the 28th of February, and to be completely finished fit for habitation on or before the 30th of June, 1856.

"4th. That the said J. M. Tear shall, so soon as the [239] same shall have been carcased in, insure and keep insured the intended erection and building in the Law Fire Insurance Society, or some other respectable office in London or Westminster, in two thirds the value thereof, such value to be ascertained from time to time by the surveyor for the time being of the said G. Clarkson.

"5th. That the said J. M. Tear shall pay, when thereunto required by the said Sir W. Middleton, his heirs or assigns, a reasonable share and proportion with the other lessees of the said Sir W. Middleton, the freeholder, towards the expenses incurred or to be incurred in making drains or sewers for the use and service of the said premises, at the rate prescribed by the surveyor of the said Sir W. Middleton.

"6th That the whole of the ballast and shingle obtained by excavation and sifting for sand on the said premises, except what may be required for making paths and walks in and about the said premises, shall be placed at the disposition of the said G. Clarkson, free of expense, for removal.

"7th. That the said G. Clarkson shall not be compelled or required to produce or prove the title of the said Sir W. Middleton to the said premises, or to deliver any abstract thereof.

"8th. That, in case the said messuage or premises shall be completed at the time and in manner hereinbefore mentioned, the said G. Clarkson will at once, or so soon after as the said ground and messuage shall have been demised to him, demise unto the said J. M. Tear, his executors, &c., the said ground and messuage for the term and at the rent aforesaid; such lease and the counterpart thereof to contain all such covenants and provisoes as are consistent with this agreement, and also all such other covenants and provisoes as are usually inserted in leases granted by the said [240] Sir W. Middleton of ground on the same estate; but that the premises hereby agreed to be demised shall not be liable or subject to the rents or covenants in respect of any other property than that hereby agreed to be demised: the same shall be prepared by the solicitor for the time being of the said G. Clarkson, at the expense of the said J. M. Tear, who shall accept such lease and execute a counterpart thereof.

"9th. That the said J. M. Tear shall not assign, part with, or pledge this agree-

ment, or his interest therein, without the consent of the said G. Clarkson first had and obtained.

"10th. That, in case of any breach or non-performance of this agreement on the part of the said J. M. Tear, or if he shall become bankrupt or insolvent, or execute an assignment of or surrender his effects for the benefit of his creditors, or if the said intended messuage or building shall at any time be left in an unfinished state, or the works shall not be regularly proceeded in to the satisfaction of the said G. Clarkson, or his surveyor, or in case of any breach or non-performance of any one or more of the covenants, clauses, or agreements hereinbefore contained on the part and behalf of the said J. M. Tear to be observed, performed, or kept, then and from thenceforth, and at any time or times thereafter, or in any of the said cases or events, it shall and may be lawful for the said G. Clarkson, his heirs or assigns, into or upon the said piece of ground hereby agreed to be demised, or any part thereof in the name of the whole, immediately or at any time thereafter to re-enter, and the said J. M. Tear and all other tenants and occupiers of the said premises thereout and from thence by force, if necessary, and without action or suit, to expel and remove, and the same, together with all erections, buildings, materials, and other things whatsoever therein or there-**[241]**upon, to have again, retain, re-possess, and enjoy, without giving or allowing any compensation or equivalent whatsoever to the said J. M. Tear, or any other parties as if these presents had not been made, anything herein contained, and any rule of law or equity to the contrary thereof in anywise notwithstanding, and to plead leave and license to any action, suit, or other proceeding for so doing, of which this agreement shall be sufficient evidence.

"11th. That the said J. M. Tear shall, as soon as the said intended messuage shall have been covered in, lay down a six inch stone ware glazed drain-pipe, for the purposes of draining the said premises, and shall connect the same with the common sewer.

"12th. That the said J. M. Tear shall put down a proper stone curb at the edge of the pathway in front of the house herein referred to, of the entire length of the said frontage, and properly pebble the channel for the purpose of carrying off the water the whole length of the said frontage."

[Then followed a specification of the manner in which the messuage referred to in the agreement was to be erected.]

In February, 1856, the plaintiff began to erect on the said piece of land, and ultimately, before the committing of the grievances complained of, did erect on it, the carcase of a house 26 feet deep and 22 feet high, with a frontage towards Victoria Road of 18 feet. In constructing this house, the then-existing eastern and western walls before described were first reduced in height, but not taken down to the footings, and afterwards carried up to the full height of 22 feet. The northern wall, both footings and super-structure, was then built for the first time. The southern wall has never had footings, as the house was intended to be a baker's shop, with a shop-frontage of the ordinary **[242]** kind. The arbitrator therefore found as a fact, that the inclosing walls of the building so erected by the plaintiff had not been carried above the footings on or previously to the 1st of January, 1856. The southern wall of the said building was erected at a distance of three feet only from the north-eastern footpath of Victoria Road: and the house ultimately, at the time of the grievances complained of, projected towards the said footpath 8 feet 6 inches beyond any of the buildings in Priory Terrace, Boundary Cottages, or Portland Terrace, and 9 feet 3 inches beyond some of them.

The said building was so erected, and up to and at the time of the committing the grievances complained of was so continued, without the consent of the Metropolitan Board of Works.

On the 17th of April, 1856, the vestry of the parish of St. Leonard's, Shoreditch, took into their consideration a complaint made to them that the plaintiff was erecting at the corner of Priory Terrace, Victoria Road, a building beyond the regular line of building, and contrary to the 18 & 19 Vict. c. 120, s. 143, which enacts that "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed 30 feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds 30 feet, notwithstanding there being gardens or vacant spaces between

the line of buildings and the highway: and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished, or set back, as the case may require, and to recover the expenses incurred by them from the owner of the premises, in manner provided by this act."

[243] The number of elective vestrymen for that purpose is one hundred and twenty: the rector and two churchwardens are also members of the vestry.

The 28th section enacts that "all powers or duties to be performed by the vestry of any parish under this act may be exercised and performed respectively by the major part of such vestry assembled at any meeting, there being not less than five vestrymen present at a meeting of a vestry which consists of not more than eighteen elected vestrymen, and not being less than seven vestrymen present at a meeting of a vestry which consists of twenty four elected vestrymen and no more, and not being less than nine vestrymen present at a meeting of a vestry which consists of thirty-six elected vestrymen or upwards: and, at every such meeting, all questions shall be decided by the votes of the majority of the vestrymen present: and the vestry may act notwithstanding any vacancies therein."

Under the 202nd section the vestry has made bye-laws for regulating their proceedings, the 13th of which bye-laws is in the following terms:—"All questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded."

The said complaint having been considered by the vestry on the said 17th of April, it was moved and seconded "that the surveyor be directed to require Mr. Tear, of Priory Terrace, Victoria Road (the plaintiff), to set back the premises illegally built beyond the regular line of buildings, within seven days: and, in case the said Mr. Tear shall refuse or neglect to set back such building to the satisfaction of the surveyor, the surveyor be directed to cause the same to be demolished, and recover the expenses thereof from the offender." A show of hands then took place, and there appeared for the motion fourteen, against it fourteen. **[244]** Thereupon, a division was demanded, and that the names be taken down. This was done, and there appeared, for the motion, twenty-five, against the motion, eighteen, neutral (that is, did not vote,) one. Thereupon, the chairman declared the motion carried.

It was proved before the arbitrator, that, between the commencement and the termination of the proceedings at the said meeting of the vestry, forty nine members thereof and no more had been in the place of meeting; but no evidence was laid before him to shew that all the forty-nine were present at the same time. The arbitrator found as a fact that forty four were present when the said division took place; but he was unable to say how many were present when the show of hands took place. It was not objected before the arbitrator that the motion was not intended to apply to the said building of the plaintiff in Victoria Road; and therefore, although the said building is not in Priory Terrace, and there were buildings in Priory Terrace which the plaintiff had erected, he found as a fact that the motion was intended to apply to the said building of the plaintiff.

The vestry treated the motion as carried, that is to say, as a resolution of their body: the terms were communicated to the defendant, who was and is their chief surveyor; and he, on the 19th of the same month, gave notice to the plaintiff in the terms of the alleged resolution.

The plaintiff did not desist; but, on the 24th of April, sent a letter to the vestry as follows:—

"1 Priory Terrace, Dalston,
"24th April, 1856.

"Gentlemen,—Permit me most respectfully to solicit your kind re-consideration of my case respecting the building lately erected by me on ground adjoining No. 1 Priory Terrace, Dalston. I can assure you, that, **[245]** at the time I commenced the building, I was not aware of the clause in the Metropolitan Management Act giving to the vestry control over any building that might be erected beyond the usual line of buildings, and was not then aware that the building was contrary to law. Having received notice from your surveyor on Saturday last, giving me notice to pull down a portion of the said premises within seven days from that date, I have inquired as to the jurisdiction of the vestry as to any such buildings as might be erected beyond

the regular line of building in the street, and am perfectly satisfied that they have power to cause any projection to be demolished if they should think fit. Should I be compelled to pull down any portion of my premises, the loss will be most serious to me, and one that may injure me much in a pecuniary point of view. I beg to submit that the property being situated as it is can be no detriment to the adjoining property, being the first house in the row; and that the plan was approved of by Sir W. Middleton's surveyor previous to the commencement of the works. Under these circumstances, I humbly trust that you will be kind enough to re-consider the matter, and give instructions to your surveyor not to take any further proceedings to demolish any portion of the building, under the powers vested in you by the act."

(Signed) "J. W. TEAR."

This letter was brought to the notice of the vestry at an ordinary meeting held on the 8th of May, 1856, without previous notice of motion. It was thereupon moved and seconded, that the former order of the vestry of the 17th of April, 1856, be carried into execution; to which an amendment was moved, that the plaintiff should have fourteen days' notice to set back the buildings erected by him in Priory Terrace, from that day. The amendment was carried by twenty-one votes against sixteen.

[246] The 57th section enacts, that "no resolution or other act of the Metropolitan Board of Works, or of the board of works for any district, or of any such vestry, shall be revoked or altered at any subsequent meeting, unless such subsequent meeting be specially convened for the purpose, nor unless such revocation or alteration be determined upon by a majority consisting of two thirds of the members of the board or of the vestrymen present at such subsequent meeting, if the number of members or vestrymen present at such subsequent meeting be not greater by one fifth than the number present when such resolution was made or such act was done; but, if the number of members or vestrymen present at such subsequent meeting be greater by one fifth than the number present at such former meeting, then such revocation or alteration may be determined upon by a mere majority."

It was proved before the arbitrator, that, between the commencement and the close of the proceedings of the vestry on the 8th of May, fifty-seven members of the vestry and no more had been in its place of meeting; but there was no evidence to shew that the said fifty-seven members were present together at the place of meeting. And the arbitrator found as a fact that only thirty-seven were present when the said amendment was put to the vote; he again, and for similar reasons as in the like case above given, found as a fact that the last-mentioned resolution and amendment applied to the said building of the plaintiff in Victoria Road.

On the 10th of May, the defendant, as chief surveyor of the vestry, gave to the plaintiff a formal notice pursuant to the last-mentioned amendment, and at the same time sent him a letter to the like effect, concluding with these words,—"I trust you will commence forthwith, and obviate my giving instructions to cause the work to be done." The plaintiff, however, went on **[247]** with the work, and on the 5th of June, 1856, the defendant made a report to the vestry in the following terms:—

"Gentlemen,—I beg to report to this vestry, that, in obedience to their order, I caused another notice to be served on Mr. J. M. Tear on Saturday, the 10th of May, requiring him within fourteen days to set back the buildings he had constructed at Priory Terrace, Victoria Road, in this parish, beyond the regular line of buildings, and without the consent of this vestry. Mr. Tear has not proceeded to set back the premises in question within the period afforded him by this vestry, nor has he in any way notified to me as your officer why your order has been disregarded. Under these circumstances, I would now beg to direct the attention of this vestry to their first order herein made in vestry 17th April, 1856, which authorizes your chief surveyor to cause the buildings in question to be demolished, or to receive your further pleasure thereon." (Signed) "W. Y. FREEBODY."

On the 19th of June, 1856, a special meeting of the vestry was duly held, pursuant to a requisition duly signed pursuant to the bye-laws by nine members. The requisition stated several matters to be submitted to the consideration of the meeting. The first on the list was in these terms:—"To consider the report of the surveyor made to the vestry on the 5th instant, relative to an erection beyond the regular line of buildings in Priory Terrace, Dalston." The matter was brought to the considera-

tion of the vestry; and the proceedings relative thereto are entered in the minutes of that body in the following terms:—

"In the matter of building in Priory Terrace erected by Mr. Tear.

"The clerk read the report of the surveyor of the 5th June, 1856.

[248] "Moved by Mr. Owen, and seconded by Mr. Edwards, that the chief surveyor be ordered to demolish the building erected by Mr. Tear beyond the regular line of buildings near Priory Terrace, Victoria Road, in accordance with the act 18 & 19 Vict. c. 120.

"Moved by Mr. Pearce as an amendment, and seconded by Mr. Beston, that Mr. Tear be summoned before the magistrate for the supposed infringement of the law.

"And upon a show of hands there appeared

"For the amendment, 6; against, 22. For the original motion, 24; against, 6.

"A division was demanded, and the names to be taken down, when there appeared,—

"For the original motion, 27 (naming them). For the amendment, 6 (naming them), Neuter, 5 (naming them).

"The chairman declared the original motion carried."

Between the commencement and the close of the proceedings on the said 17th June, forty-seven members of the vestry and no more had been in the place of meeting; but there was no evidence before the arbitrator that the said forty-seven members were present together at the said place of meeting. There was no evidence before the arbitrator to shew how many of the forty seven were present at either of the times when a show of hands was taken as aforesaid. He found as a fact, that, at the subsequent division, thirty-eight members of the vestry out of the said forty-seven were present.

The fact that the last-mentioned original motion had been carried, was communicated to the defendant as chief surveyor of the vestry, and he, on the 23rd of June, sent to the plaintiff an extract from the minutes of the vestry, setting forth the terms of the motion, and stating the fact that it had been carried. He also [249] wrote to the plaintiff a letter bearing the same date, in the following terms:—

"Sir,—Having to carry out the resolution come to by the vestry (copy of which is herewith inclosed), I beg to state that I shall deem it my duty to supply you with every information required as to the acts of the people I shall employ to remove the materials, &c. I trust you will afford me every facility towards the proper removal of the same, as well as to shore up and leave the other portion in a secure workmanlike state, in order that no further expenses be incurred or hereafter be required from you than is absolutely needed for duly removing what is required."

On the 24th of June, 1856, the defendant went with some workmen to the house to which the said motion so carried as aforesaid on the 19th of June applied, that is to say, to the house so erected by the plaintiff as aforesaid, saw the plaintiff there, and, after explaining that he had come there to demolish or set back the building as the case might require, pursuant to an order of the vestry, asked the plaintiff whether he would give him facilities for that purpose. The plaintiff refused to give any; and thereupon the defendant, by his servants on his behalf, in the bonâ fide execution of the said alleged resolution of the vestry of the 19th of June, 1856, took down so much of the said building as projected towards the north-east footpath beyond the wall of No. 1 Priory Terrace, facing the said footpath, committing no excess, and doing no unnecessary damage. The defendant, in fact, cut off a slice of the building towards Victoria Road, 18 feet wide, 22 feet high, and 8 feet deep. The building materials were placed by the defendant in the first instance within a board erected on the carriage way in front of the house; and thence they were conveyed to a stone yard belonging to the parish, in Fleming Street, Kingsland [250] Road, where they have since been. The arbitrator found as a fact, that there was space on the plaintiff's said premises on which the defendant might have stacked the said building materials after they had so been taken down and placed within the said hoarding; but that, if the plaintiff was entitled to remove them away, the stone yard was a convenient place to remove them to. He found as a fact that the defendant removed the said building materials to the said stone-yard, and detained and still detains them there as a security and pledge for the costs and expenses of so taking down or setting back the said building as aforesaid, in the bonâ fide belief that he was and is entitled so to do under the said alleged resolution of the vestry of the 19th of June, 1856, and under no other resolution or order of the said vestry; and that the plaintiff could not have obtained

the said materials back, without paying the said costs and expenses. He found as a fact that the said costs and expenses had never been demanded of the plaintiff; and that no account of them had ever been rendered to him. He also found as a fact, that the plaintiff never asked for such account, nor demanded that the said building materials should be delivered to him.

Early in the year 1856, one Hutchinson had contracted verbally with the plaintiff to take the said house and premises from the plaintiff for a baker's and confectioner's shop, for a term of twenty-one years, determinable, at the option of Hutchinson, at the end of seven or fourteen years, at a rent of 35l. per annum. By the terms of the contract, Hutchinson was to be let into possession at Midsummer, 1856; and the first quarter's rent was to be paid at Michaelmas, 1856; and he was to put in his own oven and shop-front. He was able and willing to perform his part of the contract; but declined, when he was informed that the building had been set back by the defendant; and has since **[251]** taken another house, and invested his capital in it. At the time of the contract with Hutchinson, the house had been commenced, and had been raised about three feet from the ground, except in front. The arbitrator found as a fact, that the contract between Hutchinson and the plaintiff contemplated a building having the proportion which was demolished by the defendant as aforesaid.

The plaintiff has done nothing towards reinstating or completing the said building since the acts complained of were committed.

A plan of Victoria Road was annexed to the case and was to be taken as part thereof.

The plaintiff contended,—First, that the 143rd section of the 18 & 19 Vict. c. 120, contemplates such buildings only as are new buildings within the Metropolitan Buildings Act, 18 & 19 Vict. c. 122; that the said building of the plaintiff was not a new building within that act, because the eastern and western walls thereof were carried up higher than the footings before and on the 1st of January, 1856; and therefore that the plaintiff's building was not within the said 143rd section,—Secondly, that his said building was in Victoria Road, and that there was no regular line of buildings in Victoria Road,—Thirdly, that the regular line of buildings on the north-eastern side of Victoria Road was the north-eastern boundary of the footpath on the said north-eastern side,—Fourthly, that there was no valid legal order or command of the vestry authorizing the defendant to do what he did, or any part of it, because the motion to set back his premises made on the 17th of April was conclusively negatived by the operation of the 28th section, and all the subsequent proceedings of the vestry were based on the erroneous assumption that the said motion was carried; and, further, because the result of the show of hands on the said motion was an **[252]** act or resolution of the vestry never rescinded or altered in compliance with the 57th section, Fifthly, that, at all events, the removal of the building-materials to the stone-yard, and the detention of them there, were and are wholly unjustified, and the defendant's plea of justification to the second count not proved.

The defendant contended, that the plaintiff's building was erected in violation of the 143rd section; that the vestry were well warranted in making, and did make, a valid order on him, as their surveyor and servant, to demolish or set back the said premises; and that he had acted in all respects within the authority conferred on him by such valid order.

If the plaintiff was entitled to have the verdict entered for him only on the issues on the second count, the arbitrator found the damages to which he was entitled, to be 12l.

If the plaintiff was entitled to have the verdict entered for him only on the issues on the first count, but was only entitled to have damages for the demolition of the house, he found the damages to which he was entitled, to be 95l.

If the plaintiff was entitled to have the verdict entered for him on the issues on the first count only, but was entitled to indemnity for the loss of Hutchinson's contract, then he found the damages to which he was entitled, to be 165l.

If the plaintiff was entitled to have the verdict entered for him on all the issues, then he found the damages to which he was entitled, to be 107l., or 177l., according as he was or was not entitled to damages in respect of the loss of his said contract with Hutchinson.

Montagu Chambers, Q. C. (with whom was Barnard), for the plaintiff. The first question is, whether the defendant was justified in demolishing the plaintiff's pre-**[253]**-

mises by the 143rd section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. That section enacts that, "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished or set back (as the case may require), and to recover the expenses incurred by them from the owner of the premises, in manner provided by this act." This provision, which came into operation on the 1st of January, 1856, contemplates that which shall be done in future. The 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, enacts that "a building shall be deemed to be new whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856: any other building shall be deemed to be an old building." The case shews that the building in question was an "old building;" for, it finds that the eastern and western walls close up to the footpath in Victoria Road had been carried up higher than the footings before the 1st of January, 1856. The plan shews the state of the buildings in the Victoria Road at the time the act came into operation. The court is called upon for the first time to say what is "the regular line of buildings in the street." Is this to be determined by reference to Nos. 1 and 2 Priory Terrace? or by Nos. 3, 4, 5, 6, and 7? **[254]** or by Nos. 8 and 9? or by Nos. 1 and 2 Boundary Cottages? There is nothing, it is submitted, in the Local Management Act, or in the statements in the case, to interfere with the plaintiff's right to build close up to the footpath.

Then, as to the vestry proceedings,—it does not appear from the facts found by the arbitrator that the twenty-five vestrymen who voted for the demolition of the plaintiff's premises formed the majority of those present on the 17th of April. The resolution proposed at the first vestry meeting, on the 17th of April, was conclusively negatived by the show of hands, and the statute and bye law do not authorize a subsequent division or poll: they give the vestry the option to proceed by the one mode or the other, but not by both. And, assuming the resolution then come to, to have been valid, it was not acted upon, and those passed at the subsequent meetings were mere nullities.

At all events, the plaintiff is entitled to recover upon the second count. The removal of the materials to the stone-yard was clearly unjustifiable. [Willes, J. The defendant certainly had no right to insist upon a lien on them for the expenses.]

The plaintiff is entitled to recover all the damages assessed, and the amendment of the second count was properly made.

Macaulay, Q. C. (with whom was Raymond), contrà. [Crowder, J. desired him to confine his argument to the first point, viz. whether the building in question was an "old building," and to the question raised on the second count.] The first point admits of two answers. In the first place, the arbitrator finds that the inclosing walls were not built before the 1st of January, 1856. The eastern and western walls were not erected for the purpose of any building, but were mere **[255]** boundary walls to the piece of land. The agreement under which the plaintiff took the land from Clarkson was dated the 23rd of February, 1856; and the plaintiff did not commence building his house until February. In the next place, though an "old building" for the purpose of the Metropolitan Buildings Act, it would not necessarily be so for the purpose of the Metropolitan Local Management Act. The two statutes are not in pari materiâ: they have totally different objects in view.

Then, as to the second count,—there is no statement therein of anything which amounts to a conversion. The asportation of the materials to a convenient place of deposit was perfectly justifiable. If the defendant was authorized to demolish the offending portion of the building, he was authorized to do all that was reasonably necessary to carry out that object. He could not leave the materials incumbering the highway: and he would have been guilty of a trespass if he had gone upon the plaintiff's premises to deposit them there. The arbitrator finds that the stone-yard was a convenient place to remove the materials to. [Crowder, J. Convenient for whom? He does not say that it was convenient for the use of the plaintiff.] He may fairly

be assumed to have meant so: his finding has reference to the pleadings which were before him. Then it is said that the defendant detains the materials as a security and pledge for the costs and expenses of taking down the building. But the arbitrator has not found that the defendant claimed a lien upon the materials: and, if the act of removal was lawful, the mere intention to insist upon a lien could not make it unlawful. If a man distrains cattle damage feasant, the quality of the act could not be in any degree altered or affected by his having told some third person that he means to detain the cattle until the owner pays him **[256]** 1000*l*. In *Crowther* v. *Ramsbottom*, 7 T. R. 654, it was held, that, in trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant may justify under sufficient legal process, if he had it in fact at the time, although he declared then that he entered for another cause. And Lord Kenyon said: "I never understood that a man was bound to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." [Crowder, J. The taking the materials to the stone-yard was for the express purpose of claiming a lien. It is obvious he did that for his own purposes. I do not see how you can get over that.] If the defendant did no more than he had a legal right to do, what he said or intended does not affect the validity of his act: *Stevenson* v. *Newnham*, 13 C. B. 285. [Crowder, J. That is the infirmity of your argument. The defendant had no right to remove the materials from the hoarding to the stone-yard.] There was no demand here: and this is eminently one of those cases where a demand and refusal are necessary. The asportation is mere aggravation: *Woods* v. *Durrant*, 16 M. & W. 149. A mere wrongful asportation of a chattel does not necessarily amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel: *Fouldes* v. *Willoughby*, 8 M. & W. 540; *Simmons* v. *Lillystone*, 22 Law J., Exch. 217. To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right: *Heald* v. *Carey*, 11 C. B. 977. Here, the defendant was not **[257]** asserting a right: he was acting in the performance of a public duty.

CROWDER, J. I am of opinion that there must be judgment for the defendant on the first count, and for the plaintiff in the count in trover. As to the questions arising upon the first count, they arise under the 18 & 19 Vict. c. 120, and mainly under the 143rd section. This being an act to regulate the building of streets, that section enacts that "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed 30 feet, or within 30 feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds 30 feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway: and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished, or set back, as the case may require, and to recover the expenses incurred by them from the owner of the premises in manner provided by this act" (*a*). It appears from the case that there is a road called Victoria Road, with certain buildings on the north side, to the extreme west Priory Terrace, consisting of nine houses, then Nos. 1 and 2 Boundary Cottages, and then another terrace consisting of twelve houses, called Portland Terrace; and to the extreme east three houses and other two in course of erection. To the west of Priory Terrace, there are also certain **[258]** houses numbered respectively 1, 2, 3, and 4, abutting on Marlborough Road. The end house, No. 4, marked A. on the plan, is divided from Victoria Road by a wall. It seems that a portion of the premises marked A. is skirted by that wall and a zinc flat. The premises erected by the plaintiff, marked B. upon the plan, are at the west end of Priory Terrace, and immediately behind the premises in Marlborough Road marked A. In erecting those premises, the plaintiff placed his house very near to the line of the footpath, and a considerable distance in advance of the line of any of the other houses. The defendant, in exercise of the authority conferred upon him as

(*a*) To be ascertained and determined by and recovered before two justices, s. 225.

surveyor to the vestry under the 143rd section of the act, has removed so much of the house as projected beyond the regular line of buildings in Victoria Road. The plaintiff insists that he had no right to do so. In the first place, it is contended that the building was not within the act at all; for that the 143rd section applies to new buildings, and the 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, shews that this is not a new building. That section enacts that "a building shall be deemed to be new whenever the inclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856: any other building shall be deemed to be an old building." The case finds that before the 1st of January, 1856, there were two walls, one at the east and the other at the west side of the plaintiff's land, which commenced at or near the footpath, and which had before that date been carried higher than the footings, and which subsequently became part of the house. In constructing the house, in the month of February, the then-existing east and west walls before described were first reduced in height, but not taken down to the footings, and afterwards carried up to the full height of twenty-two [259] feet. The north wall, both footings and superstructure, was then built for the first time. The south wall has never had footings, as the house was intended for a baker's shop. The arbitrator therefore finds as a fact that the "inclosing walls" of the building so erected by the plaintiff had not been carried above the footings on or previously to the 1st of January, 1856. Now, the first answer given on the part of the defendant, is, that there is no connection between the two acts,—that there is nothing to shew that the term "new building" in the 8th section of the 18 & 19 Vict. c. 122, is a definition of that referred to in the 143rd section of the 18 & 19 Vict. c. 120. But, looking at the facts, it seems to me that the objection admits of this answer. At the time the act came into operation, the two walls called the east and west walls were not connected with any building: but they became so afterwards. Therefore, even if the 8th section of the Metropolitan Buildings Act did apply, the facts negative this being an old building; and, if improperly erected as regards the line of buildings in Victoria Road, it is within the 143rd section of the 18 & 19 Vict. c. 120. Then it was said that the plaintiff was at liberty to build his house up to the footpath. It seems to me, however, that so to construe the act would be to make it utterly useless. The case finds that the houses in Priory Terrace, Boundary Cottages, and Portland Terrace, are built in symmetrical blocks close up to, or at a distance of nine inches from, an imaginary line drawn from No. 1 Priory Terrace, to No. 12 Portland Terrace. From this it is argued, on the part of the plaintiff, that there is no "regular line of buildings" in this road. The arbitrator, however, finds that there is a regular line of buildings,—which need not be a mathematical line,—and that the house in question was built beyond that line. The object of this [260] part of the act evidently was the maintaining an appearance that should be ornamental. It seems to me that the case falls within the 143rd section, and that the vestry were right in taking steps to demolish the offending structure. Then certain questions are raised as to the proceedings at the vestry meetings. It is said that the resolution proposed at the meeting of the 17th of April was conclusively negatived, by reference to the 28th section of the act, and the bye law made under the authority of the 202nd section. By one of those bye laws made for regulating the proceedings of vestries, it is provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded." At the meeting of the 17th of April, a resolution was proposed to the effect that Tear be directed to set back the premises illegally built beyond the regular line of buildings, within seven days; and, in case of non-compliance, that the surveyor be directed to cause the same to be demolished. A show of hands took place, when there appeared fourteen for the motion and fourteen against it. A division was then demanded, when there appeared to be a majority of seven in favour of the resolution. It was insisted that upon the show of hands there was an end of the resolution; for, that the true meaning of the bye law is, to give the parties the option to vote by show of hands or by division, and that, having taken the one course, they could not afterwards resort to the other. That would be contrary to all one's experience. Elections of members of parliament are invariably made by show of hands, followed by a poll. Nothing can be more clear. The proceedings were perfectly good, and the resolution valid within the act. Then it is said that, assuming the resolution at that meeting to have been a valid one, it was not the resolution that was acted upon. It appears that there was another vestry meeting held on the 8th of May, when, it being moved

[261] that the resolution of the 17th of April be carried into execution, an amendment was proposed that the plaintiff should have fourteen days' notice to set back his premises; and the amendment was carried. This made an end of the former resolution: and the plaintiff had the benefit of the additional fourteen days' delay. The plaintiff having failed to obey this last injunction, it became necessary to convene another meeting of the vestry. Accordingly, on the 19th of June, another meeting was held, when it was proposed that "the chief surveyor be ordered to demolish the building erected by Mr. Tear beyond the regular line of buildings near Priory Terrace, Victoria Road, in accordance with the act 18 & 19 Vict. c. 120;" and this was carried by a majority of eighteen. That was a perfectly separate motion. The result was communicated to the plaintiff, and, on the 24th of June, the building was demolished. I think the defendant was perfectly justified, and consequently that he is entitled to judgment upon the first count. Then comes the count in trover. I cannot help regretting that our decision should turn upon so small a matter. I cannot construe the finding of the arbitrator otherwise than as I have already suggested in the course of the argument. The building having been taken down, it appears that the materials were at first placed within a hoarding in the carriage-way, and that they were afterwards conveyed to a stone-yard belonging to the parish, which the arbitrator found to be a convenient place to remove them to. The arbitrator, however, further finds "that the defendant removed the said building-materials to the said stone-yard, and detained and still detains them there as a security and pledge for the costs and expenses of so taking down or setting back the said building as aforesaid, in the bonâ fide belief that he was and is entitled so to do under the said alleged resolution of **[262]** the vestry of the 19th of June, 1856, and under no other resolution or order of the said vestry; and that the plaintiff could not have obtained the said materials back without paying the said costs and expenses." I think it is impossible to avoid coming to the conclusion that the defendant has been guilty of a conversion. It is said that the fact of the defendant having intended to claim a lien on the materials for his costs and expenses was immaterial so long as that intention was not communicated to anybody. We must, however, give a fair and reasonable construction to the finding of the arbitrator. Reliance is also placed upon the finding of the arbitrator that the stone-yard was a convenient place for the deposit of the materials. But it is rather vague to say that any place is convenient to stow away property of this sort, that places it out of the control of the owner. There is nothing to shew that the materials were carried to the stone-yard for the benefit of the plaintiff: on the contrary, it is abundantly clear that the defendant had an eye to his own benefit only. There must, therefore, be a verdict for the plaintiff on the second count, for 12*l*.

WILLES, J. I am of the same opinion. It appears to me that there is nothing in the 8th section of the 18 & 19 Vict. c. 122, to take the building in question out of the operation of the 143rd section of the 18 & 19 Vict. c. 120: the walls called the east and west walls were mere boundary walls, and not external walls of a building. It is said that there does not appear to have been any regular line of building, in the place in question, within the meaning of the 143rd section of the Metropolis Local Management Act. That is a question of fact. The "regular line of buildings" mentioned in that section cannot possibly mean a geometrical line; it must mean substantially such a **[263]** line as shall preserve uniformity of appearance. The arbitrator, as it seems to me, has disposed of this question, by finding that there is in point of fact a regular line of buildings from No. 1 Priory Terrace, to No. 12 Portland Terrace. Then it is said that the surveyor had no authority to remove the building, because, when the resolution was put to a show of hands at the first vestry meeting, and the numbers were equal, that, according to the true construction of the bye-law, disposed of the matter, and there could not legally be a poll. The rule upon this subject is well stated by Sir William Scott, in a case of *Anthony* v. *Seger*, 1 Hagg. Consist. R. 9, 13,—"Where a poll is demanded, the election commences with it, as being the regular mode of popular elections: the show of hands being only a rude and imperfect declaration of the electors. It oftens happens, that, on a show of hands, the person has a majority who on a poll is lost in a minority; and, if the parties could afterwards recur to the show of hands, there would be no certainty or regularity in elections. I am of opinion, therefore, that, when a poll is demanded, it is an abandonment of what was done before, and that everything anterior is not of the substance of the election, nor to be so received." It is clear, therefore, that a demand of a poll or

division does away with the previous show of hands. That objection cannot be sustained. And this seems to me to dispose of the first count in favour of the defendant. As to the second count, I apprehend that a person is guilty of a conversion, if he takes away the goods of another for the purpose of depriving that other of the use of them and acquiring the use of them himself. It seems to me that that was the defendant's object in removing the building-materials to the stone-yard, —to enable him the better to enforce his claim of lien. That clearly was a wrongful deprival of the [264] plaintiff of the use of his goods. The circumstance of the materials being taken in order to enforce an unfounded claim of lien, distinguishes the cases from those cited. There will, therefore, be judgment for the defendant upon the first count, and for the plaintiff on the second count, for 12*l*.

Judgment accordingly.

JOHN PEACOCK, *Appellant*; THE QUEEN, *Respondent*. April 28th, 1858.

[S. C. 27 L. J. C. P. 224; 6 W. R. 517. Followed, *Woodhouse* v. *Woods*, 1859, 29 L. J. M. C. 150; *Morgan* v. *Edwards*, 1860, 5 H. & N. 418. Distinguished, *Park Gate Iron Company* v. *Coates*, 1870, L. R. 5 C. P. 637. Not followed on point as to costs, *Great Northern and London and North Western Joint Committee* v. *Inett*, 1877, 2 Q. B. D. 284.]

Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day.

This was an information preferred by James Bell, inspector of police, against John Peacock, an alehouse keeper; for that, "on the 20th of December, 1857, at Sutton Bridge, in the parish of Sutton St. Mary, in the parts of Holland, Lincolnshire, the said John Peacock, being then a beer-house keeper, and duly licensed to sell beer, ale, and porter and exciseable liquors by retail to be drunk and consumed in his house and premises there situate, under the provisions of the statutes in that case made and provided, did keep his said house and premises (the said day being Sunday) open for the sale of beer after the hour of eleven o'clock at night, to wit, at thirty-five minutes past eleven o'clock at night of the same day; being in the said parish of Sutton St. Mary, the population of which, according to the last parliamentary census, exceeded two thousand five hundred persons; contrary to the form of the statute in such case made and provided."

After hearing the parties, and the evidence adduced by them, the magistrates at a petty session held on the 30th of December, 1857, convicted the said John Pea [265]-cock, as an alehouse keeper, of the said offence, under the 18 & 19 Vict. c. 118, s. 1, and adjudged him to forfeit and pay the fine or penalty of 5*s*. and costs.

The said John Peacock, being dissatisfied with the said determination, as being erroneous in point of law, applied for a case for the opinion of this court pursuant to the 20 & 21 Vict. c. 43: whereupon the justices stated the following case: —

"The defendant having appeared upon summons before us to answer to the said information, it was thereupon proved on the part of the said prosecutor, by the evidence of a police-constable, that the said John Peacock was keeping and carrying on the business of an alehouse keeper at an inn called the Crown, situate at Sutton Bridge aforesaid; and that, about half past eleven o'clock on the night of Sunday, the 20th of December last, the police on duty, being attracted by a noise inside, entered the said alehouse, and there found four men in a lower room,—one of them (one of the strangers after-mentioned) having a glass of rum-and-water in his hand at the time, and being drunk and noisy; that three of such four persons were strangers, and the fourth was known to the police to be a resident at Sutton Bridge aforesaid, but not a lodger in the said alehouse kept by the said John Peacock.

"It was alleged in reply, by the said John Peacock in person, but no proof tendered or given by him, that the three strangers in question were travellers resting there for the night with droves of beast, which they were taking into Norfolk for sale: and it was not disputed by him that the other party was a resident at Sutton Bridge, and not a lodger in his said house; but it was asserted that that party neither was nor had been drinking, and set up that he was there only for the purpose of reading the

newspaper and of conversation with the drovers. Peacock further objected that he was an old [266] licensed innkeeper, and not a mere retail beer-house keeper as stated in the information and summons: whereupon we, the undersigned, did adjudge and determine that the said John Peacock was guilty of the offence so charged against him; and that his objection to the character in which he had been summoned, was removed under the provisions of the statute 11 & 12 Vict. c. 43, s. 1, by his personal appearance before us: and we did convict him accordingly in the mitigated penalty of 5s., besides costs, amounting to the sum of 18s.

"If the court shall be of opinion that the said John Peacock was duly and properly convicted of the said offence, then the conviction shall be confirmed. But, if the court shall be of a contrary opinion, then the said conviction shall be quashed."

Tompson Chitty appearing to support the appeal,

Beasley, for the respondents, objected that the application to the justices for a case was made too late, the adjudication having taken place on Thursday, the 30th of December, 1857, and a case not having been asked for until Monday, the 3rd of January, 1858; whereas, the statute requires it to be done "within three days" after the determination.

Chitty submitted that the objection was waived by the appearance of the respondents.

CROWDER, J. I think we have no jurisdiction to hear this appeal. The 2nd section of the 20 & 21 Vict. c. 43, provides, that, after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force [267] or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case, &c. Unless that condition has been complied with, we have no power to entertain the matter (*a*)[1]. The statute giving that number of days, and saying nothing about Sunday being excluded from the computation, as in some of the rules of court (*b*), it must be reckoned as one of the three days. The appellant ought, therefore, to have applied to the justices on the Saturday.

WILLES, J. The case of *Rowberry* v. *Morgan*, 9 Exch. 730, is precisely in point. The 27th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, impowers a plaintiff, in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form given by the act, on filing an affidavit of personal service, &c., at once to sign judgment: "and the plaintiff may, upon such judgment, issue execution at the expiration of eight days from the last day for appearance:" and it was held in that case, that, where [268] Sunday is the last of such eight days, it is to be reckoned in the computation as one of those days, and consequently that an execution issued on the Monday was regular. In the course of the argument there, Martin, B., referred to a case of *The Queen* v. *The Justices of Middlesex*, 7 Jurist, 396, where one of the questions turned upon the 4 G. 4, c. 95, s. 87, the turnpike-act, which requires the notice of appeal to be served within six days after the cause of complaint; and it was held, that, the conviction being on the 2nd of May, service of the notice of appeal upon the 9th, the 8th being Sunday, was not in time (*a*)[2].

(*a*)[1] See *Norton, App., The Town Clerk of Salisbury, Resp.*, 4 C. B. 32, 1 Lutw. Reg. Cas. 538; *Pring, App., Estcourt, Resp.*, 4 C. B. 73, 1 Lutw. Reg. Cas. 543; *Clarke, App., Beaton, Resp.*, 4 C. B. 76.

(*b*) See the 174th rule of Hilary Term, 1853 (13 C. B. p. 40), which provides, that, "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."

(*a*)[2] And see *The Queen* v. *The Justices of Middlesex*, 17 Law J., M. C. 111. By the 4th section of the 7 & 8 Vict. c. 101, notice of an appeal against an order of affiliation [269] is required to be given "within twenty-four hours after the adjudication." It was held, that, in computing the twenty-four hours for that purpose, Sunday is to be

Byles, J. I am of the same opinion. Sunday, at common law, is just like any other day. By the 11 G. 4 & 1 W. 4, c. 70, s. 6, Trinity Term was made to commence on the 22nd of May, and "the first essoign or general return day" was "the fourth day before the day of the commencement of the term, both days being included in the computation." Where the 22nd of May happened to be a Sunday, for the purpose of casting essoigns, it was still considered the first day of the term.

Beasley, for the respondents, asked for costs, referring to the 6th section of the statute, which places the costs at the discretion of the court.

Willes, J. That only applies where the court has jurisdiction. Here, we dismiss the appeal because we have no jurisdiction.

Appeal dismissed.

[269] In re Robert Stirling Newall, and George Elliot and Richard Attwood Glass. April 30th, 1858.

[S. C. 27 L. J. C. P. 337; 4 Jur. N. S. 562. Applied, *Penn* v. *Bibby*, 1866, L. R. 2 Ch. 133; *United Telephone Company* v. *Harrison*, 1882, 21 Ch. D. 745. See *Moseley* v. *Victoria Rubber Company*, 1887, 57 L. T. 143. Referred to, *Siddell* v. *Vickers*, 1888-90, 39 Ch. D. 98; 15 App. Cas. 496; *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 34.]

The office of the provisional specification, under the 6th section of the 15 & 16 Vict. c. 83, is, only to describe generally and fairly the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out, as in the complete specification under s. 9.—A. was the inventor of "improvements in apparatus employed in laying down submarine electric telegraph wires." In the provisional specification filed pursuant to the 6th section of the 15 & 16 Vict. c. 83, the invention was thus described,—"The cable or rope containing the insulated wire or wires is passed round a cone, so that the cable in being drawn off the coil is prevented from kinking by means of the cone, and there is a cylinder on the outside which prevents the coil from shifting in its place." In the complete specification, after describing the invention in the same terms, the inventor proceeded to say,—"When the wire or cable is to be laid down, I place over the cone an apex or top which is conoidal or conical, and around this I suspend several rings of iron or other metal by means of cords, so as to admit of adjustment at various heights over the cone. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed, and the combination of these parts of the apparatus prevents the wire or cable from running into kinks:" and the claim at the end was thus,—"What I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone, third, the use of rings in combination with the cone as described:"—Held, that the validity of the patent was not affected by the omission of all mention of the metal rings in the provisional specification.—And held, that the substitution by B. of a cylinder having a domed or hemispherical top, for the cone or the cone with the conoidal apex in A.'s apparatus,—A.'s apparatus and B.'s being used for the same purpose, and in nearly the same manner,—was evidence, and strong evidence, of infringement.—A necessary and unavoidable disclosure of the invention to others, if made in the course of mere experiments, is not such a publication as will avoid the subsequent grant of a patent,—though the same disclosure, if made in the course of a profitable use of an invention previously ascertained to be useful, would be a publication: but an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication, so as to constitute a gift of the invention to the world.—A. had invented an improved apparatus for laying down submarine telegraph wires; and, after some unsatisfactory and indecisive

excluded; and, consequently, where the order was made on Saturday, a notice of appeal given on Monday was held sufficient. In *Rawlins, App., The Overseers of West Derby, Resp.*, 2 C. B. 72, the last day for giving notices of claims under the Registration of Voters Act, 6 & 7 Vict. c. 18, falling on a Sunday, a notice of claim served upon the overseer on that day was held good.

experiments at the works on shore, having entered into a contract with government for laying down a telegraphic cable in the Black Sea (the mode of doing it being left to his discretion), fitted a vessel with his improved apparatus, and used it successfully on that occasion, and immediately afterwards took out a patent for the invention:—Held, that what was done in the Black Sea, having been done merely by way of experiment, though productive of profit to A., did not amount to a publication, so as to preclude him from afterwards obtaining the protection of a patent for his invention.

By a memorandum of agreement made and entered into the 9th of July, 1856, between Robert Stirling Newall, of Gateshead-on-Tyne, wire-rope and submarine-telegraph manufacturer and contractor, of the one [270] part, and George Elliot and Richard Attwood Glass, of East Greenwich, in the county of Kent, wire-rope and submarine-telegraph manufacturers and contractors, of the other part,—reciting that "whereas, on the 14th of May, 1855, the said R. S. Newall obtained letters-patent of that date to be granted to him for an invention under the title of 'improvements in apparatus employed in laying down submarine electric telegraph wires,' and such letters patent were duly sealed on the 3rd of August, 1855, the said invention being protected by a provisional specification left by the said R. S. Newall at the office of the commissioners of patents, with his petition, on the said 14th of May, 1855, and a specification thereof was duly filed on the 14th of November, 1855, pursuant to the proviso for that purpose contained in the said letters-patent: And whereas the said G. Elliot and R. A. Glass have lately shipped on board the ship 'Propontis' a certain apparatus to be employed in laying down submarine electric telegraph wires between Newfoundland and the opposite coast of North America, which is alleged by the said R. S. Newall to be an infringement of the said letters-patent, but which is denied by the said G. Elliot and R. A. Glass; and the said G. Elliot and R. A. Glass allege that the said letters-patent are illegal and void: And whereas the said R. S. Newall having filed a bill in the court of Chancery with a view to an injunction being obtained, proceedings in the said suit were abandoned only upon the said G. [271] Elliot and R. A. Glass agreeing to refer the whole matter to arbitration, as after provided:" It was witnessed, "that, in pursuance of the said agreement, the said R. S. Newall did thereby, for himself, his executors and administrators, promise and agree with and to the said G. Elliot and R. A. Glass, their executors and administrators, and the said G. Elliot and R. A. Glass, did, and each of them did thereby, for himself and their and his executors and administrators, promise and agree to and with the said R. S. Newall, his executors and administrators, in manner following, that is to say, that he the said R. S. Newall, his executors and administrators, and they the said G. Elliot and R. A. Glass, their executors and administrators, should and would on his and their respective parts, save as thereinafter appeared, abide by and well and truly observe and keep the award, order, arbitrament, and determination of T. W., Esq., barrister-at-law, of and concerning the matters aforesaid, so that the said arbitrator, &c., &c.: And it was agreed, that, in case the arbitrator should be of opinion that there had been an infringement of the patent by the said G. Elliot and R. A. Glass, he should give the said R. S. Newall such compensation as he should think the said G. Elliot and R. A. Glass ought to pay for the use of the apparatus then on board the 'Propontis,' in laying down such submarine telegraph wires as aforesaid: And it was agreed that the arbitrator should, if required by either party, state a special case, so as to enable the parties to take the opinion of one of the superior courts of law on any point of law: And it was thereby further agreed and declared between and by the said parties thereto, that the costs and expenses of the said submission and reference, and of the award to be made in pursuance thereof, should abide the event," &c., &c.

The arbitrator having taken upon himself the bur-[272]-then of the reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, documents, and other matters which had been given in evidence before him, made and published his award in writing of and concerning the matters referred to him, in manner following, that is to say,—he did declare that the said letters-patent were not illegal or void; and he did further award and adjudge that the defendants had infringed the said letters-patent; and he did further award, order, and direct that the defendants pay to the plaintiff the sum of 50l. as a compensation for the use of the said apparatus on board the "Propontis" in laying down

the said submarine-telegraph wire: And, in further pursuance of the said agreement of reference, being required by the parties respectively, he did state the following case for the purpose of enabling the parties to take the opinion of the court of Common Pleas on the points of law therein stated:—

The plaintiff carries on business at Gateshead, and, in the course of such business, has made and laid down several submarine cables for telegraphic purposes. The defendants carry on business at East Greenwich, and, in the course of such business, have also made and laid down submarine cables for telegraphic purposes.

The plaintiff, on the 15th of December, 1854, entered into a contract with the British Government to lay down a telegraphic submarine cable between Varna and Balaklava, and Balaklava and Eupatoria, in the Black Sea; in the execution of which contract, the apparatus, the subject of the letters-patent dated the 14th of May, 1855, was employed, such employment taking place before the date of the said letters-patent.

A copy of the provisional specification filed on the application for such letters-patent, and of the specifica-[273]-tion filed in pursuance of the usual condition contained in such letters-patent, was annexed to the award, and was to be taken as part thereof.

Previously to the making of the contract for and the laying down the Varna cable by the plaintiff, submarine cables for telegraphic purposes had usually been coiled in one or more oval or elliptical coils, in the hold or fore and aft of vessels, such coils being made as large as the vessel would permit. These coils were supported on the outside by the part of the vessel with which the coil came in contact, and also occasionally by stays at other parts of the coil where the coil was not in contact with the sides of the vessel; but these coils were usually without support in the interior: in one instance, however, guano bags, and, in another instance, a solid cylinder, had been introduced as a core to fill up and wedge the interior of the coil, and to prevent it from shifting by the motion of the vessel; but such external and internal supports were removed previously to the uncoiling or laying of the cable, and were not employed or adapted for the purposes described in the specification of the said patent.

It had been the practice, before the date of the said contract and letters-patent, to coil ropes and cables on or about cones or cylinders, in the course of manufacture; also, telegraph cables had been coiled in circular tanks, such coils being supported at their exterior by the vertical side of the tank, and at their interior by a cylindrical brick pier whereby the coils were preserved in a proper form, and capable of being subjected to water and other experimental operations previous to the cable being removed into and stowed away in the vessel for the purpose of being laid down. The successive layers of such coils were usually tied together for the purpose of preventing the different layers being interlaid, and also to retain the successive layers in [274] their places. In the laying of these cables, one end of the cable was passed out from the hold through the hatchway, or through an opening in the deck, to and through the break apparatus, and made fast to the shore, the cable being drawn out of the hold as the vessel passed onwards to and from the points between which the cable was to be laid. As the cable was so drawn out from the coil by the motion of the vessel, men were employed to cut the fastenings of the successive layers of coils, and to handle the cable so as to prevent kinks in the cable as it passed from the coil, the effect of such kinks being to destroy or materially to interfere with the insulation, and it being necessary, should a kink occur, to stop the operation of laying the cable, and cut out the kink, and join the two severed portions of the cable. The uncoiling of the cable for the purpose of paying out and of laying down was attended with danger, as the men were liable to be caught in the bight of the rope, also the rate at which the cable could be uncoiled and laid down depended to some extent upon the facility with which the men so employed could handle the cable in the process of uncoiling. This service required a great number of smart active men, who were paid a higher rate of wages than for other ordinary services.

On the 18th of December, 1854, the plaintiff entered into a contract with the government to lay down and establish an electric telegraph communication between Varna and Balaklava and Balaklava and Eupatoria, and subject to the following amongst other conditions,—the government to appoint an experienced naval officer to accompany the plaintiff's vessel, who would certify as to the shipment of the cable: the satisfactory completion also to be certified by an engineer.

In the course of the preparations for carrying out this contract, a cone was con-

structed with poles on the [275] works of the plaintiff, and a small cable coiled round such cone, and drawn off at different speeds, for the purpose of ascertaining the effect on the kinking; but the cable was not spread out and formed into a flat coil, as on board the vessel for the laying; and the experiment was stated not to have been satisfactory, or sufficient to dispense with the necessity of an experiment on a larger scale as to the utility of a cone in the laying of a submarine cable, or to have fortified the judgment of the plaintiff to a greater extent than he was already fortified by theoretical considerations as to the utility of a cone in laying a cable at sea, and in deep water, under the circumstances ordinarily attending the laying a submarine telegraph cable. This experimental cone was made in the works of the plaintiff, from which the public were excluded, and came to the knowledge of many persons employed in those works; but it did not appear to have come to the knowledge of the public generally, or to have been in use by any other persons, or in any other manner than for the purpose of such experiment.

The Varna cable was made at the works of the plaintiff at Gateshead, and shipped from the wharf of those works into a vessel called the "Black Sea," the property of the plaintiff. The vessel was fitted with a cone and external supports, as described in the specification. The cable was coiled round such cone, the coil being supported at its outsides by vertical supports arranged in a circle, as described in the specification. The "Black Sea," with the cable so coiled in the hold, started on her voyage, but, meeting with an accident from bad weather, was compelled to put into the Thames; and the cable was transferred from the "Black Sea" to the "Argus," and formed into a coil, and coiled about a cone, and supported at its exteriors in the same manner as in the "Black Sea."

[276] Precautions were taken to prevent what was going on at the works of the plaintiff becoming known; and precautions were taken to conceal the fact of the "Black Sea" being in the Thames: but, during the original shipment of the cable, and during its transference from the "Black Sea" to the "Argus," various persons other than those on board in the employ of the government and of the plaintiff, visited the "Black Sea" and the "Argus"; and such persons had the means of becoming acquainted with the apparatus so constructed: but it did not appear that any use was made of such knowledge, or that an apparatus consisting of a cone about which the cable was coiled, or of a cone in combination with external supports, was in use by others than the plaintiff before the date of the said letters-patent, or by the plaintiff before the date of the said letters-patent, except in executing the contract as hereinafter mentioned.

The "Argus," with the cable so stowed, sailed for the Black Sea on the 1st of March, 1855. On her arriving there, the top of the cone and rings, as described in the specification, were applied to and adjusted, and the laying down of the cable was completed on the 26th of April, 1855. The apparatus described in the specification of the letters-patent of the 15th of May, was employed in laying down such cable under the contract of the 15th of December, 1854. The plaintiff received an agreed or stipulated sum for the whole contract, the laying the cable under that contract, and the means or apparatus to be employed in the execution of that contract, being left to the plaintiff's choice and discretion.

The said letters-patent were applied for by the plaintiff in accordance with the intention previously entertained, of applying for such letters-patent in case the apparatus should prove successful in laying down the cable. The use of the said apparatus enabled the cable to be laid with fewer hands than the submarine [277] cables previously laid, and without the occurrence of any kinks.

The defendants, in May, 1856, fitted a vessel called the "Propontis," with a cylinder having a domed or hemispherical top, and fastened to the bottom of the vessel, with an outside cylinder of vertical supports arranged in a circle, and also fixed to the vessel. A submarine cable was coiled round this cylinder, the outside of the coil being supported by the vertical supports arranged in a circle or outside cylinder: the coil about the cylinder being thereby prevented from shifting. The cable, on being laid down, was passed through a hole in the deck and a hawse-tube, and another apparatus of the ordinary description, and drawn up against the cylinder as the laying down proceeded. The cylinder with the domed top assisted the paying out, and diminished the tendency of the cable to kink in the paying out and laying down, in the same manner, though not so perfectly, as a cone: and the outside cylinder or supports prevented the coil from shifting.

The defendants did not use any ring or rings, as described in the plaintiff's specification, adjustable to the height of the coil as the cable was payed out. The length of the cable laid by the defendants by the use of this apparatus was about 85 miles. The plaintiff was the first to use an outside cylinder, that is to say, vertical supports arranged in a circle and fixed to the vessel, in combination with a cone or internal cylinder about which the cable was coiled; and the coil being prevented from shifting in its place by the outside cylinder, and the cable as it payed out passing up against the cylinder: and such a combination was an improvement in the apparatus in use for laying down submarine telegraph cables before the laying of the Varna cable by the plaintiff.

[278] Apparatus for laying down a telegraphic cable, in which the cable was to be coiled about and drawn off a cylinder, and supported externally by cylindrical supports, was designed in the year 1852, as preparatory to laying down a submarine telegraphic cable, and drawings were made of such apparatus; but such apparatus was not published or used before the date of the plaintiff's patent.

It was contended, on behalf of the defendants, as matters of law,—first, that the use of supports placed cylindrically outside the coil round a cylinder, could not be an infringement of the above letters-patent,—secondly, that the letters-patent were invalid, because the provisional specification contained no description of or reference to the rings described and claimed in the specification,—thirdly, that the letters-patent were invalid by reason of a publication during the operations in the "Black Sea" and the "Argus" respectively, or one of them, of a material part of the invention claimed,—fourthly, that the letters-patent were invalid, by reason of the use by the plaintiff prior to the date of the letters-patent of the apparatus for which the letters-patent were granted, in executing a contract for profit, under the circumstances above stated.

The contrary was contended on behalf of the plaintiff: and the arbitrator decided each of the above points of law in favour of the plaintiff.

The title of the letters-patent was, —"Improvements in apparatus employed in laying down submarine electric telegraph wires." They were sealed on the 3rd of August, 1855, and dated the 14th of May, 1855.

The provisional specification left by the inventor at the office of the commissioners of patents, with his petition, on the 14th of May, 1855, was as follows:—

"I, Robert Stirling Newall, of Gateshead, do hereby declare the nature of the invention for 'Improvements **[279]** in apparatus employed in laying down submarine electric telegraph wires' to be as follows:—

"This invention consists of apparatus combined and acting in the following manner: —The cable or rope containing the insulated wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable, in being drawn off the coil, is prevented from kinking, by means of the cone; and there is a cylinder on the outside, which prevents the coil from shifting in its place. The cable passes over a pulley above the cone, and on to a break-wheel, round which it takes several turns, to obtain sufficient holding: and from the break-wheel it passes over the stern of the vessel on board which the cable or rope is placed: or, I use two or more break-wheels, the one behind the other; the cable or rope comes up from the hold of the vessel, and round the first break-wheel several times, then on to the second break-wheel, round which it also takes several turns. When the break is applied to the first wheel, it increases the friction on the second, and so on, according to the number of break-wheels used: or, I use two break-wheels coupled together either by spur-gear or cranks and connecting rods; the cable in such case passes round only a part of the circumference of each. There are grooves in the wheels, which guide the cable or rope from one to the other, and prevent its getting foul; or, a guide is used to push the cable from one side of the wheel to the other, so as to keep one part from riding over another."

The specification filed in the Great Seal Patent Office on the 14th of November, 1855, in pursuance of the conditions of the letters-patent, was as follows: —

"To all to whom these presents shall come, I, Robert Stirling Newall, of Gateshead, send greeting:

"Whereas, Her most excellent Majesty, Queen Vic-**[280]**-toria, by Her letters-patent, bearing date the 14th of May, 1855, in the eighteenth year of Her reign, did, for Herself, Her heirs and successors, give and grant unto me, the said Robert Stirling Newall, Her special licence that I, the said Robert Stirling Newall, my executors,

administrators, and assigns, or such others as I, the said Robert Stirling Newall, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for 'Improvements in apparatus employed in laying down submarine electric telegraph wires,' upon the condition (amongst others) that I, the said Robert Stirling Newall, by an instrument in writing under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said letters-patent:—

"Now know ye, that I, the said Robert Stirling Newall, do hereby declare the nature of the said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, that is to say:—

"This invention consists of apparatus combined and acting in the following manner:—The cable or rope containing the insulating wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable in being drawn off the coil is prevented from kinking, by means of the cone; and there is a cylinder on the outside, which prevents the coil from shifting in its place. The cable passes over a pully above the **[281]** cone, and on to a break-wheel, round which it takes several turns, to obtain sufficient holding; and from the break-wheel it passes over the stern of the vessel on board which the cable or rope is placed: or, I use two or more break-wheels, the one behind the other. The cable or rope comes up from the hold of the vessel, and round the first break-wheel several times, then on to the second break-wheel, round which it also takes several turns. When the break is applied to the first wheel, it increases the friction on the second, and so on, according to the number of break-wheels used: or, I use two break-wheels coupled together either by spur-gear or cranks and connecting-rods: the cable in such case passes round only a part of the circumference of each. There are grooves in the wheels, which guide the cable or rope from one to the other, and prevent its getting foul; or a guide is used to push the cable from one side of the wheel to the other, so as always to keep one part from riding over another. The greatest difficulty in laying down submarine telegraph wires or cables hitherto has been to limit the speed in paying them out; arising from the necessity of the leading off part of the coil being kept clear of the others, by a great number of men handling it, to prevent its getting into kinks, or becoming entangled one part with another. This is remedied by coiling the wire or cable round a cone (or several cones, if required), so that the wire in being drawn off the coil is prevented from, kinking by means of the cone. The apparatus I employ is shewn in the accompanying drawings, which represent a section and plan. A., B., C., D., is the cone: it is formed of wood, or it may be of iron, so as to prevent an even surface on the outside, so that the wire, in passing round it, may not be caught by any projection. This cone is firmly fastened to the bottom of the vessel, and reaches at least as high as the top of the coil. Around the **[282]** cone is formed a cylinder or series of uprights *m.*, strongly fastened to the bottom and deck, so as to prevent the coil of wire or cable which is coiled round the cone from shifting in its place. A strong iron ring or hoop is fastened outside the supports, to brace them together, at *n.* Over the cone is placed a pulley, one side of it being in a line with the axis of the cone.

"At a convenient distance between the cone and the stern of the vessel, is placed either one or two break-wheels, depending on the weight of wire or cable hanging over the stern, and the power of the break-wheel (which must be sufficient to prevent the cable from running out when the ship or vessel is passing over the greatest depth of water), so that by easing the break the wire may be payed out at the same speed, or nearly so, as the vessel is passing over the ground. I prefer the diameter of the break-wheel to be about eight or nine feet, and arranged in a frame-work, as shewn in the drawing. The cable is carefully coiled round the cone in horizontal layers, beginning from the outside next the cylinder, and coiling towards the cone. When the space is filled up, the bight of the rope is taken to the outside of the coil at *b*, and another layer is coiled, and so on, until the whole length is coiled round the cone.

"When the wire or cable is to be laid down, I place over the cone an apex or top, which is conoidal, as shewn in the drawing, or conical, and around this I suspend several rings of iron or other metal, by means of cords, so as to admit of adjustment at various heights over the cone, as at *c*. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed; and the combination of these parts of the apparatus prevents the wire or cable from running into kinks. The two rings nearest the coil are lowered, so as to be about six inches and a foot respectively above the coil as it is being payed out.

[283] "When the wire or cable is to be payed out, the end is led up through the rings over the pulley and round the break wheel; or, if two break-wheels are used, it is led round the first one several times to obtain adhesion, then round the second, and over the stern of the vessel to the shore, where it is made fast. The vessel then goes a-head, and the wire is drawn from the coil, sufficient friction being applied by the handle of the break-wheel or wheels to keep the wire or cable tight.

"Having thus described the nature of the apparatus I employ in laying down submarine electric wires, what I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone,—third, the use of the rings in combination with the cone, as described."

M. Smith, Q. C. (with whom was W. Stokes), for the plaintiff. 1. The arbitrator must be taken to have found that the cylinder used by the defendants is an infringement of the plaintiff's patent. The only question, therefore, on this part of the case, is, whether the use of "a cylinder having a domed or hemispherical top, and fastened to the bottom of the vessel, with an outside cylinder of vertical supports arranged in a circle, and also fixed to the vessel," could as a matter of law amount to an infringement. Now, the description of the plaintiff's invention in the specification is as follows:—"The cable or rope containing the insulating wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable in being drawn off the coil is prevented from kinking, by means of the cone: and there is a cylinder on the outside which prevents the coil from shifting in its place." There is no substantial difference between these two: **[284]** the object and purpose and the effect of both are precisely the same: the substitution of the cylinder for the cone is a mere transparent mechanical equivalent. If this would be any evidence of infringement to go to a jury, the finding of the arbitrator upon this point is clearly correct.

2. The next question is, whether the patent is invalid because the provisional specification contains no description of or reference to the rings described and claimed in the specification. This depends upon the 6th section of the 15 & 16 Vict. c. 83, which provides that "every petition for the grant of letters-patent for an invention, and the declaration required to accompany such petition, shall be left at the office of the commissioners, and there shall be left therewith a statement in writing, hereinafter called the provisional specification, signed by or on behalf of the applicant for letters-patent, describing the nature of the said invention." It is not necessary that the provisional specification should point out all the matters of detail which are required in the full specification. It is enough if it agrees with it in the statement of the general nature and object of the invention: and, if there be a difference, that is no ground for avoiding the patent. [Crowder, J. Must not the provisional specification point out all the material parts of the invention?] It is enough if sufficient be stated to bring all parties interested in the subject before the Attorney-General. And if, in the interval between the filing of the provisional and the complete specification, a more useful or convenient mode of carrying out the invention should present itself to the mind of the inventor, he is bound to specify according to the improved light which subsequent experience has thrown upon the subject. That has been done here. The inventor may, if he pleases, at once file a complete specification: s. 9. The prerogative of the crown as to **[285]** the grant of patents is wholly unaffected by the statute. The only provision for the avoidance of the patent is that contained in the 17th section, viz. for non-payment of stamp-duties at the periods prescribed. There is nothing to make it void because the provisional specification falls short of what it ought to contain, provided there be no fraud,—which is not found or suggested here.

3, 4. The third objection,—that the letters patent were invalid, by reason of a publication during the operations in the "Black Sea" and the "Argus" respectively, or one of them, of a material part of the invention claimed,—and the fourth,—that the letters-

patent were invalid, by reason of the use by the plaintiff prior to the date of the letters-patent of the apparatus for which the letters-patent were granted, in executing a contract for profit,—present substantially the same question. It is submitted that the use of the invention prior to the grant of the letters-patent did not go beyond the fair and legitimate limits of experiment. The experiment at the plaintiff's works at Gateshead is disposed of by the observations of the arbitrator. In order to ascertain the utility and practicability of the invention, it was essential that experiments should be made at sea and in deep water, under the circumstances ordinarily attending the laying a submarine telegraph cable,—with a vessel in motion, and under the action of the winds and waves, and of currents which might operate upon the machinery used for the purpose. The effect of these influences obviously could only be ascertained by the course adopted here. The utility of the invention could not be tested until the arrival of the vessel with the cable on board in the Black Sea. [Crowder, J. Was it put into use when the cable was transferred from the "Black Sea," the vessel in which it was first placed, to the "Argus?"] The [286] transfer from the one vessel to the other was merely the consequence of an accident: the cable was not "payed out." The rule upon this subject is well stated in the case of *In re Adamson's Patent*, 6 De Gex, M'N. & G. 420. There, a contractor for certain harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the works, he applied for a patent: and it was held that such user amounted to a dedication to the public, and that he was not entitled to a patent. The Lord Chancellor (Cranworth) says: "The petitioner admits that he completed his invention in May, 1855, and that he used it publicly for upwards of four months before applying for the patent. No doubt, an experiment might have been made; and, if made bonâ fide only for the purpose of testing the merits of an invention, I do not think it would have amounted to a dedication to the public: but where, as in the present case, thousands of persons had the opportunity of seeing the apparatus at work for a period of four months, during the carrying on of the petitioner's contract, and in the regular course of the undertaking, it is quite clear that no intention of applying for a patent originally existed; and, under such circumstances, and after the lapse of such a time, I must hold that there was a dedication to the public, and refuse the application." [Crowder, J. This invention was used in the carrying out of a contract.] But the contract had no reference to the invention. [Crowder, J. Nor had it in the case cited.] In order to test the utility of the invention, it was necessary that an experiment upon a large scale should be made. The arbitrator has found that there was no possibility of making a complete experiment on shore: and it is obvious that no satisfac-[287]-tory experiment could be made even at sea, except in the performance of some contract. The laying down the cable in the Black Sea was not a public use of the invention within the meaning of the statute and the letters-patent: *Morgan* v. *Seward*, 2 M. & W. 544, 559. [Crowder, J. Does the arbitrator find here that what was done in the Black Sea was done merely for the purpose of experiment?] He does not in terms find so; but that is the whole tendency of his finding: it is evident that in his judgment there was no publication.

Cleasby, contrà. The inventor by his specification claims three things,—"first, coiling the wire or cable round a cone,"—secondly, "the supports placed cylindrically outside the coil round the cone,"—thirdly, "the use of rings in combination with the cone as described." 1. In the first place, there has been no infringement. The claim distinctly points to a "cone" as an essential part of the invention. Any workman, looking at the specification, could not fail to understand from it that the material part of the plaintiff's invention is the cone: and, if so, the use of a "cylinder" could be no infringement.

2. There is a fatal difference between the provisional and the complete specification. The 6th section of the 15 & 16 Vict. c. 83, requires the provisional specification to describe "the nature of the invention." That necessarily means the whole invention. The manner in which it is to be carried into effect (and the best manner known to the inventor) is to be disclosed by the complete specification. But both must describe the invention accurately and completely. Nothing can be described as "the invention," in the complete specification, which has not already been described in the provisional specification. The inventor may in the [288] complete specification give additional

information as to the manner of carrying it out; but he has no right to add a scintilla to the invention contained in the provisional specification. The 3rd section of the act impowers the commissioners of patents to frame rules and regulations respecting the business of their office. One of the rules made in 1852, in pursuance of that authority, is as follows:—"The provisional specification must state distinctly and intelligibly the whole nature of the invention, so that the law officer may be apprised of the improvement, and of the means by which it is to be carried into effect:" see Norman on Patents, p. 240. Here, the provisional specification confines itself to the cone, altogether omitting all mention of the "rings," which appear to form a most material part of the alleged improvement. [Willes, J. A form of letters-patent is given in the schedule to the act. It recites the complete specification, if a complete specification has been filed under s. 9, or, if no complete specification has been filed, it makes it a condition that that shall be done: but, in either case, there is no reference in the letters-patent to the provisional specification, which seems to be a mere matter for the information of the law officer, and does not, as it seems, at all affect the validity of the patent. Unless you can make out that the provisional specification is conclusive as to what the invention is, there is nothing in this point.] It is not suggested that a mistake in describing the mode of carrying the invention into effect in the provisional specification, would affect the validity of the patent: but that the nature of the invention must be completely described (*a*). In *Croll* v. *Edge*, 4 C. B. 479, [289] a patent was held void by reason of a variance between the invention specified and that described in the title. In *Hancock* v. *Noyes*, 9 Exch. 388, there is a pretty strong intimation of opinion on the part of the court that a patent would be held void under a plea of non concessit, where the specification embraces something beyond the invention for which the patent was granted. In *Onions* v. *Crowley*, 1 Macrory's Patent Cases, 261, the plaintiff had taken out a patent for "improvements in the manufacture of certain parts of machinery used in spinning." The "deposit paper" lodged with the Attorney-General (for which the "provisional specification" is now substituted, and which was required to contain "an outline description of the invention,") began by describing the invention thus:—"This invention relates to certain parts of machinery used in spinning, which parts are known by the names of spindles and flyers. My improvements consist in casting such spindles and flyers from suitable moulds, instead of the mode now used for manufacturing such spindles and flyers, which present mode consists in making them all of iron forged and wrought:" and it concluded thus:—"I do not confine myself to the shape or size of flyer, but what I claim is the producing flyers of any shape and size by casting, after the principle above described." The specification described the invention thus:—"My invention has for its object the improvement of the manufacture of those parts of spinning machinery called flyers and pressers, and consists of combining the processes of casting and annealing in making such articles, in place of the means heretofore employed:" and it concluded,—"I would have it understood that what I claim is, the manufacture of flyers and pressers for spinning machinery, by casting them as herein described, and then causing them to be annealed." It was left to the jury as a question of fact, [290] whether the specification described the invention for which the patent was taken out: and the jury found that it did not.

3, 4. There was such a prior publication and user for profit of the invention in question as to invalidate the subsequent patent. The arbitrator finds, that, in December, 1854, the plaintiff entered into a contract with government to lay down an electric telegraph communication between Varna and Balaklava and Balaklava and Eupatoria. In the course of carrying that contract into effect, the invention was used; and thus it became public property. It may be that the experiments at the plaintiff's works at Gateshead did not amount to a publication: but what was done on board the "Argus" clearly did. It is said that this latter was a mere "experiment." No doubt, the plaintiff availed himself of the experience he obtained in the course of performing his contract with government to perfect his invention. But, in that sense, Stephenson, while constructing the great tubular bridge, might be said to have been engaged in an experiment. [Crowder, J. That would be a very

(*a*) See upon this subject, the evidence given by Mr. Carpmael and by the Master of the Rolls (Sir John Romilly) and the Solicitor General (Sir W. Page Wood) before a committee of the House of Lords, in 1851. Report, pp. 60, 379.

different case from this. The contract there would be for the construction of the bridge itself. Here, the contract entered into by the plaintiff was, to lay down the telegraph cable; the manner of doing it being left to his discretion and judgment.] Nihil simul inventum est et perfectum. At what period may the inventor of a thing be supposed to cease to make experiments? Was one voyage to satisfy the plaintiff as to the operation and effect of his improved method? or was he to go on making voyage after voyage? If he is allowed to make one profitable use of his discovery before obtaining a patent for it, why not more? In *Adamson's case*, 6 De Gex, M'N. & G. 420, there was but one user of the invention for profit, and yet that was held to be such a public use **[291]** of it as to avoid the patent. It is true that that was done under circumstances and conditions of greater publicity than could happen in this case; but the court cannot enter into nice considerations of the greater or less degree of publicity attending the user. The cases shew that any user prior to the grant of the patent, whereby a knowledge of the invention is imparted to the public, avoids the grant: *Wood* v. *Zimmer*, Holt's N. P. C. 58; *Losh* v. *Hague*, 1 Webster P. C. 202, Hindmarch, 95; *Carpenter* v. *Smith*, 9 M. & W. 300, 1 Webster P. C. 530, 534; *Mullins* v. *Hart*, 3 Car. & K. 297. In *Morgan* v. *Seaward*, 2 M. & W. 544, there was no user in the carrying into effect any contract: the invention was not used at all for any beneficial purpose: nor was it a thing that was capable of being used by itself. The arbitrator in stating this case has guardedly omitted to state that what was done on board the "Argus" in the Black Sea was a mere experiment. It is plain that, at the time the plaintiff put the cone on board that vessel, he had not made up his mind to apply for a patent: but that he afterwards did so in pursuance of an intention to take out a patent, if he found it desirable.

M. Smith, in reply. 1. The infringement seems to be conceded. 2. The provisional specification sufficiently describes "the nature of the invention:" it was not necessary that it should go on to describe the mode of carrying it into effect; that being the office of the complete specification. And there is no substantial variance here between the two instruments. The use of the rings was a mere mode of carrying the invention into effect,—for managing the apparatus in drawing the cable off the cone. But, supposing there was a variance, it would not, in the absence of fraud, avoid the patent: *Cook* v. *Pearce*, 8 Q. B. 1044. 3, 4. The **[292]** arbitrator expressly finds that the experiments at the works at Gateshead were incomplete and unsatisfactory. Indeed it is manifest that no experiment, except upon a scale which would be impracticable unless conducted as this was, would have sufficed to enable the inventor to judge of the utility of his invention. The circumstance of the experiment having been tried in the performance of a contract which, if successful, would produce profit, does not make it the less an experiment. Besides, the contract with government was, for making and laying down the cable, not for the apparatus whereby the operation of laying it down was to be performed. In *Bentley* v. *Fleming*, 1 Car. & K. 587, it was held, by Cresswell, J., that, if the inventor of a machine lend it to another, in order to have its qualities tested, and that other use it for some weeks in a public room, this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters-patent for it. [Crowder, J. That case was moved in the court in banc, but upon another point: which so far strengthens its authority: 1 C. B. 479.] In Coryton on Patents, p. 93, it is said "The question of 'user' is almost entirely one of fact, to be dealt with according to the circumstances of each particular case. In *Hartley* v. *Howland*, London Journal, 1852, the latitude given to the patentee was very great. The manufacture was glass, and the publication contended for the open use of the plaintiff's invention by the predecessor of the defendant during the period of three months (March to May, 1835), in a factory employing seventy men. The question put to the jury by the learned Chief Baron, was whether that constituted a sufficient publication to the trade and the world to deprive the plaintiff of the right to take out a patent. The jury found a verdict for the plaintiff." **[293]** If the question be one of fact, it is here disposed of by the finding of the arbitrator.

Cur. adv. vult.

Byles, J., now delivered the judgment of the court:—The first objection of the defendants was, that the defendants' apparatus is not an infringement of the plaintiff's invention.

It was for the arbitrator to decide any question of fact; and the court, therefore, are not at liberty to interfere with his finding, unless they see that there was no

evidence of infringement before him. But the substitution by the defendants of a cylinder having a domed or hemispherical top, for the cone or the cone with the conoidal apex in the plaintiff's apparatus,—both the plaintiff's and the defendants' apparatus being used for the same purpose and in nearly the same manner,—is, in our judgment, not only evidence, but strong evidence, to support the arbitrator's finding.

The second objection was, that the provisional specification contained no mention of the rings claimed in the full specification.

But the office of the provisional specification is only to describe generally and fairly the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out: otherwise the provisional specification must be as full as the complete specification, and drawn with as much care and deliberation. Indeed, the statute itself indicates this distinction between the provisional and the final specification; for, it calls the latter the complete specification,—implying that the former is, or may legally be, in some respects executory and incomplete. Moreover, it enacts (s. 6) that the provisional specification is to describe the nature of the invention, and no more: but when the statute comes to speak of [294] the complete specification, its language is altogether different: it enacts (s. 9) that the complete specification shall describe, not only the nature of the invention, but also the manner in which it shall be performed; and not only describe, but particularly ascertain it. We therefore think that the provisional specification in the case under consideration sufficiently describes the nature of the invention, though it does not enter into a detail of all the means by which it is to be accomplished.

The third objection was, that the plaintiff's invention had been disclosed and published before the date of the letters-patent.

But a necessary and unavoidable disclosure to others, such as here appears, if it be only made in the course of mere experiments, is no publication; although the same disclosure, if made in the course of a profitable use of an invention previously ascertained to be useful, would be a publication: *In re Adamson*, 25 Law Journ. Ch. 457.

The answer to this third objection, therefore, depends on the fourth and last and main objection, which was this, —That the use of the apparatus for profit before the date of the letters-patent, was a use which avoided the patent.

It must be and is conceded, on the part of the plaintiff, that an inventor's public use, for profit, of an invention already ascertained by previous experiment to be useful, is a gift of the invention to the public, and avoids a subsequent patent. And it is conceded by the defendant, that a use before the patent, merely experimental and tentative, does not avoid it.

Now, the use here made of the invention in actually laying down the cable, was a use which partook of both characters. On the one hand, it was experimental and tentative; but, on the other, the experiment itself turned out, not only successful, but beneficial to the inventor at the moment.

[295] The true question, therefore,—looking at the decision of the arbitrator, seems to be this: is an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, necessarily a gift of the invention to the world?

We think it is not. In the case under consideration, experiments on dry land are found to be indecisive. The decisive experiment still remains to be made on a large scale, and in deep water. An opportunity presents itself, in the course of a government contract, —not a contract for the use of this particular apparatus, but a contract for laying down the cable by any means the contractor may select. The experimentor is obliged either to experiment in a way that may turn out to be useful in the particular instance, or else not to make any efficient and decisive experiment at all. The coincidence of an experiment with actual immediate profit or advantage from it, if successful, is unavoidable.

Suppose, even, that this coincidence had been accidental. Suppose that, in the course of the voyage, the inventor had tried some further and new experiment, with an alteration of the apparatus, which alteration had at once answered some useful purpose; surely that further invention would have been his property: otherwise, a man cannot have the property in an invention which starts from his brain so fully matured and armed that it not only succeeds at the first trial, but accomplishes on that very trial some profitable or useful purpose.

If, indeed, the plaintiff in the present case had on other and subsequent voyages

used his apparatus, and unnecessarily delayed his application for a patent, he would have given his invention to the public. But here the arbitrator must be taken to have found,—as he well might on the evidence before him,—that the [296] inventor lost no time, but applied for his patent with reasonable expedition.

There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

DALTON *v.* THE SOUTH-EASTERN RAILWAY COMPANY. May 8th, 1858.

[S. C. 27 L. J. C. P. 227; 4 Jur. N. S. 711; 6 W. R. 574. Applied, *Pym* v. *Great Northern Railway*, 1863, 4 B. & S. 407. See *Wolfe* v. *Great Northern Railway*, 1890, 26 L. R. Ir. 554. Applied, *Taff Vale Railway* v. *Jenkins*, [1913] A. C. 6.]

In an action founded upon Lord Campbell's Act, 9 & 10 Vict. c. 93, for injury resulting from death, legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned.—Therefore, in an action by a father for injury resulting from the death of his son through the negligence of the servants of a railway company, it appeared that the son, who was twenty-seven years of age, and unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, and of taking them on those occasions presents of tea, sugar, and other provisions, besides money, amounting in the whole to about 20*l.* a year: Held, that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute. —But held, that it was not competent to the jury to award him compensation for the expenses incurred by him for his son's funeral or for family mourning.

This was an action brought by the plaintiff, as administrator of his deceased son, to recover damages under Lord Campbell's Act, 9 & 10 Vict. c. 93, by reason of the deceased having been accidentally killed through the negligence of the defendants' servants.

The declaration stated that, before and at the time of the committing of the grievance thereinafter mentioned, the defendants were common carriers of passengers for reward by trains of carriages by a certain railway, and, before the committing of the grievance thereinafter mentioned, the said intestate, at the request of the defendants, became, and at the time of the committing of the said grievance, at their said request, was, a passenger in a certain train of carriages, to be by the defendants carried, for reward to them in that behalf, by the said train of carriages by and along the said railway from one place to another place: and that, before and at the time of the committing of the said grievance, the defendants were possessed of a [297] certain other train of carriages, and were causing the same to proceed along the said railway, and had the management, government, and direction thereof upon the said railway: yet that the defendants, by their servants in that behalf, took so little and such bad care in and about the carrying of the deceased as aforesaid by the first-mentioned train, and in and about the management, government, and direction of the said secondly-mentioned train, that, by reason of the said carelessness and negligence, the said secondly-mentioned train came into violent collision with the first-mentioned train, and greatly crushed and broke the carriages whereof it consisted, and by means thereof the said deceased was killed, leaving him surviving his father, the plaintiff, and his mother, Sarah Dalton, for whose benefit this action is brought; and, after his death, administration of all and singular the goods, chattels, and credits which were of the deceased at the time of his death, in due form of law was granted by the Right Reverend Father in God, John Bird, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan: And the plaintiff, as administrator as aforesaid, claimed 600*l.*

The defendants pleaded not guilty; whereupon issue was joined.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term. The action was brought by the plaintiff, as administrator, under the 9 & 10

Vict. c. 93, to recover damages against the defendants for the loss sustained by himself and his wife through the death of their son, who was accidentally killed whilst a passenger in a train on the South Eastern Railway, which on the 28th of June last, through the negligence of the company's servants, came into collision with another train on the defendants' line between the Blackheath and Lewisham stations.

[298] It was admitted on the part of the defendants that the death of Thomas Dalton was the consequence of negligence on the part of their servants, and that that negligence was of such a character as would have enabled the deceased himself to recover damages for any injury short of death which might have resulted to him thereby: but it was insisted that the plaintiff and his wife had sustained no such injury by the death of their son as to enable them to maintain an action under the statute.

As to this the facts were these:—The deceased, who was about twenty-seven years of age, and unmarried, resided in London, where he worked as a piano-forte maker, earning about 3l. a week. For the last seven or eight years he had been in the habit of visiting his father and mother, labouring people at Dartford, once a fortnight, and on these occasions took them presents of tea, coffee, sugar, meat, &c., which with occasional donations of money averaged about 20l. a year.

On the part of the company, it was submitted, that, under this statute, the plaintiff could only recover in respect of the loss of some legal right. On the other hand, it was submitted that it was enough that the plaintiff should have had a reasonable expectation of a continuance of pecuniary advantage from the remaining alive of his son: and, in addition to compensation for that loss, the plaintiff claimed 10l. which he had expended upon his son's funeral, and also the cost of providing himself and wife with mourning.

The learned judge told the jury, that, in his opinion, the plaintiff and his wife had sustained such a pecuniary injury from the death of their son as to entitle them to recover damages under the statute: and he directed them to find separately the sums they thought the plaintiff entitled to in respect of the mourning and the funeral expenses.

[299] The jury accordingly returned a verdict for the plaintiff,—assessing the damages as follows:—80l. for the plaintiff, and 40l. for his wife, in respect of the pecuniary loss sustained by their son's death; 10l. for the funeral; and 15l. for mourning: and leave was reserved to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no evidence of such damage as would entitle the plaintiff to maintain an action under the statute, or to reduce the damages by deducting the sums allowed for funeral expenses and mourning.

Hugh Hill, Q. C., having on a former day in this term obtained a rule nisi,

Montagu Chambers and Needham, shewed cause. The first question is whether the plaintiff has sustained such an injury from the death of his son as to entitle him to maintain the action. Now, the act is intituled "An act for compensating the families of persons killed by accidents." The first section enacts, "that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." And the 2nd section enacts "that every such action shall be for the benefit of the wife, husband, parent (which by the interpretation clause, s. 5, includes father and mother, and grandfather and grandmother, and stepfather and stepmother), and child of the per **[300]** son whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." Can it be said that "injury" did not result to the parents of this young man from his death? He was not residing with them, it is true; but he was constantly visiting them, and materially contributing to their support. [Crowder, J. It will be said on the other side that many circumstances might have occurred to induce the son to discontinue these contributions.] The court will rather contemplate the continued performance of

a duty dictated alike by nature, morality, and religion. The damage can only be measured by the state of facts at the time, and the probability of their continuance. It has already been decided in many cases that compensation may be awarded for wounded feelings in addition to pecuniary damage. [Byles, J. Except as to the 10*l.* and 15*l.*, this point hardly arises. There is no complaint of the direction. The law casts upon a son a legal obligation to maintain his parents. The plaintiff therefore has clearly sustained some damage by his son's death; and the quantum is not in question.] The 7th section of the 43 Eliz. c. 2, enacts that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed; upon pain that **[301]** every one of them shall forfeit 20*s.* for every month which they shall fail therein." Incidentally, it is true, that is in aid of the parish; yet it is a duty which is distinctly fixed upon the parent or child. If the compensation under this statute were to be limited by the strict legal rights and liabilities of the parties, a very small class of persons indeed would be benefited by it. Take the case of a man having a son at college, or studying for a profession, to whom an allowance is made suitable to his station, could it be said, that, because the father was under no legal obligation to continue the allowance, the son would sustain no pecuniary loss by his death? It is enough if he is deprived of those just expectations of pecuniary aid which but for the death he would have a right to entertain. In the case of an action for the seduction of a daughter, the legal foundation of the action is the service of the daughter: but it never was suggested that the father could not recover damages because the daughter was under no legal liability to render service. The case of *Waters* v. *Towers*, 8 Exch. 401, strongly supports this argument. That was an action for a breach of contract in not fitting certain mill-gearing in a workmanlike manner, and for not completing it within a reasonable time; the declaration alleging for special damage that the plaintiffs lost the benefit of a certain contract. It appeared that, in consequence of the defendants' breach of their contract, the plaintiffs, who carried on the business of bobbin-spinners in Cumberland, were unable to fulfil a (verbal) contract which they had made with two of the members of their firm, who carried on a separate business in Manchester, for the supply of goods as alleged in the declaration. On behalf of the defendants, it was submitted that the loss of profit upon that transaction was too remote a consequence to be the subject of special damage; and that, even if that **[302]** were not so, still the plaintiffs could not recover any damages in respect of it, by reason of the community of the parties, and also that the contract was invalid by the 17th section of the statute of frauds, 29 Car. 2, c. 3, the value of the goods agreed to be supplied being above 10*l.* A verdict was taken for the plaintiffs for 14*l.*, with leave to move to increase it by 113*l.*, the estimated profit which would have accrued to the plaintiffs, if their contract for the supply of the bobbins had been fulfilled. Upon cause being shewn against a rule obtained for that purpose, it was submitted that the contract was not binding on the parties, inasmuch as no action at law could be maintained by the three plaintiffs against two of themselves, and also because the contract was void by the statute of frauds. But Alderson, B., said: "If a person undertakes to make a certain article for another, and to deliver it to him on a particular day, but fails to do so until a year afterwards, it would be most unreasonable that the latter should not recover any damage because the contract was not in writing. The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, 'We should have made such and such a contract, if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract." And the rule was made absolute. [Aspland, Amicus Curiæ, mentioned a case of *Bramall* v. *Lees*, tried before Crompton, J., at Liverpool, at the Spring Assizes, in 1857, where the father of a child twelve years of age recovered a verdict for 15*l.* against a druggist, who had sent laudanum instead of tincture of rhubarb, and so caused the child's death; it appearing that the child was at the time incapable of earning anything towards its support, it was insisted on the **[303]** part of the defendant that the parents sustained no pecuniary injury from its death, and a

rule nisi was granted to set aside the verdict, but, being discouraged by the court, it was ultimately allowed to drop (see 29 Law Times, 82, 111, 166). Then, as to the funeral expenses and mourning, —it was incumbent on the plaintiff to bury his son decently, and reasonable to put on mourning for his loss. These expenses, therefore, as much constituted a consequential damage as if the son had sustained an injury short of death, and the plaintiff had carried him home and incurred expense in medical and other attendance upon him. [Byles, J. It may be said on the other side that the duty of burying the body properly devolved upon the parish officers, under the 7 & 8 Vict. c. 101, s. 31.]

Petersdorff, in support of the rule. This case presents a question of no ordinary difficulty. Since the passing of the statute, no intelligible rule has been laid down for the computation of damages: and it remains for this court,—or for the court of Exchequer in a similar case now pending before it, of *Franklin* v. *The South Eastern Railway Company*, arising out of the same accident,—to say what is the legitimate interpretation of the act. Is the test for the measure of damages to be the calculable or ascertainable pecuniary loss which the survivor has sustained, as was suggested by Pollock, C. B., in *Gillard* v. *The Lancashire and Yorkshire Railway Company*, 12 Law Times, 356? Or is the test to be the hope or expectation of benefit from the continuance of the life of the deceased? If the former is to prevail, this rule must be made absolute. If the latter, see the incalculable number of degrees of which that expectation may consist,—from almost ab-**[304]**-solute certainty to the extreme of doubt. [Crowder, J. Why would not reasonable expectation do,—that which a reasonable man might fairly expect?] Who is to say what is reasonable expectation here? [Crowder, J. The jury, perhaps.] In *Blake* v. *The Midland Railway Company*, 18 Q. B. 93, it was held, that, in an action under this statute, by the wife, husband, parent, or child, of a person killed by misfeasance, the jury, in estimating the damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. Coleridge, J., at the conclusion of the judgment in that case, says: "We are of opinion that the learned judge at the trial ought more explicitly to have told the jury, that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband; and that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive." [Byles, J. To entitle you to succeed on the first part of your rule, you must shew that the plaintiff was entitled to no damages at all.] The question is, has the plaintiff through the act of the defendants' servants, sustained any calculable pecuniary loss? [Crowder, J. Can any reasonable being doubt that this plaintiff had a pecuniary interest in his son's life? For seven or eight years he had been in the regular habit of contributing to the support of his parents. It is true he might not always be of ability to continue this: but the same uncertainty exists in all cases where the loss is of an income arising from personal exertions.] There is little or no analogy between earnings and accidental or occasional gifts like these. The statute contemplates a "recompense" for the loss of profit arising from some legal obligation. The relation of parent and child is not necessary to create **[305]** the mere moral obligation to administer to the wants of the aged and destitute. The true rule, it is submitted, is this, where the son is not emancipated from his parent's roof, and he by his industry contributes to his parent's support, to the extent of the pecuniary value of that contribution the parent would be entitled to compensation: but, where the son is emancipated, the circumstance of his having been in the habit of assisting his parent out of the proceeds of his labour, will not afford the latter a ground of action in respect of the discontinuance of these voluntary contributions. Suppose the son had happened to be out of employ at the time of the accident, would that circumstance have affected the measure of compensation? All these considerations shew the difficulty and the danger in dealing with this statutory right to compensation for a pecuniary loss. As to the funeral expenses, — these clearly are not within the act. The duty of a parent to bury his child, or of a child to bury his parent, if of ability, stands upon a totally different footing, and is altogether independent of accident.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

The great question in this case is disposed of by the judgment of the court of Exchequer in *Franklin* v. *The South Eastern Railway Company*, 3 Hurlst. & N. 211, by

which it is decided, with our entire concurrence, that legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act, 9 & 10 Vict. c. 93; but that the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of **[306]** that expectation being disappointed, and the probable pecuniary loss thereby occasioned (*a*).

In respect, therefore, of the sum of 120*l.*, given as damages upon that footing, the verdict must stand.

As to the expenses of the funeral and mourning, however, we think they ought not to be allowed. The subject-matter of the statute, is, compensation for injury by reason of the relative not being alive: and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss

The rule must, therefore, be absolute to reduce the verdict by those expenses, and discharged as to the residue.

Rule accordingly.

[307] JOHN THOMAS METCALFE AND GEORGE METCALFE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. April 28th, 1858.

[S. C. 27 L. J. C. P. 205; 6 W. R. 498. Explained, *Vaughton* v. *London and North Western Railway*, 1874, L. R. 9 Ex. 97. Adopted, *M'Queen* v. *Great Western Railway*, 1875, L. R. 10 Q. B. 577. Explained, *Shaw* v. *Great Western Railway*, [1894] 1 Q. B. 380.]

In an action against a common carrier for the loss of a parcel, a replication that the loss arose from the felonious acts of the defendants' servants is a good answer to a plea founded upon the carriers' act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value exceeded 10*l.*, and was not declared at the time of delivery to the carrier.—In an action against a railway company, as common carriers, for the loss of goods, the defendants pleaded a plea founded upon the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value of the goods exceeded 10*l.*, and was not declared at the time of the delivery to them; to which plea the plaintiffs replied that the loss arose from the felonious acts of servants of the company.—It was proved that the goods in respect of which the action was brought consisted of articles of jewellery, &c., contained in a tin box, which was inclosed in a deal box fastened with a padlock; that the box was brought to the company's station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and that, when the box was delivered to the plaintiffs there by a porter of the company, it was found that the outer box had been opened, and the tin box and its contents abstracted from it:—Held, no evidence for the jury of a felony by the company's servants.—A box containing goods, some of which were the property of A., and some the property of B., was delivered on their behalf by a third person at a railway station, to be carried from Worthing to London. The box was addressed

(*a*) Pollock, C. J., in giving the judgment of the court in that case, says: "The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed: and the only way to ascertain what it does is to shew what it does not mean. Now, it is clear that damage must be shewn, for, the jury are to 'give such damages as they think proportioned to the injury.' It has been held that these damages are not to be given as a solatium, but are to be given in reference to a pecuniary loss. That was so decided for the first time in banc in *Blake* v. *The Midland Railway Company*, 18 Q. B. 93. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for, they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."

to A., and was received by him in London, and he paid the carriage:—Held, that there was evidence of a joint bailment in respect of which a joint action might be brought by A. and B. for the loss of the goods.

The declaration stated that the defendants were, and still are, common carriers by railway for hire, and the plaintiffs, at the request of the defendants, caused to be delivered to the defendants, and the defendants then accepted and received of the plaintiffs, a certain box, and divers goods, to wit, one box, two watches, one snuff-box, one purse, one sovereign, one ring, one pencil case, four shirt-studs, one pin, two shirt-cuttlings, of and belonging to the plaintiffs, therein contained, to be safely and securely carried and conveyed by the defendants, as such carriers for hire as aforesaid, from a place called Worthing, upon the said railway of the defendants, to a certain other place, to wit, London, and there safely to be delivered to the plaintiffs for a certain reward to be paid by the plaintiffs to the defendants in that behalf; yet the defendants did not nor would safely and securely convey or deliver the said box and the said goods as aforesaid, but, on the contrary, so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, default, and improper conduct of the defendants, and not otherwise, the said goods became and were, and still are, wholly lost to the plaintiffs: Claim, 100*l*.

The defendants pleaded,—first, not guilty. secondly, that the plaintiffs did not cause to be delivered to the defendants, nor did the defendants accept or receive of the plaintiffs, the said box, or the said goods, or any of them, upon the terms or for the purposes in the declaration in that behalf alleged, -thirdly, that the goods [308] in the declaration mentioned were contained in one outside package or parcel, that is to say, the said first-mentioned box, and, irrespective of the value of the box secondly mentioned and the said purse, exceeded in value the sum of 10*l*., and were all of them, except the said purse and box secondly mentioned, articles and property of sorts and descriptions mentioned in the 1st section of a certain statute made and passed in the session of parliament holden in the eleventh year of the reign of King George the Fourth and the first year of the reign of King William the Fourth [11 G. 4 & 1 W. 4, c. 68], commonly called "The Carriers' Act," and within the intent and meaning thereof, and intended to be protected thereby,—which said first-mentioned box, so being the outside package or parcel in which the said goods were contained, and accessory thereto, was delivered, with the said goods therein, by the plaintiffs to the defendants as common carriers, to be carried by them, to wit, for hire, to the place in the declaration mentioned; that the said box secondly mentioned, and the said purse, were envelopes and inclosures in which respectively certain parcel of the residue of the said goods were contained, and accessory thereto; that, before and at the time when the said first-mentioned box, and the said goods, were so delivered as aforesaid, the defendants had caused to be, and there was, affixed, in legible characters, in a public and conspicuous part of a certain office of the defendants for the receipt of packages and goods to be carried by them as such common carriers as aforesaid, a notice under and according to the true intent and meaning of the said statute, whereby they the defendants notified that a certain rate of charge therein mentioned was required to be paid to them, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe [309] conveyance of articles of the several kinds and descriptions in the 1st section of the said act mentioned; and that, at the time of the delivery of the said package or parcel, to wit, the said first-mentioned box and the said goods to the defendants as aforesaid, the value and nature thereof, to wit, of the said goods so exceeding such value as aforesaid, were not declared by the person delivering the same, or any one, and neither the said increased charge was then or at any time paid or offered, nor was any engagement to pay the same accepted by the defendants or the person receiving the said first-mentioned box and the said goods, or any other person whatever.

The plaintiffs joined and took issue upon the above pleas; and, for a second replication to the third plea, said that the loss and injury in the declaration, and every part thereof, arose from the felonious acts of servants of the defendants then being in their employ, and not otherwise.

The defendants took and joined issue on the plaintiffs' second replication.

They also demurred to the second replication, on the ground "that the defendants, under the circumstances stated, were not liable for the felonious acts of their servants."

Spinks, in support of the demurrer. There is nothing in the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, to render a common carrier liable for the felony of his servants: to constitute an answer to the third plea in this case, therefore, the replication should have alleged, as did the new assignment in *Butt* v. *The Great Western Railway Company*, 11 C. B. 140,—that the felony occurred through the gross negligence of the defendants. [Willes, J. That case has been very much misunderstood. It was not, as is assumed in some of the text-books, a **[310]** case under the statute at all It was twice argued. On the first occasion, the replication being like this, I demurred on the ground that carriers are not answerable at common law for the felonious acts of their servants. The plaintiffs then amended by new assigning, alleging that the article was feloniously stolen by certain servants of the defendants whose names were unknown to the plaintiffs,—"whereby the same was not safely and securely carried, but became and was wholly lost to the plaintiffs, as in the declaration mentioned." The defendants again demurred, and, upon the argument, the court suggested (and the plaintiffs adopted) a further amendment, by replying a loss by felony, and that such felony arose through the gross negligence of the defendants. It was there assumed on all hands that felony did not excuse gross negligence. Crowder, J. *Butt* v. *The Great Western Railway Company* is explained in a subsequent case of *The Great Northern Railway Company, Appts., Rimell, Respt.*, 18 C. B. 575. Jervis, C. J., there said: "I think the judge has altogether misconceived the decision of this court in the case of *Butt* v. *The Great Western Railway Company*, because, when the defendants set up a defence under the statute, negligence has nothing to do with the question. The rule is this, under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and, on the other hand, under the carriers' notice, negligence is the sole question, felony is immaterial. Under the statute, felony is an answer; under the notice, negligence. That is the effect of *Butt* v. *The Great Western Railway Company*, which was a case of felony permitted or occasioned by the negligence of the defendants." And my Brother Willes added, —"I am glad the Lord Chief Justice has explained the case of *Butt* v. *The Great Western Railway Company*: for, in **[311]** some modern text-books (*a*), it is cited as a case upon the statute, which in truth it has nothing whatever to do with."] Those dicta conflict with the decision of the court of Queen's Bench in the case of *Hinton* v. *Dibbin*, 2 Q. B. 646, 2 Gale & D. 36. [Willes, J. Not at all.]

Raymond, contrà, was not called upon.

Crowder, J. The plea is answered by the replication, and consequently the plaintiffs are entitled to judgment.

Willes, J., and Byles, J. concurring,

Judgment for the plaintiffs.

May 24th.—The issues of fact came on to be tried before Byles, J., at the sittings in London in Trinity Term, 1858. The facts that appeared in evidence were as follows: —The plaintiffs are brothers, and were both acting as agents of a Mr. Hollingham of Worthing in the sale of an article used for agricultural purposes, called English guano. They both lodged at Mr. Hollingham's house in Augusta Place, Worthing. On the 17th of August, 1857, they left that place for the purpose of proceeding to London by the 2.40 p.m. train, accompanied by a man named Oliver, a servant of Mr. Hollingham, **[312]** who carried their carpet-bags. On their arrival at the station, it was discovered that a deal box which they had intended to take to London with them had been left behind, and accordingly they sent Oliver back to Augusta Place for it, with instructions to forward it to the Queen's Head Inn, Borough, by the next train. On his return to Augusta Place, Oliver received the box from Mr. Hollingham, with a direction on it to "J. T. Metcalfe, Queen's Head, Borough," and delivered it to a porter at the station at Worthing, in time for the 4.20 train. The box when delivered to Oliver was secured by a padlock, and had in it, amongst other things, the articles enumerated in the declaration, inclosed in a tin box, some of the articles being the property of each of the brothers. On the morning of the 18th of August, between 9 and 10 o'clock, the box was delivered at the Queen's Head by a porter belonging to the company, to whom

(*a*) See Chitty and Temple on Carriers, 55, 140; Chitty on Contracts, 6th edit. (by Russell) 437; Addison on Contracts, 4th edit. 515; Smith's Mercantile Law, 5th edit. (by Dowdeswell) 286. 288 (*i*); 1 Smith's Leading Cases, 4th edit. 176.

a receipt was given for it by John Thomas Metcalfe, who paid for the carriage. The box was immediately carried up stairs to a bed room, and opened by George Metcalfe, when it was found that the tin box and its contents had been abstracted. These facts were proved by the plaintiffs, Mr. Hollingham, and the man Oliver.

On the part of the plaintiffs it was insisted that there was ample evidence to prove the allegation in the replication that the loss arose from the felonious acts of servants of the defendants; or, at all events, there was enough to call upon the defendants for explanation.

For the defendants it was submitted, that there was no evidence to go to the jury of any felony by a servant of the company, and that there was no evidence of any joint bailment.

The learned judge directed a verdict to be entered for the plaintiffs upon the first and second issues, and [313] for the defendant upon the third plea and the replication thereto, reserving leave to the plaintiffs to move to enter a verdict for 30*l.* if the court should be of opinion that there was any evidence to support the replication which ought to have been submitted to the jury; and also leave to amend by striking out the name of one plaintiff, if necessary,—and reserving leave to the defendants to move to enter the verdict for them on the second issue, if the court should be of opinion that there was no evidence of a joint bailment by the two.

Lush, Q. C. (with whom was Raymond), for the plaintiffs, now moved, pursuant to the leave so reserved to him, to enter the verdict for them. There was abundant evidence (unanswered, as it was, by any evidence on the part of the defendants,) to justify the jury in coming to the conclusion that the tin box and its contents had been abstracted from the outer deal box by some person in the company's employ whilst it remained in their custody. [Williams, J., referred to *The Great Northern Railway Company, App., Rimell, Resp.*, 18 C. B. 575.] There is a wide distinction between that case and the present: there was no evidence there of a felony having been committed at all,—nothing but the mere absence of delivery of the parcel at its destination. Here, it was proved that the box was delivered to the company at Worthing locked, and that it was delivered by them locked at the place to which it was directed in London. [Cockburn, C. J. It would be rather strong to presume merely from that, that a felony had been committed by a servant of the company.] It was surely enough to call upon the company to give some evidence in explanation. This is not a loss which could have occurred by negligence. [Byles, J. The box might have been exposed by negligence on the part of the defendants.] It was enough [314] for the plaintiffs to trace the box and its contents to the custody of the company. It is impossible in such a case to prove more. [Williams, J. We all know very well that there is danger of other persons besides the company's servants gaining access to parcels of value. Byles, J. You begin by shewing that the box is carried for you by the servant of a third person from Augusta Place to the railway station at Worthing.] There is no suggestion that the tin box and its contents were not in the other box at the time of its delivery at the Worthing station. [Cockburn, C. J. The statute was intended for the protection of the carrier in respect of valuable articles, which require more than ordinary care. That protection will be entirely withdrawn if felony is to be assumed without some reasonable foundation for it. It is incumbent on the plaintiff to prove, not the possibility, but the fact of a felony having been committed by a servant of the company.] It would be absolutely impossible to bring a charge of felony home to any one of the company's servants. [Williams, J. That only shews that it is a difficult thing to prove the exception which you rely on.] The evidence shews that a felony had been committed whilst the box was in the possession of the company: and there is no evidence that any person other than the servants of the company had an opportunity of getting at it. To hold that that is not evidence enough to call upon the company for an answer, will virtually operate as a repeal of the statute.

Cockburn, C. J., being a shareholder in the company, declined to take any part in the judgment.

Williams, J. I am of opinion that there ought to be no rule. I am ready to concede that this case does differ from that of *The Great Northern Railway Com* [315]-*pany, App., Rimell, Resp.*, 18 C. B. 575 (*a*), inasmuch as here there was evidence from

(*a*) In that case, a parcel was delivered to a porter of the railway company at the

which the jury might conclude that a felony had been committed by somebody. But the plaintiffs are not entitled to recover unless they shew affirmatively that the goods in question were lost by means of a felony committed by one of the company's servants. It is a general rule of law that every man is presumed to be innocent until proved to be guilty: and the servants of a railway company are not to be excluded from the benefit of that rule. Now, it is impossible to say that there was any evidence that the box in question was feloniously abstracted by one of the company's servants. If such a question were to be left to the jury, upon what is called a scintilla of evidence, whether or not the loss had occurred through the felony of a servant of the company, we all know too well the tendency of juries to find against railway companies, to doubt what would be the result. But, to hold such evidence as this to be enough would be altogether to deprive the company, as carriers, of the protection which the legislature has thought fit to throw around them in certain cases.

Willes, J. I am of the same opinion. All that the evidence here shews, is, that the box was given into the custody of a servant of the company at Worthing, **[316]** and that they were employed to carry it, without any notice of the nature and value of its contents; and that, when it reached its destination in London, it was found that a portion of its contents had been abstracted. That might have been done either by one of the servants of the company or by some other person. In order to make out a greater degree of likelihood that the act was committed by a servant of the company than by any one else, the plaintiffs might have shewn a primâ facie case had the defendants only been carriers of goods, or if it had appeared that the box could not have been exposed so that other persons coming to the railway might have had access to it. Everybody knows that that is not so. The servants of the company, probably too few in number, may have been obliged for a time to leave the box in the office, or in the van with the door open, when strangers might be about, ready to take advantage of the opportunity. To complete the circumstantial evidence here, there is wanting some fact which is more consistent with a loss by felony of a servant of the company than with any reasonable view of the case to the contrary. I think there was no evidence here upon which the jury ought to act, or upon which any reasonable being could act, in arriving at the conclusion contended for on the part of the plaintiffs.

Byles, J. The facts of this case are in some respects stronger, and in some weaker, than were those in *The Great Northern Railway Company, App., Rimell, Resp.* There was no proof that the box was safe at the Worthing station, or when it was placed in the van, or that it was placed in the van at all, or that the van was locked: nor was there any evidence as to what became of it on unloading in London, or when it was deposited at the terminus in London, or as to the mode of con-**[317]** veying it to the hotel where the plaintiffs were staying, except that one of the company's porters brought it there. There was nothing to exclude the supposition that the tin box might have been abstracted by some one else, so as to fix it upon a servant of the company. In *The Great Northern Railway Company, App., Rimell, Resp.*, it was proved that the parcel was placed by the porter in the usual receptacle, a locked box in the van; and yet Jervis, C. J., says,—"I think the judge was wrong in leaving the first question" (whether the parcel had been stolen by some one of the company's servants) "to the jury, because there was in my opinion no evidence whatever for them that any felony had been committed by any one of the servants of the company. In truth, unless the courts in cases of this sort take upon themselves the duty of deciding, the statute (11 G. 4 & 1 W. 4, c. 68), which was intended for the protection of the carrier, will become a dead letter: for, juries always will find felony as against a company. I think it is the duty of the presiding judge to withdraw the question altogether from the jury, and not to allow them an opportunity of finding in favour of the plaintiff in defiance of all evidence. I therefore think the judge of

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station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage-van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed:—Held, no evidence for the jury of the parcel having been stolen by a servant of the company.

the county-court in this case was wrong in leaving it to the jury at all, and that he ought at once to have directed a nonsuit." For these reasons, it seems to me that there is no ground for disturbing the conclusion of the jury.

Rule refused (*a*)[1].

May 26th.—Bovill, Q. C. (with whom was Creasy), in pursuance of the leave reserved to him at the trial, now moved **[318]** to enter a verdict for the defendants on the second issue, on the ground that there was no evidence of a joint bailment by the two plaintiffs. There was no joint-property in the box or its contents. The delivery of it to the company was by one of the plaintiffs only (John Thomas Metcalfe), and it was directed to him, and the carriage of it was paid by him. [Willes, J. Which was the owner of the deal box?] That did not appear. [Cockburn, C. J. Why should it be the less a joint bailment because the contents were in part the separate property of each of the plaintiffs? This is a very unworthy objection for the company to take. Suppose the plaintiffs had each brought a separate action, what observations would there not have been made upon the conduct of the attorney? Byles, J. I reserved leave to amend by striking out the name of one of the plaintiffs. The only consequence, therefore, of the success of this miserable objection would be, that the one who is struck out might bring another action, and might come better prepared with evidence of the felony.]

Cockburn, C. J. I think there should be no rule in this case. I think there was abundant evidence of a joint contract. The box appears to have contained property belonging separately to each of the plaintiffs, but none in which they had a joint ownership. The question is whether there was a delivery to the company to be carried on behalf of the two jointly. I am of opinion that there was. The delivery was not by the hand of either of the plaintiffs; but by a third **[319]** person, with whom the company contracted as with the agent of an unknown principal. Having so contracted with him, it turns out that he was agent, not for one of the plaintiffs only, but for both. If so, the contract was with the two jointly.

Williams, J. I also am of opinion that there was a joint contract, and a joint consideration: and, if so, the authorities establish that it is immaterial that the plaintiffs have separate interest in the subject-matter. This appears from the following passage in 1 Rolle's Abridgment, Action sur Case (Z), pl. 9, —"Si en action sur case per A. et B. vers C., soit recite en le declaration que lou certain particuler avers appertient al A., et auters particuler avers appertient al B., fueront toll per person nemy conus, en consideracion de 10l. done per A. et B. al C., C. assume et promise a procurer les ditz avers d'estre restore al A. et B., et pur ceo que les avers ne fueront restore ils porteront cest action: cest action est bien port joyntment per A. et B., coment que les avers que appertient al A. doint estre restore a luy, et les autres avers a B., et issint le chose d'estre performe severall et nemy joynt, uncore entant que le contract est joynt et le consideracion joynt, et n'est conus quant lun done et quant l'auter, l'action est bien port joyntment. Hill. 1649, enter *Evans et Ewans* v. *Draper*, adjudge, ceo esteant move en arrest de judgment" (*a*)[2]. **[320]** That

(*a*)[1] From the language of the judgment, it would seem, that, if the box had been received by the servants of the company at Augusta Place, Worthing, and had been delivered by them at the Queen's Head, in London, and so had been in their custody and under their control during the whole of the transit, it would equally have been held that there was no evidence to go to the jury that its contents had been abstracted by a servant of the company.

(*a*)[2] This case is cited in Vin. Abr. Actions (Z), pl. 9, in marg., by the name of *Vaux* v. *Steward*: and it is also reported three times in Style, pp. 156, 157, 203. On the first occasion, Roll, C. J., is reported to have said: "The promise here is entire, for the consideration is entire, and so the action may be jointly." On the second occasion, he held, "that it is an entire promise, and a joint consideration, though the cattle taken were several, and therefore the action may be joint; and, if one lay out money for a thing assumed to be done for a third person, if it be not done an action shall be brought upon the assumpsit by him who laid out the money." But, "because a case was cited out of Yelverton's Reports (*Poppam* v. *Morton*, Yelv. 1) to be against the opinion of the court, therefore the court ordered the counsel to bring that case, and in the mean time they would advise." On the third occasion, the case is thus

authority establishes, that, if this had been an action upon the contract itself, it would properly have been a joint action. And, although this is not an [321] action upon the contract, but for a breach of duty, still it is founded on contract, and must follow the general rules as to joinder which govern actions ex contractu.

WILLES, J. I am entirely of the same opinion. It is certainly a very strange question for the company to raise, inasmuch as the only effect of holding the contract to have been with each separately, would be that the company must be harrassed by two actions when the whole merits might be disposed of in one. The remedy would be by striking out the name of George Metcalfe, to whom the box was not addressed, and who did not pay the carriage of it, pursuant to the leave reserved at the trial. But it appears to me that the point is disposed of by saying that there was some evidence that the box with its contents was delivered to the company upon a joint contract to be carried for the two plaintiffs, because it was delivered by a person who might reasonably be considered to have been at the time the servant of both. No evidence appears to have been given as to the ownership of the box: but it was in the joint use of the two plaintiffs for the purpose of the journey. I think there was enough evidence to warrant the jury in concluding that there was a joint delivery of the box to the company, and a receipt of it by them under a joint contract, and therefore that the action was well brought in the names of the two plaintiffs.

BYLES, J., concurred.

Rule refused.

[322] PORTMAN *v.* MIDDLETON AND ANOTHER. May 6th, 1858.

[S. C. 27 L. J. C. P. 231; 4 Jur. N. S. 689; 6 W. R. 598.]

A. contracted with B. to repair a steam threshing-machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B. (although there was ample time for him to have done so after C. had broken his contract); whereupon B. sued A., who paid him 20*l.* to settle the action:—Held, that A. was entitled to recover from C. the sum he had paid him for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A. to B. was not such a damage "as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they

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stated:—"Vaux and Vaux brought an action upon the case against Draper, upon a promise, and declared that the defendant, in consideration of 10*l.* paid by the plaintiffs unto the defendant, did assume and promise unto the plaintiffs to procure certain cattle of the plaintiffs taken from them by a third person, to be re-delivered unto them by such a time, and for not performing this promise they brought their action. Upon non assumpsit pleaded, there was an issue joined, and a verdict found for the plaintiffs. The defendant moved in arrest of judgment, that this action was not well brought jointly by the plaintiffs, but that they ought to have brought two several actions, in regard that the promise upon which the action was founded was not an entire promise, but was a several promise made to each of the plaintiffs. The counsel on the other side prayed for judgment, and said the promise was entire, made to both, and not several, and so the jury have found it, which shall be intended to be true: and, if it should not be so, it would be disadvantageous for the defendant. Hales said, on the other side, that the assumpsit is several, and the acts to be done by the defendant to the plaintiffs are several, although the assumpsit sounds as a joint assumpsit. Roll, C. J., said, that the consideration given is entire and cannot be divided, and there is no inconvenience in joining in the action in this case: but, if one had brought the action alone, it might have been questionable. Nicholas and Ask, justices, of the same opinion. But Jerman, justice, differed, and said that these are several promises, viz. to deliver such chattel severally to each of them as did belong properly to them, and so there must be two several actions. But judgment was given for the plaintiff, except better matter shewed."

made the contract, as the probable result of the breach of it,"—within the rule in *Hadley* v. *Baxendale*, 9 Exch. 341.

This was an action for a breach of contract in not delivering a fire-box within the time stipulated.

The declaration stated that the plaintiff, before the time of the making of the agreement with the defendant thereinafter mentioned, had been employed by a certain person to repair and put in order for him a steam threshing-engine, the said engine to be finished and delivered to the said person by a certain specified time, at and on certain reward to be paid to the plaintiff by the said person; and thereupon the plaintiff retained and employed the defendant to make or repair for him a fire-box for the said steam threshing-engine of a certain size and according to certain instructions given to the defendant by the plaintiff, and by a time agreed upon between the plaintiff and the defendant, which said retainer the defendant accepted at and for the sum of 12l., and which said sum the plaintiff paid to the defendant before the delivery by the defendant of the fire-box thereinafter mentioned: Averment, that, although the defendant had delivered a fire-box as and for the fire-box so agreed to be made or repaired by him for the plaintiff, yet he did not do the same by the time agreed upon between the plaintiff and the defendant, nor according to the said instructions of the plaintiff, but wholly neglected and disobeyed the same instructions; and although, when the plaintiff so employed the defendant to make or repair the said fire-**[323]**-box, he informed the defendant for what purpose he required the same, and of what size and materials the same must be, and by what time the plaintiff had contracted with the said person to finish and deliver the said steam threshing-machine, and which said time had long elapsed; yet the defendant had made and delivered to the plaintiff a fire-box unsuited to and unfit for the said steam threshing-engine, imperfect in materials, and different in size from the fire-box agreed to be made by the defendant, and wholly useless to the plaintiff, and that the defendant had refused to make a fire-box fit for the steam threshing-engine, or to return the said sum of 12l. to the plaintiff; whereby the plaintiff had not only lost the said sum of 12l. so paid by him to the defendant, but had incurred great expense in and about constructing a fit and proper fire-box for the said steam threshing-engine, and was also liable to make compensation to the said person for the delay in delivering the said steam threshing-machine to him, such delay being caused by the wrongful conduct of the defendant.

There were also counts for money payable by the defendant to the plaintiff, and for money received by the defendant to the use of the plaintiff.

The defendant traversed the retainer and the alleged breaches of contract, and also pleaded never indebted; whereupon issue was joined.

The cause was tried before Channell, B., at the last Assizes at Worcester. The facts were as follows:—In the Spring of 1857, the plaintiff, an engineer, was employed by one Sheaf to repair a steam threshing-engine; the work to be finished before harvest, or by the end of July or the beginning of August. It being found necessary to get a new fire box made, the plaintiff in June went to the defendants at Birmingham and verbally contracted with them to make one for **[324]** him for 12l. Upon inquiring how long it would take to make it, the defendants' foreman answered, "About a fortnight." The fire-box was not sent to the plaintiff until the 3rd of September, when it was found to be useless. The plaintiff was then obliged to employ another person to make another fire-box, for which he had to pay 20l. The threshing engine, in consequence of these delays, not being ready until November, Sheaf brought an action against the plaintiff to recover damages in respect of his breach of contract, claiming 50l.; but he ultimately settled the matter by accepting 20l. and costs, making together 25l. 17s.

It did not appear that the plaintiff, when he gave the defendants the order for the fire-box, communicated to them the nature of his contract with Sheaf; or that they were made aware of it until after there had been a complete breach of that contract; although there was some evidence of a conversation between Sheaf and the defendants upon the subject in the month of June.

Under the direction of the learned Baron, the jury returned a verdict for the plaintiff for the 12l. which he had paid the defendants for the fire-box, 8l. for the extra expenses he had incurred in procuring another, and 20l. in respect of the compensation he had paid to Sheaf for the non-performance of his contract with him.

Pigott, Serjt., on a former day in this term, pursuant to leave reserved, obtained a rule nisi to reduce the damages by the sum of 20*l.* on the grounds that no precise time was contemplated by the contract between the plaintiff and the defendants, and that the payment to Sheaf was not a damage fairly resulting from the defendants' breach of their contract.

Huddleston, Q. C., and R. Kettle, on a subsequent day, **[325]** shewed cause. The plaintiff is entitled to recover, not only the sum he had paid to the defendants for the useless fire-box, and the 8*l.* which he was obliged to pay to procure another, but also the damages he was compelled to pay to Sheaf for his breach of contract, which but for the defendants' failure to perform their contract with him he would not have incurred. The rule as laid down by the court of Exchequer in *Hadley* v. *Baxendale*, 9 Exch. 341, is, that, "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." That rule was acted upon in *Bramley, App., Chesterton, Resp.*, ante, vol. ii., p. 592, where it was held, that, where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenants' wrongful act had prevented him from delivering possession. In giving judgment, Cockburn, C. J., says: "This use of the land by the landlord, viz. the letting it to a new tenant, is the common and ordinary course of dealing on the part of an owner of land. The defendant, therefore, must have understood, that, when the plaintiff gave him notice to quit, he would enter into a contract with a new tenant to let the premises to him from the expiration of such notice. And in this case there is the further and not unimportant fact that the tenant was apprised of the fact that the land-**[326]**-lord had re-let the premises, and consequently was aware of the inconvenience and loss he was exposing him to by his improper conduct. I therefore think it not at all unreasonable, but, on the contrary, very salutary, to hold him liable to compensate his landlord to the extent of the natural and necessary consequences of his wrongful act" (*a*). The natural consequence resulting from the non performance of the defendants' contract, was, the non-completion by the plaintiff of his contract with Sheaf. [Crowder, J. The damages claimed by Sheaf could hardly be said to be the natural consequence of the defendants' breach of their contract with the plaintiff.] At all events, it comes within the second branch of the rule laid down in *Hadley* v. *Baxendale*: it might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it; for, the defendants knew that the article was wanted for the ensuing harvest, and that the inevitable consequence of the non-performance of their contract would be that the plaintiff would be unable to perform his contract with Sheaf. [Byles, J. There was no evidence that the defendants were aware of the plaintiff's contract with Sheaf until after breach.]

Pigott, Serjt., in support of the rule. The plaintiff is, no doubt, entitled to recover back the 12*l.* he paid for the fire-box, and also the 8*l.* for the difficulty in getting another one: but he clearly is not entitled to **[327]** recover anything in respect of the contract which he had made with Sheaf. At the time the order was first given, in June, the plaintiff did not communicate to the defendants his engagement with Sheaf to have the threshing-engine ready in time for harvest; nor did he do so until after there had been a complete breach of the contract between him and Sheaf. Damages from the plaintiff's breach of his contract with Sheaf clearly could not have been in the contemplation of the parties as flowing from the breach of the defendants' contract with the plaintiff, so as to bring the case within the rule in *Hadley* v. *Baxendale*. As soon as the defendants had broken their contract, it was the plaintiff's duty to put himself in a position to perform his contract with Sheaf, by procuring a fire-box else-

(*a*) Willes, J., observed that he was erroneously reported in this case to have said, —"I would wish, however, to guard myself from admitting, that, apart from contract, the tenant is liable for holding over;" and that it ought to have been, "that, in an action of contract, the tenant would be liable for holding over."

where, —*Peterson* v. *Ayre*, 13 C. B. 365, per Maule, J., —and he had ample time to do this before the commencement of harvest; for, it appeared that it could have been made in a fortnight. It would be monstrous to hold the defendants responsible for the breach of a contract with a third party, the terms of which they were wholly unacquainted with.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This case was argued on Friday last before my Brothers Willes and Byles and myself. The rule sought to reduce the damages: and we are of opinion that it must be made absolute. The action was brought to recover damages for the breach of a contract entered into between the plaintiff and the defendant, under which the defendant was to furnish a fire-box for the plaintiff by a given time. The article was not furnished within the time, and, when it was sent to the [328] plaintiff, it was found to be utterly useless. The plaintiff, who had paid the sum agreed on, viz. 12*l*., sought to recover back that sum, together with the damages which he had sustained by reason of the defendants' breach of contract. The jury gave a verdict for 12*l*., the sum paid, and a further sum of 8*l*. for the extra expense which the plaintiff was put to in procuring another fire-box, and about which there is no dispute. They also gave a further sum of 20*l*. as special damage arising from the defendants' breach of contract. The question is whether the jury were warranted in giving this latter sum. We are of opinion that they were not. The special damage was sought to be recovered by reason of the plaintiff's having entered into a contract with one Sheaf to repair for him a steam threshing machine. The contract between the plaintiff and the defendants as to the fire-box was quite separate and distinct from that. The defendants had nothing whatever to do with the contract between Sheaf and the plaintiff. But it was said, that, inasmuch as Sheaf had brought an action against the plaintiff for his breach of contract,—a breach of contract occasioned by the insufficiency of the article furnished by the defendant,—and had recovered damages (or been paid a sum of 20*l*.) for the breach of that contract, that was a damage which the plaintiff was entitled to recover against the defendants for the breach of their contract. We think, however, that this case is entirely governed by that of *Hadley* v. *Baxendale*, 9 Exch. 341, to which reference was made, and does not come within that rule by which alone this sum could be recovered as special damage. It is laid down by the court of Exchequer in *Hadley* v. *Baxendale* that, "where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as [329] may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, it is quite clear that this special damage was not the ordinary consequence of the breaking of the defendants' contract. The only question was, whether it came within the second part of the rule as above laid down, —that the breach of contract was such as that the damage arising from it might be supposed to be in the contemplation of both parties at the time they made the contract. We have looked carefully at the notes of the learned judge who tried the cause, and we cannot find that there is any such evidence as would lead to the conclusion that it was in the contemplation of the parties that the breach of the contract entered into between the plaintiff and Sheaf, and the damages recovered by him (Sheaf) in consequence, would be the probable result of the breach by the defendants of their contract to furnish a fire-box to the plaintiff. We therefore think that the rule to reduce the damages should be made absolute: and we cannot help thinking, the action being brought to recover back the sum of 12*l*., the amount agreed to be paid for the fire-box,—that it would be a monstrous conclusion to arrive at, that the breach of the contract in not furnishing the article contracted for at that price, should give rise to the additional damages of 20*l*. here sought to be recovered.

Rule absolute.

[330] LEWIS *v.* BARKES. LEWIS *v.* BLAGDON, AND SIX OTHER CAUSES. April 19th, 1858.

[S. C. 27 L. J. C. P. 247; 4 Jur. N. S. 663; 6 W. R. 652.]

Actions having been brought against eight several defendants upon mutual insurance policies, the court, at the instance of the defendants, granted a rule for consolidating them,—upon the terms that the several defendants should admit the amounts for which they were respectively liable, in case their liability should be established, and should consent, if necessary, to an order referring it to the master to settle the same.

Eight several actions had been brought by the same plaintiff against the above-named several defendants as members of a mutual assurance association called The London Marine Assurance Association, upon one and the same policy of assurance. The plaintiff having declared in each action as for a constructive total loss, a summons was taken out on behalf of the defendants before Pollock, C. B., calling upon the plaintiff to shew cause why the said actions should not be consolidated. The plaintiff declined to consent to a consolidation, except upon the following terms, "that the said defendants should state the proportions in which they are respectively liable; that the said defendants should admit themselves to be members of the said assurance association, and should also admit that one Thomas Denham was their agent duly authorized to execute the policy of assurance expressed to be granted by him to the plaintiff." The learned Chief Baron thereupon referred the matter to the court.

Scotland, accordingly, on a former day in this term, moved for a rule to consolidate the actions. He submitted that there was no ground for deviating in this case from the ordinary course of practice, by imposing terms upon the defendants such as those proposed at chambers.

O'Malley and H. Lloyd shewed cause. This is not an ordinary consolidation rule. The terms proposed are not unreasonable. The plaintiff here would be bound to prove what in the ordinary consolidation rule is ad-**[331]**-mitted,—the proportions being ascertained by the policy. Here, it is conceded, there is a different case as to each defendant; but there is one question common to the whole of the cases, viz. the cause of the loss. The terms here proposed were enforced by Cresswell, J., at chambers, in another case. In *Everth* v. *Blackburn*, 6 M. & S. 152, terms were imposed upon the defendant. [Byles, J. Let those defendants consolidate who are willing to admit their proportions.]

Scotland, in support of his rule. There is no pretence for binding the defendants in the way suggested. In *Hollingsworth* v. *Brodrick*, 4 Ad. & E. 646, 6 N. & M. 240, which generally governs these cases, two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the court consolidated them after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected. In *Everth* v. *Blackburn*, money was paid into court, and therefore the liability to some extent was admitted. If this rule is granted, the only effect will be, that, if the plaintiff obtains a verdict against the defendant against whom he elects to proceed, the other defendants are all bound by it; whereas, if he fails in that one action, he may still try the others. [Crowder, J. You probably will not object to the admission of the amount in each case, provided your admission does not extend to an admission of liability?] That seems to be reasonable.

Cur. adv. vult.

WILLES, J., now proceeded to deliver the judgment of the court (*a*):—

[332] The question in this case was, whether several actions upon mutual insurance policies ought to be consolidated, according to the usual practice in actions upon ordinary policies.

We think that no sufficient objection to such consolidation has been put forward. The defendants will be bound by the decision of the first case, if in favour of the plaintiff. The plaintiff, if he fail in his first case, will be at liberty then to try the

(*a*) The case was argued before Crowder, J., Willes, J., and Byles, J.

others. As to the delay which may be occasioned to the plaintiff, that will be fully compensated by his obtaining judgment in all the actions, if he succeed in the one selected. The defendants, by entering into the rule, agree to judgment against all, in case the plaintiff succeeds against any one defendant. The plaintiff may select a defendant within a week.

As to the amount for which judgment is to be signed in case the plaintiff succeeds, the defendants must within a week state how much they are respectively liable for, in case their liability be established, and must consent, in case it becomes necessary, and the plaintiff applies for an order to that effect, to a reference to the master as to amount, upon such terms as to costs as the judge shall think fit. The rule must, therefore, be absolute, in the ordinary form, with the above additions.

Any difficulty in settling it, may be brought before a judge at chambers.

Rule absolute (*a*)[1].

The rule was drawn up as follows: – "It is ordered that the said defendants, within a week, deliver to the said plaintiff or to his attorney a statement in writing of the amounts for which judgments are to be signed in case the pla ntiff succeeds, and for which they are [333] respectively liable in the event of their liability being established as hereinafter mentioned; the said plaintiff, within a week after the delivery of such statement, electing against which one of the said defendants he will proceed to trial: and that all further proceedings in the said other causes respectively be stayed until after such trial shall be had; the defendants in such other causes respectively, by their counsel, hereby undertaking, in case a verdict shall be found for the said plaintiff on the said trial, to be bound and concluded thereby, and consenting in that event to a judgment being entered against each of them in the said causes, for such amounts respectively as shall be so stated by the said defendants, or ascertained as hereinafter mentioned: And it is further ordered, in case the said plaintiff shall not succeed in the action so to be tried as aforesaid, then that he be at liberty to proceed in such other causes; and, in the event of his succeeding against any one of the said defendants, the said other defendants respectively (*a*)[2] hereby consent to a judgment being entered against them as aforesaid, notwithstanding the said plaintiff shall have failed in the cause so firstly directed to be tried: And, by consent of counsel for the said defendants respectively, it is further ordered that the plaintiff shall be at liberty, if necessary, to apply to a judge for an order to refer it to one of the masters of this court to ascertain the amounts for which such judgments shall be so entered as aforesaid, and upon such terms as to costs as to the said judge shall seem meet."

[334] HOLE *v.* BARLOW. May 5th, 1858.

[S. C. 27 L. J. C. P. 207; 4 Jur. N. S. 1019; 6 W. R. 619. Discussed and distinguished, *Stockport Waterworks Company* v. *Potter*, 1861, 7 H. & N. 169. Overruled, *Bamford* v. *Turnley*, 1862, 3 B. & S. 73. Observed on, *Beardmore* v. *Tredwell*, 1862, 3 Giff. 683. Discussed, *Carey* v. *Ledbitter*, 1862, 13 C. B. N. S. 476; *Wanstead Local Board of Health* v. *Hill*, 1863, 13 C. B. N. S. 184. Referred to, *Brand* v. *Hammersmith and City Railway*, 1867-69, L. R. 2 Q. B. 236; L. R. 4 H. L. 171; *Crump* v. *Lambert*, 1867, L. R. 3 Eq. 413. Discussed, *Luscombe* v. *Steer*, 1867, 17 L. T. 230. Held overruled, *Sholts Iron Company* v. *Inglis*, 1882, 7 App. Cas. 528; *Reinhardt* v. *Mentasti*, 1889, 42 Ch. D. 688.]

In an action for a nuisance arising from the burning of bricks on the defendant's own land near to the plaintiff's dwelling-house, the judge told the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being so carried on;" and he left to them two questions, – first, "was the place in which the bricks were burned

(*a*)[1] In *M'Gregor* v. *Horsfall*, 3 M. & W. 320, 6 Dowl. P. C. 338, where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the court refused, at the instance of the defendants, to compel the plaintiffs to consolidate and to be bound in one of the actions, without their consent. And see *Syers* v. *Pickersgill*, 27 Law J. Exch. 5

(*a*)[2] Other, of course, than the defendant who has obtained a verdict.

a proper and convenient place for the purpose,"—secondly, if they thought the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life and property uncomfortable:—Held, no misdirection.

This was an action for a nuisance. The declaration stated that the plaintiff was possessed of a certain messuage and dwelling-house, garden, and appurtenances which he the plaintiff inhabited and still inhabits, and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made a certain brick-kiln upon the land of the defendant in front of the house of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks, and caused a noxious and unwholesome vapour to arise, to the injury of the premises of the plaintiff; and that the plaintiff's house was thereby during all the time, and still was, rendered uncomfortable, unhealthy, unwholesome, and unfit for habitation, &c.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Byles, J., at the sittings at Westminster after the last term, when the following facts appeared in evidence:—The plaintiff occupied a house in a newly-formed road abutting upon a field belonging to the defendant, and upon which the defendant, preparatory to the building of certain houses thereon, had excavated the clay and converted it into bricks, which he caused to be placed in three "clamps" for burning, near to the plaintiff's dwelling-house, one of them being within thirty feet of it. There was abundant though conflicting evidence of annoyance.

On the part of the defendant, it was submitted that the thing complained of was not actionable, seeing that it was done in a convenient place, and not wantonly and with intent to injure or annoy the plaintiff.

[335] In submitting the case to the jury, the learned judge in substance told them, that, "to entitle the plaintiff to maintain an action for an injury of this nature, it is not necessary that the thing complained of should be injurious to health: it is enough if it renders the enjoyment of life and property uncomfortable. If you are satisfied from the evidence that the enjoyment of the plaintiff's house was rendered uncomfortable through the instrumentality of the defendant, that is sufficient to entitle the plaintiff to maintain this action. But that is subject to this observation,—that it is not every body whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood, that can bring an action. If that were so,—as has already been observed by the learned counsel for the defendant,—the neighbourhood of Birmingham and Wolverhampton and the other great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious and offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community. I apprehend the law to be this, that no action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on. But it may be that it would not be justifiable to place clamps for brick burning in the immediate vicinity of Berkeley or Belgrave, or Eaton Squares. But it is a very different thing to say that the mere temporary burning of bricks, made from clay dug from the spot, in a new neighbourhood in the outskirts of London, which no one could say was an inconvenient place for the purpose, though it might cause annoyance to one or two persons residing near, would afford a ground of action. If this were so, it would be exceedingly difficult to find any place **[336]** within a reasonable distance at which this sort of trade could be exercised at all. It is, therefore, my duty to tell you that this action will not lie, although you should be of opinion that the nuisance complained of is such as to render the plaintiff's enjoyment of his life and property uncomfortable, if you should think that the place where the business is carried on was a convenient and proper place for the purpose. There is one further observation I must make, and it is this,—It used to be thought, that, if a man went to reside near to a place where he knew there was a nuisance, he could not complain of it, inasmuch as he went to the nuisance. That was supposed to be the law many years ago: but it is not so now. Assuming that this plaintiff perfectly well knew that the defendant was about to burn bricks on his land, and knew the precise spot where the clamps would be placed, and knew what the result would be, when he came to reside there, still that would not disentitle him to maintain this action. The two questions which I purpose leaving to you, are,—first, was the place in which these bricks were burned a proper and convenient place for the purpose?

That seems to me to be not a question of law for me, but one of fact for you upon the evidence you have heard. If you think, looking at all the circumstances, it was a proper place, then, although the plaintiff's enjoyment of his property may have been rendered uncomfortable, he cannot maintain an action. Secondly, if you are of opinion that the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life and property uncomfortable? These are the two questions which you have to decide, upon the evidence which has been laid before you."

The jury having returned a verdict for the defendant,

[337] Aspland, on a former day in this term, obtained a rule nisi for a new trial, on the ground that the learned judge misdirected the jury, in telling them "that an action did not lie for the acts complained of as a nuisance, if carried on in a proper and convenient place, and that an action did not lie for causing annoyance by carrying on a lawful trade, if carried on in a proper and convenient place; and in directing the jury that there were two questions for them, -one being, was the place a proper place? and that, if so, although the plaintiff's enjoyment might have been rendered uncomfortable, he could not sue,—the other being, whether the nuisance was such as to make the enjoyment of life and property uncomfortable; and in directing the jury to find for the defendant, if they thought the place a proper place, although the plaintiff's enjoyment might have been rendered uncomfortable: and on the ground that the verdict was against the evidence."

Collier, Q. C., and Garth, now shewed cause. There was evidence and abundant evidence for the jury on both sides, and there is no pretence for disturbing their verdict [Byles, J. There certainly was strong evidence on both sides: but I must say I rather expected that the jury would find for the plaintiff.] Then it is said that the learned judge was wrong in leaving it to the jury to say whether the place in which the bricks were burned was a proper place for the purpose, and in telling them that if they thought, looking at all the circumstances, it was a proper place, although the plaintiff's enjoyment of his property may have been rendered uncomfortable, he could not maintain an action. In all the authorities, however, upon the subject, from the earliest time to the present, the locality has always been considered a material ingredient. In Comyns's **[338]** Digest, Action upon the Case for a Nuisance (C), it is said: "An action upon the case does not lie upon a thing done to the inconvenience of another; as, if a man erect a mill near to the mill of another, whereby the other loses part of his profit. 1 Rol. 107, l. 20; 11 H. 4, fo. 47 b. So, it does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." That is almost identical with the proposition put by the learned judge in his summing-up here. In *Rich* v. *Basterfield*, 4 C. B. 783, which was an action for a nuisance arising from smoke issuing out of the defendant's chimney, to the inconvenience of the plaintiff in his occupation of an adjoining house, Erle, J., in leaving the case to the jury, told them that "every man is bound so to use his property as not to injure his neighbour's rights,—with this qualification, that he may make a reasonable use of his own rights, exercising them in a reasonable place"(*a*). In *Jones* v. *Powell*, Palmer, 536, 539, Hutton, 135 (cited in Gale on Easements, 2nd edit. 293), Hide, C. J., says: "Un tan house est necessary, car touts wear shoes: et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass-house; et pur ceux doient estre erect in places convenient pur eux." In *Rex* v. *Pierce*, Shower, 327, an information was brought against the defendant by the recorder of London, for erecting and continuing a soap-boilery in Wood Street. It was held by Jefferies, C. J., "that, though such a trade is honest, and may be lawfully used, yet if by its stench it be an annoyance to the neighbours, it is a **[339]** nuisance." A case is also mentioned of a "calendar-man in London, in Bread Street, who was convicted before Lord Hale on such an information; for that the noise of his trade disturbed the neighbours and shook the adjacent houses:" and another case of a "brew-house on Ludgate Hill, *Rex* v. *Jordan*, where the defendant was compelled to prostrate the same and convert it to other purposes; for that such trades ought not to be in the principal parts of the city, but in the outskirts." In *Baines* v. *Barker*, Ambler, 158, 3 Atkyns, 750, Lord

(*a*) This can hardly be correctly expressed; for, no man can be said to make a reasonable use of his own rights, if that use conflicts with a pre existing right of his neighbour.

Hardwicke refused to grant an injunction to stay the building of a small-pox hospital in Cold Bath Fields, very near the houses of several of the plaintiff's tenants, though it appeared that in the lease of the house in question, granted by the plaintiff to the defendant, there was a covenant against turning it into a brew-house, because it would be a nuisance. The Lord Chancellor said: "I am of opinion it is a charity likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be carried far." All these cases shew that the locality is a material ingredient in the inquiry of nuisance or no nuisance; and, if so, the direction of the learned judge was unexceptionable. It was for the jury to say whether the defendant bonâ fide carried on his business of brick-burning in a manner and in a place which were proper and convenient.

Shee, Serjt., and Aspland, in support of the rule. The weight of the evidence preponderated greatly in favour of the plaintiff. [Crowder, J. There was evidence on both sides; and I do not understand the learned judge to say that he is dissatisfied with the result: we can hardly, therefore, interfere upon that ground.] No doubt the opinion of the jury was entirely **[340]** influenced by what fell from the learned judge. The substance of his direction to them was,—"No matter how injurious may be the thing complained of, or how much it may interfere with the comfortable enjoyment of the plaintiff's dwelling-house, provided the place is a convenient one for the purpose, no action will lie." [Byles, J. What I meant to say, was, that the circumstance of the thing being done in a convenient and proper place, would justify some degree of annoyance. I had the passage in Comyns's Digest in my mind at the time.] The passage relied upon by the other side, has no authority cited to vouch it. Comyns says, Action upon the Case for a Nuisance (A), that "an action upon the case lies, if a man erect anything offensive so near the house of another, that it becomes useless thereby: as, a swine-stye (*Aldred's case*, 9 Co. 59 a.; 2 Rol. 141, l. 13), or a lime kiln (*Aldred's case*; 2 Rol. 141, l. 5), or a dye-house (*Jones* v. *Powell*, Hutton, 135), or a tallow furnace (*Morley* v. *Pragnell*, Cro. Car. 510; 1 Rol. 88, l. 41),—but, if he be a chandler, quære, 1 Rol. 88, l. 48; 2 Rol. 139, l. 2,—or a privy or brew-house (*Jones* v. *Powell*, Hutton, 136, Palmer, 539), or a tan fatt (*Jones* v. *Powell*), or a smelting-house (1 Rol. 89, l. 15), or a smith's forge (*Bradley* v. *Gill*, 1 Lutw. 69)." [Byles, J. A swine stye might not be considered a nuisance in Bethnal Green: but it certainly would be so in Grosvenor Square.] The enjoyment of pure and undefiled air is the common-law right of every subject of Her Majesty, whether he resides in a hovel or a mansion. In the passage cited from Comyns (C), where it is said that an action upon the case does not lie "for a reasonable use of my right, though it be to the annoyance of another," it is somewhat remarkable that the word "offensive" is dropped. In the case of *Walter* v. *Selfe*, 29 Law J., Ch. 433, an injunction was granted by Vice-Chancellor Knight Bruce under very similar circum-**[341]**-stances to those of this case. There, the plaintiff was the owner of a house and pleasure-grounds at Surbiton, in Surrey, and the defendant purchased a piece of land, about an acre in extent, situate at a distance of less than one hundred yards from the plaintiff's house, and commenced burning bricks made of the clay dug therefrom: and an injunction was granted. The Vice-Chancellor says, in pronouncing judgment: "One of the plaintiffs in this case sues as the owner, and the other as tenant and occupier, of a parcel of land at Surbiton, in Surrey. The plaintiff's dwelling-house, with the out-buildings appurtenant to it, stands on part of the land, the other part consists of a garden or pleasure-ground or both, also belonging to the house. It is admitted that the house was built before the year 1829, and has been used and occupied as a dwelling-house continually from a time preceding that year. The land on its north eastern part adjoins a portion or parcel of land containing more than one acre, but less than two acres in the whole, which belongs to the defendant, and on which in the spring or early in the summer of 1850 he began to manufacture bricks of the clay or earth of the same land, by burning in what I believe is a common mode of manufacturing, by means of a clamp. It does not appear that before 1850 any manufacture or process of that sort, or of any offensive, objectionable, or disagreeable kind, had been begun on any part of this portion of land, or carried on there." "The first point disputed, or not conceded, is, the question whether, as between the defendant, in his character of a person owning, using, and occupying his parcel of land, on the one hand, and the plaintiffs in their characters of owner and occupier of the house, offices, and gardens occupied by the plaintiff Mr. Pressly, on the other,

Mr. Pressly is entitled to an untainted and unpolluted stream of air for the necessary supply and rea-[342]-sonable use of himself and his family there, or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere. There can, I think, be no doubt in fact or in law that this question must be answered in the affirmative, meaning by untainted and unpolluted air, not necessarily air as fresh, free, and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence." "The question then arises whether this is, or will be, an inconvenience to the occupier of Mr. Walter's house as occupier, a question which I think must be answered in the affirmative, though, whether to the extent of being noxious to human health, to animal health, in any sense, or to vegetable health, I do not say, nor do I deem it necessary to intimate any opinion." "The important point next for consideration may properly, I conceive, be thus put,—ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people? I am of opinion that this point is against the defendant; for, the plaintiffs have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, or whatever their state of health may be." In Viner's Abridgment, Nusance (G) pl. 16, it is said that "the stopping of wholesome air is a nuisance, as well as the stopping of the light." So, pl. 18, "If a [343] dyer erects a dye-house so near my house, by which I dare not dwell in this my house, for the stink of the smoke and other nastiness, this is a nuisance." And for these passages *Aldred's case*, 9 Co. Rep. 59, is cited. In Stephen's Commentaries, 4th edit., vol. 3, pp. 491, 492, it is said, that, "If a person keeps his hogs or other noisome animals so near the house of another, previously built and inhabited (*a*)[1], that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance, as it tends to deprive him of the use and benefit of his house (*b*). A like injury is if one's neighbour sets up and exercises any offensive trade; as, a tanner's, a tallow-chandler's, or the like; for, though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is 'sic utere tuo ut alienum non lædas:' this, therefore, is an actionable nuisance." "And upon the same principle it may be laid down generally, that if one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's land, it is a nuisance: for, it is incumbent on him to find some other place to do that act, where it will be less offensive." If there be any such rule of law as suggested, it can have no application to a thing which is not done in the course of carrying on a trade. To entitle the defendant to immunity in a case of this sort, he must shew a prescriptive right or twenty years user: *Bliss* v. *Hall*, 5 Scott, 500, 4 N. C. 183, 6 Dowl. P. C. 442: *Flight* v. *Thomas*, 10 Ad. & E. 590, 2 P. & D. 531, 7 Dowl. P. C. 741 (*c*).

[344] CROWDER, J.(*a*)[2]. I am of opinion that this rule should be discharged. It was moved upon two grounds,—first, that the verdict was against the evidence, secondly, for misdirection. As to the first ground, there was evidence on both sides of an extremely conflicting character: but the question was one especially for a jury; and the learned judge who tried the cause has not expressed himself dissatisfied with the result. That point, therefore, is disposed of. Then, with respect to the alleged misdirection,—The complaint is that the learned judge put it to the jury as an ingredient for their consideration whether the burning of these bricks was in a proper and convenient place. By the language he used, he evidently referred to the passage which has been cited from Comyns's Digest, Action upon the Case for a Nuisance (C), and which is to be found in Selwyn's Nisi Prius, 10th edit. p. 1115, and in Gale on

(*a*)[1] See 1 Smith's Leading Cases, 4th edit. 131. But see *Elliotson* v. *Feetham*, 2 N. C. 134, 2 Scott, 174.

(*b*) Citing *Morley* v. *Pragnell*, Cro. Car. 510.

(*c*) See the authorities collected in a very elaborate judgment delivered by Vice-Chancellor Kindersley in *Soltau* v. *De Held*, 2 Simons, N. S. 133, 154.

(*a*)[2] Williams, J., had gone to chambers.

Easements, 295. The question is, whether that is a misdirection. The passage from Comyns's Digest is as follows:—"An action upon the case does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." The instances given certainly are of trades: and this defendant was not carrying on the trade of a brick-maker; but he was burning bricks upon his own land, for the purpose of building houses, which are necessary for the habitation of man. It seems to me that the rule is as applicable to the burning of bricks under such circumstances, as to the carrying on of a trade. It must be a question for the jury in each case whether or not the burning was in a convenient place. Without, therefore, going into the **[345]** facts of this case, I am of opinion that the direction of Brother Byles to the jury was consistent with all the authorities, and that we should be in effect overruling several of them if we were to make this rule absolute.

WILLES, J. I am of the same opinion, and for the same reasons; and I will only add a word or two to what has fallen from my Brother Crowder. The common-law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted, is subject to this qualification, that necessities may arise for an interference with that right pro bono publico, to this extent, that such interference be in respect of a matter essential to the business of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place. And this is not without analogy. Every man has a right to enjoy his character untainted and uncontaminated by the breath of slander: but that right is subject to the rule as to privileged communications, which justifies and permits a reasonable publication of defamatory matter, even though it should amount to a charge of felony. So, every man has a right to the enjoyment of his land: but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases, private convenience must yield to public necessity. It seems to me that we shall be only acting upon that principle in discharging this rule.

BYLES, J., said nothing.

Rule discharged.

[346] PARKER *v.* IBBETSON. April 28th, 1858.

[S. C. 27 L. J. C. P. 236; 4 Jur. N. S. 536; 6 W. R. 519.]

An agreement was entered into between the plaintiff and the defendant in the following terms:—"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum: Also provided at the end of the year B. find A. has done sufficient business to justify him in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*"—It being proved at the trial, that, by a general custom of the trade, a yearly hiring is determinable by a month's notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case—In an action upon the above agreement, charging a wrongful dismissal within the year, the judge left it to the jury to say whether the proviso was meant by the parties to exclude the custom:—Held, a misdirection; there being no ambiguity in the contract, and its construction being for the court.

This was an action against the defendant for wrongfully discharging the plaintiff from his service.

The first count of the declaration stated, that, by agreement between the plaintiff and the defendant, the plaintiff agreed to serve the defendant for one whole year in the capacity of agent or representative in the defendant's business of a manufacturer of woollen and mohair cloths, at a salary of 150*l.* per annum; that the plaintiff duly entered upon the said service; and that, although the plaintiff had always been ready and willing to continue in such service on the terms aforesaid, yet the defendant, before the expiration of the said year, refused thenceforth to allow the plaintiff to continue in his said service, and then wrongfully discharged him therefrom without any reasonable cause.

The declaration also contained counts for money paid, and for money found to be due upon accounts stated.

The defendants pleaded several pleas; amongst others,—first, a traverse of the agreement alleged in the first count,—fifthly, to the first count, that the plaintiff became and was the agent of the defendant, as in that count mentioned, upon certain terms and according to a certain condition annexed to the said contract by the general usage and custom in that behalf of and in the trade and business in which the plaintiff was so employed as aforesaid, that is to say, that either of the said parties might determine the said **[347]** service, upon giving to the other of them one calendar month's notice of his intention to do so, the plaintiff, in the event of the said service so being determined, and upon the determination thereof, becoming and being entitled to claim from the defendant a proportionate part of his wages or salary aforesaid up to the expiration of such notice, and to the time of such determination of the said service: Averment, that theretofore, and one calendar month before the defendant put an end to the said service, or refused to suffer or permit the said plaintiff to continue in his said service, and discharged the plaintiff therefrom, he, the defendant, gave to the plaintiff one calendar month's notice of his, the defendant's, intention to put an end to the said service, and to discharge the plaintiff therefrom; and that the defendant at and after the expiration of the said calendar month refused to allow the plaintiff to continue in his, the defendant's, said service, and discharged the plaintiff therefrom,—which was the said alleged breach of contract in the first count mentioned. Issue thereon.

The cause was tried before Cresswell, J., at the sittings in London after last Michaelmas Term. It appeared that the defendant, who was a woollen-merchant at Leeds, having a place of business in London, engaged the plaintiff to serve him in the capacity of agent or representative there, upon the terms contained in the following memorandum:—

"Memorandum of agreement made between Henry Ibbetson & Co., of Leeds, of the first part, and Richard Awood Parker, of, &c., of the second part: The aforesaid Richard Awood Parker engages to serve the said Henry Ibbetson & Co. as agent or representative, at the salary of 150*l.* per annum in consideration thereof. Also provided at the end of the year the said H. Ibbetson & Co. find the said Richard Awood Parker has done **[348]** sufficient business to justify them in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.*, to his present stipulated amount of 150*l.* As witness our hands this 30th day of January, 1857."

(Signed) "Henry Ibbetson & Co.
"Richard Awood Parker."

The plaintiff continued in the service of the defendant under this agreement until the 1st of August (receiving his salary monthly), when the defendant gave him a month's notice to quit. For this dismissal, which the plaintiff contended was wrongful, and in contravention of the agreement, the present action was brought.

On the part of the defendant, several witnesses were called to prove a custom in the particular trade to dismiss at a month's notice, though the engagement was at a yearly salary: and it was proved that one house of great eminence adopted a form of hiring to exclude the custom for a month's notice: but some of the witnesses, on cross-examination, said they had never known an instance of a clerk having been dismissed at a month's notice, where the agreement stipulated for a bonus for good conduct at the end of the year.

In his summing up, the learned judge instructed the jury in substance as follows:—The plaintiff in this case complains that he has been dismissed by the defendant on a month's notice, notwithstanding he was engaged under a contract for a year. The defendant, on the other hand, says, "It is true I entered into a contract with you for a year, but, by the custom and usage of the place where the contract was made and was to be fulfilled, viz. London, a clerk or servant, though hired under such circumstances, is liable to be discharged, and entitled to put an end to the service, at a month's notice." No doubt, with refer-**[349]**-ence to domestic servants, the custom is universally so: a servant is hired at yearly wages; the hiring is yearly, but is liable to be terminated by either party on a month's notice. It does not, however, follow from that that the same state of things exists with regard to clerks and persons

in the position of the present plaintiff. The circumstance of the contract being in writing makes no difference: it is not any stronger or more binding by being written, though it renders the proof of its terms more easy and less liable to misrepresentation or mistake. If that which is here put upon paper had simply been expressed by word of mouth, its legal operation and effect would have been precisely the same. In order to justify his dismissal of the plaintiff within the year, the defendant by his fifth plea sets up the custom of a month's notice: and, if he proves that to your satisfaction, whether the contract be in writing or not makes no difference. Now, the defendant has called before you several witnesses to prove the custom as alleged. It was not necessary, perhaps hardly possible, to adduce an instance exactly in point, of a person in the precise position of the present plaintiff. But you must judge from the general understanding of the trade in analogous cases, whether the parties meant to contract upon the footing of that custom. Where there is a general custom prevailing with reference to a particular trade in the place where a contract is made, and nothing is said to exclude it, the contract must be assumed to have been made subject to the importation of the custom into it. For instance, in a particular trade, a contract for the sale of goods, nothing being said to the contrary, is understood to be at a credit of a fortnight or a month,—in that case, the parties are supposed to contract with reference to the custom, and are bound by it. One of the defendant's witnesses states that it is the custom of the trade **[350]** generally to put an end to the service at a month's notice, where the hiring is yearly and at a yearly salary. Generally speaking, a yearly salary imports a yearly hiring; as in the case of a butler or a coachman: and, in the cases under the old settlement law, a general hiring at a yearly salary was always held to be a hiring for a year. The principal witness on the part of the defendant, however, on cross-examination, stated that he did not remember an instance of a clerk or agent in this particular trade having been dismissed at a month's notice, where the contract contained such a provision as in this case, for a bonus for good conduct at the end of the year. That, as it seems to me, may have some influence in determining your judgment upon this question. The parties first agree for a general hiring, at a yearly salary: then they add a proviso, that, if the employer shall at the end of the year consider the agent deserving of it, he shall be rewarded with a donation of 30*l*. Now, the only legitimate effect of that,—assuming the custom to have been established,—would seem to be, that, by introducing that stipulation into the contract, they meant the custom to be excluded. The first question, then, for your consideration will be, whether such a custom as alleged exists in the particular trade: and the second question will be, whether the contract was made with reference to the custom, or was a special contract to which the custom did not apply. If you think the evidence establishes the custom, it merely remains for you to consider whether you infer from the latter part of the agreement that the parties meant to exclude the application of the custom in the particular case. If you think they did not contract with that intention, the defendant will be entitled to your verdict. If, on the other hand, you think the custom is not established, then the dismissal of the plaintiff before the expira-**[351]**-tion of the year is not justified, and he will be entitled to your verdict, with such damages as you may think him fairly entitled to for such wrongful determination of the contract.

The jury found,—first, that the custom was proved,—secondly, that the hiring was a special hiring, to which the custom did not apply; and thereupon they found for the plaintiff, damages 70*l*.

Hugh Hill, Q. C., in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground that, the jury having found the fact of the existence of the custom for the defendant, their finding as to the special terms of the contract was immaterial; or for a new trial, on the ground of misdirection, inasmuch as it was not a question for the jury whether the special terms of the contract excluded the custom, but the construction of the contract was for the court, and, according to the true construction, the custom was not excluded.

Pigott, Serjt., and V. Williams, now shewed cause. No leave to enter a verdict was reserved, consequently the most the defendant can have will be a new trial. It is said that the parties were bound by the custom, notwithstanding the special terms of the agreement. But, by the form of his fifth plea, the defendant has made it a question for the jury; and the jury have disposed of it, by negativing the application of the custom proved to the particular contract. [Crowder, J. What more is this

than a contract of hiring for a year, with a promise of a gratuity, under certain conditions, at the end of it!] The agreement contemplates that the relation of master and servant shall enure at all events until the end of the year. There is no ambiguity in the document: no exposition can be admitted to **[352]** contradict or vary its terms. No doubt, you may annex an incident to a contract, where the contract is silent upon the subject, or does not exclude it. But a party may always by special contract waive the benefit of a custom: *Webb* v. *Plummer*, 2 B. & Ald. 746; *Hutton* v. *Warren*, 1 M. & W. 466. In *Spartali* v. *Benecke*, 10 C. B. 212, 222, Wilde, C. J., says: "The rules of law relating to the admissibility of the usages of trade to affect the construction of written contracts, are well settled; and the difficulty that has arisen respecting them has been, in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved. The rules of evidence applicable to the present case are, first, that, in mercantile contracts, evidence is admissible to prove that the words in which the contract is expressed, in the particular trade to which the contract refers are used in a peculiar sense, and different from the sense which they ordinarily import,—secondly, that evidence of usage is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent: but both these rules are subject to the limitation or qualification, that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, expressly or by implication, the terms of the written contract." [Crowder, J. What is there here to shew that the parties stipulated for any particular determination of the contract?] The proviso shews that they contemplated that it should not be put an end to until the expiration of the year. [Byles, J. It shews rather that they contemplated the probability of its continuance until the end of the year.] In the case of a clerk, a general hiring is a hiring for a year: *Beeston* v. *Collyer*, 12 J. B. Moore, 552, 4 Bingh. 309. In *The King* v. *Droitwich*, 3 M. & Selw. 243, Lord **[353]** Ellenborough says: "I take the rule of law to be, that, if no particular time is expressed for the continuance of the service, or is reasonably to be implied, a hiring for a year is to be intended." In *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20, A. on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year: B. took the proposals and went away, and entered into A.'s service on the 24th of July: and it was held that this was a contract on the 20th, not be performed within the space of one year from the making, and within the 4th section of the statute of frauds. In *Fawcett* v. *Cash*, 5 B. & Ad. 908, a general hiring of a warehouseman, "the employer engaging to pay 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary should be 180*l.*" was held to be a hiring for a year. This subject underwent considerable discussion in *Baxter* v. *Nurse*, 7 Scott, N. R. 801, 6 M. & G. 935. Here, all the witnesses who were interrogated upon the subject negatived the application of the custom for a month's notice to the case of an agreement with the special stipulation contained in the agreement in this case. If this be a question for the jury, they have decided it for the plaintiff (*a*).

Hugh Hill, Q. C., and Buller, were not called upon.

Crowder, J. I am of opinion that this rule must be made absolute. The question arises in an action brought upon an agreement entered into between a **[354]** clerk or servant and his employer in a certain trade, which agreement is in writing; and the contention at the trial was as to the existence of the custom stated in the fifth plea, and its application to the contract before the court. The jury were asked certain questions, and invited to draw certain conclusions. These were, whether the custom was proved, and whether, if proved, it was applicable to the special terms of this contract. On the part of the defendant, it is contended that this latter was not a question for the jury, but for the court; and I am of that opinion. Looking at the evidence, it seems to have been established that there was a general custom in the trade that a yearly hiring might be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff, that, assuming such a custom to exist, the special terms of this agreement exclude the application of it to this case.

(*a*) In Addison on Contracts, 4th edit. 430, it is laid down, upon the authority of a case of *Johnson* v. *Bleukensopp*, 5 Jurist, 870, that, "If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words."

It seems to me that there is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendant as agent at the salary of 150l. per annum: then follows a proviso, that if, "at the end of the year the said Henry Ibbetson & Co. (the defendant) find the said R. A. Parker (the plaintiff) has done sufficient business to justify them in recompensing by making up his salary to 180l., to do so, being a donation of 30l. to his present stipulated amount of 150l." Reading this agreement,—and its construction is for the court, and not for the jury,—it seems to me to be simply an agreement for a yearly hiring at a yearly salary; and that there is nothing in the proviso to alter the nature and character of the agreement: it is a mere statement that the defendant will at the end of the year, if he shall see fit, make the plaintiff a present of 30l. It is clear that this 30l. could not have been recovered by action, if the service had lasted until the **[355]** end of the year. The simple question is, whether, looking at the custom proved, which is general, there is anything in the written agreement to exclude it. I see nothing in it that can have that effect The proviso cannot exclude it: that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom, it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule, that, wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract, unless by express terms excluded. There was nothing to warrant the conclusion of the jury; and consequently the rule will be made absolute, not, however, to enter a verdict for the defendant, no leave having been reserved, but for a new trial.

WILLES, J. I am entirely of the same opinion. The fact of the plaintiff having been engaged at a yearly salary under an agreement which has been reduced into writing, is clearly not enough to exclude the custom, which was proved to be general, to determine a yearly hiring by giving a month's notice,—just as in the case of domestic servants, where, though a general hiring is presumed to be a hiring for a year, the service may nevertheless be put an end to at any time by a month's notice. The question is whether the application of that general custom to the particular case is excluded by the concluding words of the agreement, which provide, that, at the end of the year, if the employer is satisfied with the amount of business done, he will make an addition of 30l. to the stipulated salary. Would that proviso be inconsistent with the agreement going on to say that the master should still be at liberty, if so minded, to dismiss the servant at **[356]** any time during the year, upon giving him a month's notice? Clearly not. The custom, being proved, becomes part and parcel of the contract The jury had no right to take upon themselves to say that the special contract excluded the custom. The evidence upon which that conclusion was founded does not in fact negative the application of the custom to a hiring under a contract like this. The witness merely stated that he did not know of an instance where under such an agreement as the present the custom had been acted upon.

BYLES, J. In cases of this nature, two questions generally arise,—the one, a question of law, whether the terms of the agreement may admit or must necessarily exclude the custom,—the other, one of fact, whether, if the agreement may admit the custom, the custom extends to the particular agreement. I do not therefore see that the learned judge was wrong in leaving this latter question to the jury. The evidence of the custom was irresistibly strong; and, although the jury might, upon proper evidence, have found a limited custom, there was no evidence of any such limitation here.

Rule absolute for a new trial.

[357] SMITH *v.* GLASSCOCK. April 20th, 1858.

[S. C. 27 L. J. C. P. 192; 6 W. R. 487.]

The admittance of tenant for life upon a surrender to the use of the will, enures as the admittance of those in remainder, so as to vest the estate in them. A testator devised copyhold land to his widow for life, remainder to his six children, three sons and three daughters, in equal shares, as tenants in common. After his death, his widow was duly admitted. The widow died, and two of the daughters also died unmarried and intestate: but there was no evidence as to the third daughter.

One of the sons went abroad, and never was heard of. The second was proved to be alive. The third, in 1843 (his mother and two sisters being then dead), got himself admitted in respect of three sixths of the land; and in 1845, in default of claim by the other remainder-men, after proclamation, got admitted to the rest as heir-at-law of the person last seised. In 1850, he covenanted to surrender five sixths of the land to the plaintiff, and the plaintiff was thereupon admitted by the lord:—Held, that the plaintiff thereby obtained no title to more than four sixths,—even as against one having no title, but a bare possession.

This was an action of ejectment in which the plaintiff sought to recover five sixths of a garden at Harlowe, in the county of Essex.

The cause was tried before Williams, J., at the last Assizes at Chelmsford, when the following facts appeared in evidence:—The property in question, which was copyhold, had formerly belonged to one John Faulder, who by his will, dated in March, 1812, devised it to his widow for life, with remainder to his six children, John (who was illegitimate), Thomas, Jane, Elizabeth, Mary, and Joseph, in equal shares, as tenants in common. John Faulder died shortly after the date of his will, and his widow was duly admitted tenant on the roll. She afterwards died. Mary and Jane, two of the daughters of the testator, also died, unmarried and intestate. John, the eldest son, went abroad, and had never since been heard of; and there was some evidence that Elizabeth died on her way out to Calcutta. On the 16th of June, 1843,—the widow of the testator and the two daughters Mary and Jane being dead, and Elizabeth having disappeared,—Thomas Faulder was admitted to his one sixth share, and to the shares of Mary and Jane as heir-at-law, and thus became entitled to three sixths. On the 20th of June, 1845, proclamation was made in the lord's court, and, neither of the other remainder-men having claimed to be admitted, Thomas Faulder appeared and was admitted to the re-[358]-maining three sixths, as heir-at-law of the testator; and down to the time of the trial no other claimant had appeared. In August, 1850, Thomas Faulder covenanted to surrender five sixths of the property to the plaintiff; and, on the 4th of July in that year, the plaintiff was admitted tenant in respect of five sixths.

The defendant did not pretend that he came in otherwise than as tenant to John Faulder, the testator: and it appeared that he had paid him rent for several years; but that, after the death of the testator, he declined to pay rent, in consequence of the disputes which arose between the children on account of the illegitimacy of the eldest son, John.

The learned judge ruled, that, inasmuch as there was no evidence of Joseph's death, the plaintiff had made out no title to recover in respect of his one sixth share; and he directed a verdict to be entered for the plaintiff for four sixths, reserving leave to the plaintiff to move to enter it for the other sixth, if the court should be of opinion that he was entitled to do so.

Hawkins now moved accordingly. As against Joseph, the lord could only seize quousque for default of his appearance on proclamation: but, as against all the rest of the world, the admittance of the plaintiff would be an absolute title. [Byles, J. Suppose Joseph came now and claimed to be admitted, what answer would the present plaintiff have to an ejectment by him?] None. [Crowder, J. The plaintiff claims title to five sixths under a person who at the most legally possessed only four sixths.] *Doe d. Le Keux* v. *Harrison*, 6 Q. B. 631, seems to be precisely in point. There, the heir of copyhold lands not appearing on proclamation, the lord seized quousque. Afterwards, the heir claimed; [359] and, the lord declining to admit him, on the supposition that another party had title, the heir obtained a rule nisi for a mandamus to compel his admittance. Upon the discussion of that rule, the court, by consent of the heir and the lord (no other party appearing), directed that an ejectment should be brought to try the right. On the trial, the heir proved title; and the defendant (the lord) put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant, the judge left the case to the jury on the proof of title in the lessor of the plaintiff (the heir): and he had a verdict. Upon a motion to enter a nonsuit, it was held that the plaintiff was entitled to recover; for, that the lord, though he had seized quousque, could not hold against the heir, on the mere proof of a devise to parties who had not

claimed admittance, and of whom nothing was known. Coleridge, J., there says: "The seizure quousque makes no difference in the right of the heir. The lord seizes only till the tenant comes in. That seizure does not give him any adverse title." [Williams, J. How do you make out a title to Joseph's share?] Until June, 1845, there was no tenant on the roll. Proclamations were then made in the ordinary way: and, no one coming in, the heir-at-law of the person last seised makes claim and is admitted. The plaintiff, who claims through him, though he may have no title as against Joseph, has a perfectly good title as against all the rest of the world. [Williams, J. Admittance is not conclusive of title: two claiming by different titles may be admitted: *Rex* v. *The Lord of the Manor of Hexham*, 5 Ad. & E 559, 1 N. & P. 53. There must have been a surrender to the use of John Faulder's will. The admittance of the tenant for life would be the admittance of all in re-**[360]**-mainder under the will (*a*).] This is not a question as between Thomas, the heir-at-law, and Joseph: but as between a tenant duly admitted on the roll and a wrong-doer, a mere trespasser on the estate. The recovery against him would not in any degree affect Joseph's right.

Williams, J. I am of opinion that there ought to be no rule in this case. It appeared at the trial that the testator, John Faulder, devised the property in question to his widow for life, remainder to his six children, John, Thomas, Jane, Elizabeth, Mary, and Joseph, in equal shares, as tenants in common; that, there being a surrender to the use of the will, the widow was duly admitted tenant on the roll; and that the testator's son Joseph, in respect of whose one-sixth the verdict is sought by this rule to be entered, is still alive. Now, it is a rule of copyhold law, that the admittance of the tenant for life is the admittance of all those in remainder. In short, it is an admittance to the whole estate. The question is, whether the plaintiff has made out his title to recover this one sixth, when it is shewn to be outstanding in a person who is living. He founds his right to recover upon the fact of his having **[361]** been admitted tenant on the roll. But his admittance as tenant on the roll cannot give him a title as against one who has already been admitted by the admittance of his mother, the tenant for life. We have been much pressed with the case of *Doe d. Le Keux* v. *Harrison*, 6 Q. B. 631. That, however, is a totally different case. There, the lord, who had seized quousque, attempted to set up, in answer to the claim of the heir, a devise by the ancestor, under which the devisee had never claimed to be admitted. It was objected on the part of the plaintiff, that the will alone, without any proof of the devisee having been admitted, amounted to nothing. And of that opinion was Parke, B., whose ruling was upheld by the court. The difference between the two cases is manifest: there, there was nobody who was clothed with the legal estate under the devise; here, the devisee in remainder is in by the admittance of the tenant for life. I therefore think the plaintiff has failed to make out his title to recover more than the four sixths for which the verdict was taken.

Crowder, J. I am of the same opinion. The plaintiff made out his title to four sixths; but, as to the one sixth in respect of which he now seeks to enter the verdict, he has altogether failed. He founds his claim upon the fact of the property having been transmitted to him through a person who has been admitted tenant of the whole property. That, however, gives him no title. The admittance of Mrs. Faulder, the widow, was in law an admittance of all those who were entitled in remainder,—of the son Joseph amongst the rest. *Doe d. Le Keux* v. *Harrison*, for the reasons stated by my Brother Williams, has no application. It is said that the admittance of Thomas Faulder, under whom the plaintiff claims, at all events entitles him to recover against a mere trespasser. But the defendant is no trespasser: **[362]** he can only be

(*a*) In Scriven on Copyholds, 4th edit. 294, it is said: "It has long been settled that the admittance of the tenant for life or years is the admittance of all in remainder, so as to vest the estate in them;" referring to *Brown's case*, 4 Co. Rep. 22 b., where it was resolved that "the admittance of a tenant for life is the admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom." And see *Rex* v. *Wilson*, 10 B. & C. 80, 5 M. & R. 140, where it was held that the lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of the will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee.

removed from the one sixth by proof that the plaintiff is the rightful owner of it. That the plaintiff has failed to make out.

Byles, J., concurred (*a*)[1].

Rule refused.

THE YORKSHIRE TIRE AND AXLE COMPANY, *Appellants*: THE ROTHERHAM LOCAL BOARD OF HEALTH, *Respondents*. April 21st, 1858.

[S. C. 27 L. J. C. P. 235; 6 W. R. 443. Distinguished, *Mersey Docks and Harbour Board* v. *Jones*, 1860, 8 C. B. N. S. 127.]

An application to send back for amendment a case on appeal from justices under the 20 & 21 Vict. c. 43, s. 2, may be entertained before the day of argument.

A case having been stated by justices, under the statute 20 & 21 Vict. c. 43, s. 2,

Garth, on a former day, moved, on behalf of the appellants, that it might be sent back for amendment (*a*)[2]. The application before the justices was for penalties for continuing a certain drain after notice from the board. The question was whether what was done had not been done with the consent of the board. The justices refused to convict. It was suggested that material omissions had been made in the case as stated, -that a certain notice which had been given by the **[363]** company to the local board of health in 1854, and an order made by the board in June, 1855, in answer to the company's application for permission to put a blow-off pipe into the sewer, and also a plan of the locus in quo,—all of which had been before the justices, and acted upon by them,—were altogether omitted.

Manisty, Q. C., contrà, submitted that this was not the proper time to make the application; but that the case must be argued before the court could see whether or not any amendment was required: and he referred to a case of *Christie*, *App.*, *The Guardians of St. Luke, Chelsea, Resp.*, 27 Law Journ., M. C. 153, where the court of Queen's Bench refused to entertain such a motion before argument. As to the plan, he stated, that, if that was used before the justices, there could be no difficulty as to its being used here. [Byles, J. I see nothing in the act to take away the ordinary jurisdiction of the court as to amending special cases (*a*)[3]. Willes, J. The omission of the notice and order seems to have been a mere slip.] We do not admit that the order was produced before the justices.

Willes, J. That being the case, the better course will be for Mr. Garth to renew his application, upon affidavit; and we will deal with the costs when the matter comes properly before us.

Garth now renewed his motion, upon an affidavit which distinctly alleged that the order had been produced and acted upon by the justices.

Manisty, for the respondents, prayed for time to answer the affidavit: which was granted.

[364] On a subsequent day, Manisty intimated that he did not intend to file any affidavit in answer: and it was agreed that the case should go back for amendment, each party to be at liberty to submit to the justices any additions which they might think ought to be made.

Rule accordingly.

PUGH AND OTHERS *v.* STRINGFIELD AND ANOTHER. April 23rd, 1858.

[S. C. 27 L. J. C. P. 225; 6 W. R. 487.]

W. F. covenanted with A., B., and C., to whom he had severally mortgaged certain unfinished messuages, to complete the premises by a given day; and A., B., and C.

(*a*)[1] Cockburn, C. J., was ill, and Willes, J., sitting at nisi prius.

(*a*)[2] Under s. 7, which enacts that "the court for the opinion of which a case is stated shall have power, if they think fit, to cause the case to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall be amended."

(*a*)[3] See *Hills* v. *Hunt*, 15 C. B. 30.

severally covenanted with W. F. to make him certain periodical advances. In consideration of the arrangement thus entered into with W. F., D. and E. jointly and severally guaranteed to A., B., and C., that W. F. should duly perform his covenant with them,—their joint and several liability under the guarantee not to exceed 100*l*. Default having been made by W. F.,—Held, that A., B., and C. might recover to the extent of the 100*l*. in a joint action against D. and E., in respect of damages sustained by them, or either of them, from W. F.'s breach of covenant.

This was an action upon a guarantee. The declaration stated, that, before the making by the defendants of the promise thereinafter mentioned, the plaintiffs had respectively advanced to one William Few several sums of money upon several indentures by way of mortgage of certain messuages or tenements situate at Kentish Town and Camden Town, in the county of Middlesex; and certain arrangements had been entered into between the plaintiffs and other parties with the said William Few touching their said several mortgages and properties, and which arrangements were expressed, contained, or referred to in an indenture which had at the time of the making by the defendants of their promises thereinafter mentioned, been prepared, and which said indenture was and is made between the said William Few of the first part, the plaintiff Charles Pugh of the second part, the plaintiff Robert Dobbing of the third part, and the plaintiff James Gardiner of the fourth part, and Edward Moss Dimmock and **[365]** Richard Burby of the fifth part, whereby, after reciting as therein is recited, the said William Few covenanted with the plaintiffs that he would on or before the 10th day of January, 1857, complete and finish, to the satisfaction of such surveyor for the time being who might be jointly appointed by the plaintiffs, and pursuant to and in accordance with the plans, specifications, and conditions then already prepared by Mr. George Low, the surveyor at that present time acting on behalf of the plaintiffs, and signed by the said William Few, the said several messuages or tenements situate and being at Kentish Town and Camden Town aforesaid, and comprised in the said several indentures of mortgage, including the making of all roads and pavements, and laying out gardens to the extent of making paths therein, and upon the terms and subject to the conditions therein contained: That by the said indenture the plaintiffs covenanted and agreed with the said William Few that they would advance to him, for the purpose of enabling him to complete and finish the said messuages or tenements and premises, the sum of 1557*l*., such sum to be advanced, as the work should proceed, in weekly payments, upon the certificates of the said surveyor, and each of such certificates to be applicable to the work done towards the completion and finishing of the said messuages or tenements and premises during the seven days next preceding the date thereof: Averment, that, the said indenture having been so prepared, the defendants, in consideration of the said arrangements so entered into by the plaintiffs with the said William Few, and that the plaintiffs would covenant to advance to the said William Few, for the purpose of enabling him to complete and finish the said messuages or tenements according to the said plan, specification, and conditions so already prepared, and signed by the said William Few, and which cove-**[366]**-nant and agreement were and are respectively contained in the said indenture, guaranteed and agreed with the plaintiffs that the said William Few should duly and properly perform and fulfil the said covenant so entered into by him with the plaintiffs, and contained in the said indenture, for the completion and finishing, upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said thereinbefore-mentioned indenture of even date therewith mentioned; it being, nevertheless, agreed and declared that the defendants' joint and separate liability under or by virtue of the said guarantee or agreement should not exceed the sum of 100*l*.: Breach, that, although all things had happened and been done, and all times had elapsed reasonable and necessary to entitle the plaintiffs to have the said covenant and agreement performed by the said William Few, and also to have the defendants' said guarantee and agreement performed by them; yet the said William Few had wholly neglected and failed to perform his said covenant so entered into by him with the plaintiffs, and contained in the said indenture, for the completion and finishing the said messuages or tenements, and the plaintiffs had thereby sustained damages to a greater amount than the sum of 100*l*., and although all things had been done and happened, and all times had elapsed reasonable and necessary to entitle the

plaintiffs to have and recover of and from the defendants the said sum of 100l., yet the same had not been paid to the said plaintiffs: And the plaintiffs claimed 100l.

The defendants pleaded, to the first breach, that the said William Few did not neglect and fail to perform his said covenant so entered into by him with the plaintiffs, contained in the said indenture, for the comple-[367]-tion and finishing of the said several messuages or tenements situate and being at Kentish Town and Camden Town as in the said declaration alleged, nor had the plaintiffs thereby sustained any damages.

Upon this plea the plaintiffs joined issue.

The cause was tried before Willes, J., at the first sitting at Westminster in this term. The guarantee and the deed therein referred to were put in. The guarantee (which was addressed to the plaintiffs) was as follows:—

"London, 24th of October, 1856.

"Gentlemen,—In consideration of the arrangements entered into by you with Mr. William Few, of, &c., builder, and of your covenanting to advance to him, for the purpose of enabling him to complete and finish certain messuages or tenements situate at Kentish Town and Camden Town, Middlesex, according to the plan, specification, and conditions already prepared, and signed by the said William Few, and which covenant and agreement are respectively contained in a certain indenture of even date herewith, made between the said William Few of the first part, Charles Pugh of the second part, Robert Dobbing of the third part, James Gardner of the fourth part, and E. M. Dimmock and R. Barby of the fifth part, we the undersigned, William Stringfield and John Groves Cooper, of, &c., do hereby jointly and severally guarantee and agree that the said William Few shall duly and properly perform and fulfil the covenant entered into by him with you, and contained in the said indenture of even date herewith, for the completion and finishing, upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said indenture of even date herewith mentioned; it being, nevertheless, agreed and declared that our joint and separate liability under or by virtue of this [368] guarantee or agreement shall not exceed the sum of 100l. (Signed) "John W. Stringfield.
"J. Groves Cooper."

It was proved that William Few had failed to perform his covenant for the completion of the messuages referred to in the deed, and that each of the three plaintiffs had thereby sustained damage exceeding 100l. But it was insisted on the part of the defendants that no joint damage had been sustained by the three plaintiffs, so as to entitle them to maintain the action, or, at all events, for more than nominal damages.

A verdict was taken for the plaintiffs, for 100l., leave being reserved to the defendant to move to enter a verdict for him on the above-mentioned issue, or to reduce the damages to 1s., if the court should be of opinion that the defendants' contention was well founded.

Atherton, Q. C. (with whom was W. Brandt), now moved accordingly. This is in substance a contract of indemnity; and, unless it be shewn that the plaintiffs have sustained a joint damnification, they cannot recover, or, at all events, not beyond nominal damages. The breach of covenant complained of is in respect of the non-completion of the three several sets of premises, the interests of the plaintiffs in which are entirely separate and distinct. The court has already decided, *ante*, vol. iii., p. 2, that the interests of the three plaintiffs in this contract is joint: but they cannot recover unless they shew a joint damage. Here, there is no possibility of a common damage to the three. [Crowder, J. Your argument would render the guarantee altogether nugatory.] It may be that the parties would have a remedy in equity. [Willes, J. That would be on the ground that each of the [369] plaintiffs was a trustee for the others. *Lamb* v. *Vice*, 6 M. & W. 467, shews that a trustee may maintain an action upon an indemnity for his cestui que trust.] The difficulty here is that each of the covenantees sustains a separate damage, and in different proportions.

Crowder, J. I am of opinion that there should be no rule. The court having already decided that one of the plaintiffs could not sue upon this guarantee alone, the interests of the three therein being joint, it seems to me to follow that the three may jointly maintain an action upon it: and I think it would be making the whole contract

senseless, to hold that nominal damages only can be recovered for the breach. The plain meaning of the guarantee is, that, if damages result to the plaintiffs or either of them from Few's breach of covenant, the defendants are to be liable to the extent of 100l. The 100l. being recovered, the plaintiffs will hold it in trust to be applied in proportion to the extent of damage sustained by each. But the defendants have nothing to do with its application.

WILLES, J. Having been a party to the former decision of the court upon this guarantee, it does not become me to say anything about it. I will only observe, that, if each of the plaintiffs might maintain a separate action, the first, on proof of damage resulting to him beyond that amount might recover the whole 100l., and leave the others in the lurch: whereas, if they join in suing, each will recover the proportion he may be entitled to. If the guarantee had been given to one having no interest in the subject-matter, but who was merely a trustee for third persons, he might well have sued upon it. That is clear from the class of cases of which the case I referred to is one. There, an officer **[370]** of the Palace court entered into a bond, with sureties, to the knight marshal of that court, conditioned for the due performance of the duties of his office; and (inter alia) that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the court. Having taken insufficient bail from a defendant arrested in an action in that court, an order was made requiring him to pay the amount of debt and costs in the action, which he disobeyed: and it was held that the knight marshal was entitled, as a trustee for the plaintiff in the action, to recover, in an action on the bond, the full amount of the debt and costs. If, then, one having no interest may sue as trustee, there can be no reason why the parties interested may not sue in the same way. I therefore agree with my Brother Crowder in thinking that there should be no rule.

BYLES, J. I am entirely of the same opinion. As between the plaintiffs and the defendants, the damages to be recovered under this instrument must be joint; but, as between the plaintiffs themselves, the interest in the fund when recovered is several. The three plaintiffs jointly are trustees for each other severally. Any other construction would render this guarantee altogether nugatory. We are, in effect asked to reverse the maxim "Interpretatia fienda est, ut res magis valest quàm pereat."

Rule refused.

[371] HART *v.* MILES. April 23rd, 1858.

[S. C. 27 L. J. C. P. 218.]

The declaration stated, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff, that, if he should succeed in procuring the bills or either of them to be discounted, he would apply the proceeds in a given way: averment, that the defendant did succeed in procuring the bills to be discounted, but that he failed to apply the proceeds as agreed: —Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise.

The first count of the declaration stated, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, one for 25l., and the other for 24l. 10s. 6d., each drawn by the defendant upon and accepted by the plaintiff, and payable to the defendant's order, and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff, that, if he should succeed in procuring the said bills or either of them to be discounted, he would pay to Messrs. Sotheron & Richardson the proceeds of such discounting, or a sufficient part thereof, in discharge of another bill of exchange for 45l. 5s. 10d., or of so much thereof as such proceeds would satisfy; and the defendant succeeded in procuring the said first-mentioned bills to be discounted, and the plaintiff did all things necessary to have the defendant perform his said promise, and a reasonable time for the defendant so to do elapsed; yet the defendant broke his said promise, in this, that he did not pay the proceeds, or any part thereof, to the said Messrs. Sotheron & Richardson, in discharge of the said

bill of exchange for 45l. 5s. 10d., or any part thereof: by reason whereof the said Messrs. Sotheron & Richardson obtained judgment in an action at law against the plaintiff for the amount of the last-mentioned bill, and damages and costs, amounting to a large sum, to wit, 51l. 4s. 2d., and issued execution thereon, and caused the plaintiff's goods to be seized and sold in satisfaction of the said judgment, and of the poundage, costs, and expenses of the said execution, amounting in the whole to a large sum, to wit, 64l. 2s. 10d., and of certain arrears of rent: [372] and by reason thereof, the goods of the plaintiff to a much greater value than the amount of those moneys, were sold under the said execution, for the purpose of raising the said moneys: and thereby the plaintiff was greatly injured in his expectations, and ruined in his business and circumstances, and greatly harassed and impoverished: and by reason thereof also the plaintiff became liable to pay the two first-mentioned bills, and may have to pay the same, and was put to costs and charges in and about endeavouring to procure the holder of those bills not to sue the plaintiff thereon.

The defendant pleaded, amongst other pleas,—secondly, that he did not succeed in procuring the said bills to be discounted, as alleged. Issue thereon.

The cause was tried before Williams, J., at the sittings in London after last term. It appeared that the defendant received the two bills on the 30th of June, 1857, and paid them in to his account at his bankers,' where they were entered short, but that, shortly afterwards, he obtained an advance from the bankers, upon an understanding that any bills in their hands belonging to him might be discounted. The execution took place on the 7th of August: and the bills became due in September.

On the part of the defendant, it was submitted that this was a mere naked bailment, and that the defendant was acting as agent for Messrs. Sotheron & Richardson.

The learned judge left it to the jury to say whether the defendant made the agreement upon his own responsibility, whether he did succeed in getting the bills discounted, and whether he knew of the discount before the date of the execution, telling them, that, if he did know of the discount before that event, there was an end of the case, except as to damages; but that, if he did not, he would not be liable.

[373] The jury returned a verdict for the plaintiff,—damages, 75l.

Wordsworth, Q. C., now moved for a new trial on the grounds of misdirection, and that the verdict was against evidence; and also in arrest of judgment as to the first count. He submitted that the question of agency ought to have been more pointedly put to the jury, and that they should have been told that the defendant was not responsible for the accidental passing of the bills to his debit by his bankers without his authority. As to the arrest of judgment, he contended that the count disclosed no consideration whatever for the defendant's promise; and that, at the utmost, it disclosed a mere bailment, without reward. [Willes, J. If there be any consideration, we cannot inquire into the adequacy of it: *Haigh* v. *Brooks*, 10 Ad. & E. 409, 4 P. & D. 288.]

Crowder, J. I am of opinion that there is no ground for arresting the judgment in this case. Looking at the whole declaration, though it certainly is somewhat vague, I think it may be supported, and that the consideration stated is sufficient. The statement is, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised, &c. It is clear that the bills were the plaintiff's property, and that he was entitled to the possession of them: and it is equally clear that they were in the possession of the defendant without value. Instead of requiring him to give them up, the plaintiff consents that the defendant shall retain them for a given purpose, viz. to get them discounted. That is a sufficient consideration for the defendant's promise to dispose of [374] the proceeds in the manner agreed upon, if he succeeded in getting the bills discounted. If the defendant had not made the promise he did, the plaintiff might have handed the bills over to somebody else for the purpose of procuring them to be discounted. I think the consideration was sufficient to support the promise. As to the alleged misdirection,—I am at a loss to discover in what it consisted. It is said that the learned judge should have told the jury that the defendant got no benefit from the transaction: and, further, that he had been pressed with an argument that the case was one of agency only,—that the defendant was acting merely as agent for Sotheron & Richardson,—and that that should have been put to the jury. The learned judge did ask the jury whether the defendant made the

agreement upon his own responsibility. That was in effect putting the question of agency to them. The defendant clearly did not make the promise as agent: it was an original undertaking. I see no ground therefore for granting a rule upon this point. But, with regard to the evidence, we will speak to the learned judge.

WILLES, J. I agree with my Brother Crowder that there was no misdirection. As to the arrest of judgment, I also agree with him in thinking that the declaration discloses a sufficient consideration for the defendant's promise. If the pleader had reflected a little, he would probably have stated it thus,—in consideration of the plaintiff's consenting to the defendant's retaining possession of the bills, and getting the same discounted if he could, the defendant promised, &c. I rather think he was considering how the promise would have looked had it been gathered from a correspondence between the parties. If the defendant had written to the plaintiff thus,—"In consideration of your consenting to my retaining the bills in my pos-[375]-session, I undertake, if I succeed in procuring them to be discounted, to hand over the proceeds to you;" and the plaintiff had answered, -"I assent to the terms of your letter;" there would have been a contract between them that the defendant should procure the bills to be discounted if he could, and hand over the proceeds. That is the contract which is to be implied here. It is do ut facias, or facio ut facias. That brings me to my last observation: if this be not a sufficient consideration, the defendant might have procured the bills to be discounted, without being compellable to hand over the proceeds. Assuming that there was no consideration in the first instance, the fact of the defendant's getting the money in the end makes him liable; just as a man who gives a guarantee for goods to be supplied to a third person incurs no liability until the goods are supplied,—the contract being until then entirely unilateral.

BYLES, J. I am of the same opinion. The true meaning of the declaration I conceive to be this, that the plaintiff intrusts or continues to intrust the two bills, which are his property, to the defendant upon certain terms. I think, for the reasons given by my Brother Willes, that was a good consideration moving from the plaintiff for the defendant's promise to hand over the proceeds if he succeeded in getting the bills discounted. And, further, as my Brother Crowder observes, if the defendant had not retained the bills, the plaintiff might have got them discounted elsewhere. The loss of that opportunity was a detriment to the plaintiff, which would be of itself a sufficient consideration. Further, the declaration alleges that the defendant afterwards succeeded in getting the bills discounted, but failed to pay over the proceeds. There is, therefore, a good consideration for the defendant's promise at least in three ways.

[376] Crowder, J., on a subsequent day, intimated that he had conferred with Cresswell, J., and that the court saw no ground for disturbing the verdict upon the evidence.

Rule refused.

DENDY *v.* NICHOLL. April 30th, 1858.

[S. C. 27 L. J. C. P. 220; 6 W. R. 502. Referred to, *Toleman* v. *Portbury*, 1871-72, L. R. 6 Q. B. 251; L. R. 7 Q. B. 344; *Evans* v. *Wyatt*, 1880, 43 L. T. 177; *Penton* v. *Barnett*, [1898] 1 Q. B. 281.]

A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence.

Ejectment for a piece of meadow land in the parish of Hendon, in the county of Middlesex. The writ was dated the 16th of May, 1857.

The cause for trial before Cockburn, C. J., at the sittings in Middlesex after last Michaelmas Term, when a verdict was (by consent) taken for the plaintiff, upon the following admitted state of facts,—from which the court were to be at liberty to draw such inferences as a jury would be warranted in drawing; leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that those facts shewed a waiver by the plaintiff of his right of re-entry:—

The defendant held the land in question as tenant to the plaintiff under a lease dated the 30th of November, 1838, for twenty-one years from Michaelmas then last, at the yearly rent of 3l. The lease contained the following covenant:—"That [the

lessee], his executors or administrators, shall not at any time during the said term hereby granted, demise, grant, set, or let, or underlet the said hereby demised premises, or any part thereof, nor part with this indenture of lease (except by will), for all or any part of the said term, to any person or persons whomsoever, without the special [377] licence in writing of the said [lessor], his heirs or assigns, first had and obtained." Proviso, "that, if the said yearly rent of 3l., or any part thereof, shall be behind or unpaid by the space of twenty one days next after the same shall become payable, or if the said [lessee] do not well and truly perform and keep all and every the covenants and agreements hereinbefore expressed, and which on his or their part are or ought to be performed and kept, and that according to the true intent and meaning of these presents, then and from thenceforth, or at any time or times hereafter, it shall and may be lawful for the said plaintiff, his heirs or assigns, into and upon the said premises hereby demised, or any part thereof, to re-enter, and the same to have again, retain, re-possess, and enjoy as in his and their first and former estate, anything hereinbefore contained to the contrary thereof notwithstanding: nevertheless, this present demise shall be in force for the purpose of compelling a due performance of the covenants hereinbefore contained, and not then duly performed."

The defendant entered under this lease, and occupied up to Michaelmas, 1854, when he underlet the demised premises by parol to one Frend, who entered and continued in occupation from that time under an arrangement with the defendant to pay the rent half-yearly to the plaintiff. The fact that the premises were so let was known to the plaintiff shortly after the letting took place: but he did not know the terms as to the rent. After the letting to Frend, neither he nor the defendant paid any rent to the plaintiff up to the 30th of April, 1857. On that day, the plaintiff issued a writ for the recovery of the rent due on the 25th of March preceding. On the 16th of May, the cause was by a judge's order referred to the master, and the defendant, on the 23rd, paid the plaintiff's attorney the amount of the rent so due.

[378] On the 16th of May, 1857, this action was commenced; the breaches of covenant in respect of which it was brought were stated in the particulars to be,—first, the non-payment of rent accrued due subsequently to Michaelmas, 1854,—secondly, the assignment, underletting, and demise of the premises, and parting with the indenture of lease, contrary to the covenant in that behalf.

Hugh Hill, Q. C., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground that the facts admitted at the trial shewed that the plaintiff had waived his right of re-entry.

Kinglake, Serjt., and H. Lloyd, now shewed cause. The question is, whether the acceptance of rent from the lessee on the 23rd of May, 1857, was a waiver of the forfeiture accruing from the unauthorized underletting at Michaelmas, 1854, of which forfeiture the landlord had elected to avail himself by having previously commenced an action of ejectment on the 16th. In the notes to *Dumpor's case* (4 Co. Rep. 119), in 1 Smith's Leading Cases, 4th edit. 33, it is said: "It is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents, instead of the possession of the land; and, as an election once made and expressed cannot be retracted (quod semel placuit in electionibus amplius displicere non potest: Co. Litt. 146 a.), the receipt of subsequent rent, as such, without more, binds the landlord by proving an election. But rent to the amount of that reserved in the lease may be received under circumstances shewing it to be paid and accepted merely as compensation for use of [379] the land, and not with the intention of setting up the lease, nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture: see *Doe* v. *Batten*, Cowp. 243. It is not supposed that the naked question of intention to waive would in such a case be left to the jury. The question should perhaps be,—Did the lessor receive the rent eo nomine as rent due under the lease? See per Parke, J., *Doe d. Griffith* v. *Pritchard*, 5 B. & Ad. 765, 776. A receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it. *Jones* v. *Carter*, 15 M. & W. 718. See Co. Litt. 215 a." [Willes, J. All that is now exploded. Crowder, J. The court of Queen's Bench, in *Croft* v. *Lumley*, 5 Ellis & B. 648, decided that the receipt of rent, as a matter of law operated to waive all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect. The Exchequer

Chamber affirmed the judgment in that case, but upon another point. The case afterwards went to the House of Lords, with a like result: see 6 House of Lords Cases, 672 (*a*).] In *Jones* v. *Carter*, 15 M. & W. 718, it was held that the service by a lessor upon the lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due or covenants broken after the service of the declaration. Parke, B., in giving judgment, there says: "Though the lease is de-[380]-clared to be void for breach of covenant, it is perfectly well settled that the true construction of the proviso is, that it shall be void at the option of the lessor: *Rede* v. *Farr*, 6 M. & Selw. 121, *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401, and other cases: and, consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined. In the cases above referred to, the option was held to have been exercised by the receipt of rent subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and, if once rendered void, it could not again be set up. An entry, or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease, which is made void at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option: and, once determined, the lease could not be revived It was said there was no authority upon the point now under consideration; but there is a case at Nisi Prius materially bearing upon it, in which Lord Tenterden expressed a clear opinion that the receipt of rent after an ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe d. Morecraft* v. *Meux*, 1 C. & P. 348. A case was desired, but we cannot find that any was [381] argued. We entirely agree in Lord Tenterden's opinion. The precise point that he decided was, that, on the trial of an ejectment for a forfeiture (in which, of course, the entry was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. We think the same consequence follows from an entry admitted by the consent-rule: but, even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all." The intention of the landlord to waive the right of re-entry or the forfeiture, must be evidenced by some unequivocal act which cannot be retracted: *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, 7 D. & R. 98; *Doe d. the Baron de Rutzen* v. *Lewis*, 5 Ad. & E. 277, 6 N. & M. 764. In both those cases the evidence of waiver was clear and distinct. [Crowder, J. Having treated the defendant as his tenant by suing him for the rent, can the plaintiff afterwards change his mind and elect to treat him as a trespasser?] In *Blyth* v. *Dennett*, 13 C. B. 178, a demand of rent accruing subsequently to the expiration of a notice to quit, was held not necessarily to be a waiver of the notice. [Crowder, J. That is a totally different matter. It was necessary there to have the assent of both parties to create a new tenancy: Here, all that is needed is, the election of the landlord to discontinue the tenancy. In Comyns's Digest, Condition (P.), it is said, that "if, after a condition broken annexed to an estate of freehold, and notice of it, the feoffor accept the rent due at a subsequent day, it shall be a dispensation of the forfeiture, for he allows the estate to have continuance: Co. Litt. 211 b.; *Harvey* v. *Oswald* (*Harvie* v. *Oswel*), Cro. Eliz. 553, [382] 572. So, if a condition upon a lease for years be, for non-payment of rent to re-enter, the acceptance of rent at a subsequent day is a dispensation: Cro. Eliz. 553, 572." Unless there be some distinction between an assize of rent and the present mode of enforcing payment of rent by action, I do not see how

(*a*) As to the question of waiver, see the opinions of Bramwell, B., p. 705, of Crompton, J., p. 713, of Martin, B., p. 720, of Williams, J., p. 725, of Wightman, J., p. 729, and of Coleridge, J., p. 733.

that is to be answered.] In the course of the argument in *Doe d. Nash* v. *Birch*, 1 M. & W. 402, 406, Parke, B., observes: "In *Green's case*, Cro. Eliz. 3, calling the party a tenant in a receipt for by-gone rent, was held to be sufficient evidence of a waiver: and that, though the receipt of the rent would not be a waiver, yet that the calling him tenant in the receipt was. You may say that a demand of rent is not a [waiver of a] forfeiture, because the landlord in effect says, 'If you will pay me the rent, I will accept you as a tenant,' and the tenant does not do so; therefore it is incomplete: some distinct act ought to be done to complete a waiver." [Crowder, J. I observe that the learned Baron, in giving judgment in that case, says, —"I think that an absolute unqualified demand of the rent by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports."]

Hugh Hill, Q. C., and Maude, in support of the rule. The simple question here is, whether the bringing an action for the rent, and afterwards by means of the action receiving the rent, was not a sufficient election by the lessor to affirm the continuance of the lease, so as to prevent him from afterwards turning round and treating the lessee as a trespasser. The particulars in the action shew that the rent in respect of which it was brought accrued subsequently to the time the plaintiff had notice of the forfeiture. *Doe d. Matcraft* v. *Mears*, 4 B. & C. 606, 7 D. & R. 98, *Doe d. the Baron de Rut* [383]-*zen* v. *Lewis*, 4 Ad. & E. 277, 2 N. & M. 764, and *Jones* v. *Carter*, 15 M. & W. 718, shew that the intention of the landlord to waive the forfeiture must be evidenced by some unequivocal act. But here was an unequivocal act shewing a clear election on the part of the plaintiff to treat the defendant as a continuing tenant. Littleton, § 219, says,—"If a man grant by his deed a rent charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behind, and the distress detaine until he be payd. But he cannot do or have both together, &c. For, if he recovers by writ of annuity, then the land is discharged of the distress, &c. And, if he doth not sue a writ of annuity, but distreine for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity." Upon this Lord Coke observes, -Co. Litt. 145 a., – "Here is to be observed that this determination of the election of the grantee must be by action or suit in court of record; for, albeit the grantee distreine for the rent, yet he may bring a writ of annuitie, and discharge the land. And Littleton putteth his case here surely upon a recoverie in a writ of annuitie, but if the grantee doth bring a writ of annuite, and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further." [They were stopped by the court.]

Crowder, J. I am of opinion that this rule, which calls upon the plaintiff to shew cause why the verdict should not be entered for the defendant, on the ground that the facts admitted at the trial shewed that the plaintiff had waived his right of re-entry, should be made abso-[384]lute. It appears to me that the facts shew distinctly that there was a waiver of the forfeiture. The facts are these: -The defendant was tenant to the plaintiff under a lease which contained a covenant by the lessee not to underlet the premises without the consent in writing of the lessor. The defendant broke this covenant by under-letting to one Freud in 1854. On the 30th of April, 1857, the plaintiff commenced an action against the defendant to recover the arrears of rent due from Michaelmas, 1854, to Lady Day, 1857. The writ was in the ordinary form: but by the particulars the action appeared to be brought for rent accruing up to the 25th of March preceding. For the defendant, it is said, that, although he had incurred a forfeiture by under-letting without the lessor's consent, yet the plaintiff had waived his right to take advantage of that forfeiture, by having, with knowledge of its existence, brought an action for the rent subsequently accruing, which action was continued by a judge's order referring it to the master, and under which the rent up to the 25th of March, 1857, was paid on the 23rd of May. On the other hand, it is said, that, inasmuch as this action of ejectment was brought on the 16th of May, 1857, the very day on which the judge's order was made in the action commenced on the 30th of April, and before the money was paid in that action, the plaintiff's right of entry was not waived, and he was entitled on that day, viz. the 16th of May, to insist upon the forfeiture. The question, therefore, is, whether the

bringing the action for the rent on the 30th of April, and the subsequent acceptance of the rent in that action, amounted to a waiver. I am of opinion that it did. Authorities have been cited,—amongst others, *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, 7 D. & R. 98, and *Jones* v. *Carter*, 15 M. & W. 718,- to shew that a landlord by bringing an ejectment sufficiently evinces an intention to treat [385] the tenant as a trespasser. And, at first, it appeared to me that the payment of the rent on the 23rd of May could not operate as a waiver [of a forfeiture] of which the landlord had previously elected to avail himself by bringing an ejectment on the 16th. In delivering judgment in *Jones* v. *Carter*, Parke, B., says: "After such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it: and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty after that time." The act there relied on as determining the landlord's option, was, bringing an ejection. How does that apply here? Here, the landlord, by bringing an action for rent accruing subsequently to the accrual of the forfeiture, and obtaining payment of the rent by means of that action, has clearly made his election to treat the lessee as still being his tenant. Surely that as unequivocally shows the landlord's determination to treat the lease as an existing lease, as the bringing of an ejectment demonstrates an intention to treat the tenant as a trespasser. The tenant must under those circumstances be induced to consider himself still tenant, and could not conceive himself liable to be dealt with as a trespasser. There is also a strong expression of opinion to the same effect by the same learned judge in *Doe* v. *Birch*, 1 M. & W. 406. It is true it was not necessary to the decision of the case: but still everything that fell from that very learned judge is entitled to weight. "The question of waiver," he says, "does not distinctly arise in this case. If it had, the authorities cited shew that this was a lease voidable at the election of the landlord. Then I think that an absolute unqualified demand of the rent by a person having sufficient authority, would have [386] amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports." That dictum goes beyond what is necessary in the present case. The learned judge lays it down as his opinion that an unqualified demand of the rent would operate a waiver of the forfeiture. Here, there has been not merely a demand of the rent, but an action brought to enforce it. That seems to me to be an unqualified and conclusive act on the part of the landlord, shewing a determination on his part to treat the lessee as still continuing his tenant. If this action were held to be maintainable, this gross inconsistency would result, viz. that the plaintiff, having already recovered the rent up to Lady Day, 1857, would recover the land by reason of the forfeiture in 1854, and also, as my Brother Willes suggested in the course of the argument, mesne profits down to the time of the verdict. Such a result could never be permitted. I think the authorities abundantly shew, that, by such a demand as has been made here, the plaintiff has elected conclusively to treat the defendant as his tenant, and cannot afterwards turn round and make him a trespasser. For these reasons, I think the rule to enter a verdict for the defendant must be made absolute.

Willes, J. I am entirely of the same opinion. It has been contended on the part of the plaintiff that the bringing an action of ejectment was such an election on the part of the landlord to take advantage of the forfeiture and put an end to the term, as to prevent the subsequent acceptance of the rent from operating to revive the lease; and that that view is sustained by the decision of the court of Exchequer in *Jones* v. *Carter*, 15 M. & W. 718. I am glad we are not bound to lay down so capricious a doctrine as that, although the bringing an action of ejectment is an un-[387]-equivocal demonstration of intention on the part of the lessor to treat the lessee as a trespasser, yet the bringing an action to recover the rent is not an equally strong and unequivocal demonstration of his intention to treat him as continuing tenant. That, as it seems to me, would be a gross inconsistency, unless there be some substantial distinction between an action of ejectment for the recovery of the land and an action to recover the rent: and none such has been pointed out. It is not necessary, and therefore would be an unprofitable waste of time, to compare the writ of ejectment under the Common Law Procedure Act (15 & 16 Vict. c. 76) with the old writ of covenant for non-payment of rent. It is enough to say that each is a demand in a court of record,—the one of the land,—the other of the rent. It would

manifestly be inconsistent to hold that the writ of ejectment is an election by the landlord to treat the tenant as a trespasser, and that a writ of covenant for the rent would not be an election to treat him as tenant. I think we are bound to hold the one just as much an election as the other.

Byles, J. When the facts are carefully looked at, they seem to me to disclose as clear a case of waiver as could well be conceived. First, there is a demand of the rent, then an action brought to enforce that demand, and then a judgment signed in that action, and the rent paid by the tenant and accepted by the landlord. The plaintiff relies upon the lease for the purpose of enforcing payment of the rent; and now he says that during the same period it was mere waste-paper. That clearly can never be permitted.

Rule absolute.

[388] Hollingham *v.* Head. April 16th, 1858.

[S. C. 27 L. J. C. P. 241; 4 Jur. N. S. 379; 6 W. R. 442. Referred to, *Lansdowne v. Connor*, 1889, 24 L. R. Ir. 57.]

In an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition,—Held, that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the condition suggested.—But the judge allowed the plaintiff to be asked, on cross-examination, whether he had not made such conditional contracts with others,—with a view of testing his credit or the accuracy of his memory.—Quære, whether it was proper even to that extent?

This was an action for the price of a quantity of artificial manure sold by the plaintiff to the defendant.

At the trial before Williams, J., at the last Assizes for Sussex, it appeared that the plaintiff, who represented himself to be the agent of a company styled the Sussex Manure Company, was in the habit of travelling about to the different market towns to sell an article called Rival Guano; that he met with the defendant, who was the occupier of a farm in the county of Sussex, adjacent to a farm which had formerly been in the occupation of the plaintiff, and prevailed upon him to purchase a quantity of this guano; and that it turned out to be altogether worthless.

The defence set up was, that the article had been purchased by the plaintiff subject to a condition that it was not to be paid for unless it proved equal to Peruvian guano: and it was proposed, on cross-examination, to ask the plaintiff whether he had not made contracts with other persons for the sale of his Rival Guano upon the terms that the purchasers should not pay for it unless it turned out to be equal to Peruvian guano.

The learned judge permitted the question to be put, for the purpose of testing the plaintiff's credit.

The defendant's counsel then proposed to call witnesses to prove that the plaintiff had made contracts with other persons for the sale of his guano upon the terms suggested.

The learned judge ruled that this evidence was not admissible, as not being relevant to the issue, and res inter alios acta.

[389] A verdict having been found for the plaintiff,

Montagu Chambers now moved for a new trial, on the ground of the improper rejection of evidence, and also that the verdict was against evidence. This case presents an exception to the general rule, res inter alios acta alteri nocere non debet. It may be departed from where it is essential to do so for the purpose of confirming the testimony of a witness, because it is just and right that this should be done. Lord Coke says, Co. Litt. 152 b,—"It is holden for an inconvenience that any of the maxims of the law should be broken, though a private man suffer loss; for that, by infringing of a maxim, not only a general prejudice to many, but in the end a public incertainty and confusion to all would follow. And the rule of law is regularly true, res inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet; which are true, with this exception, unless an inconvenience would follow." In *Rex*

v. *Egerton*, R. & R. C. C. 375, upon an indictment for extorting money under a threat of an abominable accusation, it was proposed to examine the prosecutor as to a subsequent ineffectual attempt by the prisoner to obtain a further sum by means of a similar threat; and Holroyd, J., received it (Wood, B., coinciding with him in its admissibility), "on the ground of its being offered as confirmatory of the truth of the prosecutor's evidence as to the transaction of the former day, and as to the nature of those transactions" (*a*). And, upon a case reserved, the evidence was held to have been properly admitted. So, in *Llewellin* v. *Winckworth*, 13 M. & W. 599, it was held, that, in an action against a **[390]** party as acceptor of a bill of exchange, accepted in his name by another person, when evidence has been given of a general authority in that person to accept bills in the defendant's name, an admission by the defendant of liability on another bill so accepted, is good confirmatory evidence of the former. [Byles, J. See the ground upon which Parke, B., puts it. He says,—"If you have proof * of the general authority, an admission of liability on another bill is confirmatory of it. In *Cash* v. *Taylor*, 8 Law J. (1830), K. B. 262, Lloyd & Welsby M. C. 178, the letter did not shew that Tallents had a general authority to accept bills. There is a great distinction between the fact of authorizing another bill to be drawn on the defendant, and admitting a liability on another bill so drawn: the former is evidence of a general authority to accept bills for him; the latter may well be confirmatory of proof * of general authority. Here, there was ample evidence for the jury of a general authority: then, the defendant's admission of liability is strongly confirmatory of that."] The verdict was so directly in the teeth of all the evidence as almost to amount to a perverse verdict.

Willes, J. I am of opinion that there ought to be no rule in this case. The question is, whether, in an action for goods sold and delivered, it is competent to the defendant to set up by way of defence that the plaintiff has entered into contracts with third persons in a particular form, with the view of thereby inducing the jury to come to the conclusion that the contract sued upon was not as represented by the plaintiff. I am clearly of opinion that it was not competent to the defendant to do so. The case put forward on the part of the plaintiff, was, that the defendant bought of him a quantity of a certain article called "Rival Guano," at a given price per ton. The defend-**[391]**ant, on the other hand, insists that it was one of the terms of the contract that he was not to pay for the article unless it turned out to be equal to Peruvian guano. The plaintiff, having given evidence in support of his case, was asked on cross-examination by the defendant's counsel whether he had not entered into contracts for the sale of his guano to other persons upon the terms suggested, viz. to be paid for only on condition that it proved equal to Peruvian guano. That question was disallowed as not being competent evidence for the purpose of establishing that the contract was made subject to that condition. And I understand that my Brother Williams also rejected similar evidence in chief, which was offered on the part of the defendant. I am of opinion that the evidence was properly disallowed, as not being relevant to the issue. It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down the rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point they have to decide. This rule is nowhere more clearly laid down than in the very able treatise by Mr. Best upon the Principles of Evidence, 2nd edit. 319. "Of all rules of evidence," he says, "the most universal and most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. Its theoretical propriety can never be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters in dispute between contending parties, **[392]** or which otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside, as beyond the jurisdiction of the tribunal, as tending to distract its attention and to waste its time." And the same

(*a*) Would it have been competent to the prosecutor to call a third person to prove a similar attempt by the prisoner to extort money from him?

* Evidence?

learned author, in another part of his book, says,—p. 14,—"There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but, in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required." Now, it appears to me that the evidence proposed to be given in this case, if admitted, would not have shewn that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus,—Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. Where, indeed, the question is one of guilty knowledge,—as in case of a charge of uttering base coin or forged notes,—such evidence is received as tending to establish a necessary ingredient in the crime. But I am not aware of any other instance. If such evidence were held admissible, it would be difficult to say that the defendant might not in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a [393] particular class, for the purpose of shewing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable. The only ground upon which it could at all be suggested that such an inquiry could be permitted on cross-examination, would be, that it was a means of testing the credit of the witness or the accuracy of his memory. But I doubt even that: and that does not appear to have been the way in which it was put. As to the cases referred to, — *Egerton's case*, R & R. C. C. 375, is altogether distinguishable. There, the prisoner was charged with having extorted money from the prosecutor by means of a threat to charge him with a certain offence: and the prosecutor was allowed to give evidence of another ineffectual attempt by the prisoner to obtain money from him by similar threats,—in order to shew the intention of the prisoner in making the demand. The evidence there was admissible because it was all part of one persecution of the prosecutor; it was relevant to the matter in issue, as shewing the nature and character of the transaction in question. In *Llewellyn* v. *Winkworth*, 13 M. & W. 598, which was an action against the defendant as acceptor of a bill of exchange accepted in his name by another person, evidence having been given of a general authority in that person to accept bills in the defendant's name, an admission by the defendant of liability upon another bill so accepted was held to be good confirmatory evidence. There, too, the evidence was relevant to the issue. For these reasons, I am of opinion that there is no pretence for granting a rule on the ground of misdirection or the improper rejection of evidence. As to the other branch of the motion,—for a new trial on the ground that the verdict was against the evidence,—if the learned judge who [394] tried the cause had expressed himself dissatisfied with the verdict, I should probably have thought a rule might be granted: but, as he has not so expressed himself, there will be no rule.

Byles, J. I am of the same opinion. This seems to me to be a perfectly clear case. It may be that the plaintiff might well have been asked, on cross-examination, with a view of testing his credit or refreshing his memory, whether he had not made other contracts such as the defendant suggested to have been made here. But, as substantive evidence in the defendant's case, it clearly was not admissible. It would be contrary to all precedent and to all principle.

Williams, J. I entirely agree with the view presented by my Brother Willes; and I must say that it has rather inclined me to think that I was wrong in allowing the evidence even to the limited extent I did. I admitted it only for the purpose of pressing the memory of the witness, expressly ruling it to be inadmissible for the purpose of proving the substantive fact. As to this, there could be no doubt whatever. It would manifestly lead to great inconvenience, if the parties were to be allowed incidentally to investigate other transactions and dealings having no connection with the cause of action with respect to which they are at issue. With respect to the latter branch of the motion,—I cannot say that I think the verdict was wrong.

It was purely a question for the jury: and it was very difficult for any one to say where the truth lay.

Rule refused.

[395] SMITH *v.* LINDO. April 20th, 1858.

[Affirmed in Exchequer Chamber, 5 C. B. N. S. 587.]

A dealer (in London) in shares in a public company, (whether British or Foreign) is a "broker" within the statute 6 Ann. c. 16, and incapable of suing for commission, unless duly licensed. —But, where an unlicensed person had assumed to act as a broker in the purchase of such shares,—Held, that he might recover from his principal the price which pursuant to a usage of the share-market he had been obliged to pay, the statute of Anne not making the contract void, but merely preventing the unlicensed broker from recovering any remuneration for his services in making it.

This was an action for money payable for work done by the plaintiff for the defendant, at his request, as a broker, and for fees due and of right payable by the defendant to the plaintiff in respect thereof; and for scrip and shares sold and delivered by the plaintiff to the defendant; for money paid; and for money found to be due on accounts stated.

The declaration also contained a count stating that the defendant retained and employed the plaintiff, as such broker as aforesaid, to purchase for the defendant certain scrip certificates of shares on the London Stock-Exchange, to be paid for by the defendant on the then next settling day on the said exchange, for reward to the plaintiff; and the defendant, on such retainer, authorized and requested the plaintiff to purchase the said scrip according to the usual terms of the said exchange, one of such terms being, that, in the event of the shares not being paid for at the time fixed for payment by the contract of purchase, the purchaser's broker shall be liable to indemnify the seller in respect of such default; that the defendant, on such retainer, agreed to save the plaintiff harmless in respect of such liability; that the plaintiff accepted such retainer, and did purchase the said scrip for the defendant on the said exchange, to be paid for on the said day, and on the terms aforesaid; and that the defendant did not, when the said day of payment (which had elapsed) arrived, save harmless, nor had he since saved harmless the plaintiff in the premises, but the defendant made default in the payment for the said scrip, whereby the plaintiff became liable to the said seller as aforesaid, and the said seller had sued and re**[396]**-covered judgment against the plaintiff in respect of the plaintiff's said liability, and the plaintiff had thereby been put to heavy expenses and liabilities.

The defendant pleaded,—first, to the common counts, never indebted,—secondly, to the last count, that the defendant did not agree with, or retain or employ, or authorize or request the plaintiff as in that count alleged,—thirdly, to the last count, that the plaintiff did not purchase the said scrip for the defendant in manner or on the terms in the said last count alleged,—fourthly, to the last count, as to so much of the residue of the declaration as relates to work alleged to have been done, and money alleged to have been paid by the plaintiff for the defendant, that the said work alleged to have been done by the plaintiff for the defendant was done by the plaintiff within the city of London, as a broker for the defendant, that is to say, in and about the purchasing and bargaining and making contracts for the purchase for and on behalf of the defendant of divers scrip certificates purchased by the plaintiff for the defendant in a certain public company; that the said money alleged to have been paid by the plaintiff for the defendant, was money paid by the plaintiff within the said city of London, as such broker as aforesaid, as the price of the said scrip certificates, in fulfilment and performance of the said contracts; that the plaintiff made such payments in his own wrong, and without any express request whatever from the defendant to pay the same; and that, except and by way of implication from the said retainer and employment of the plaintiff to purchase the said scrip certificates thereinbefore mentioned, and from the usage and custom of the trade and business relating thereto (*a*), there never was any request whatever to the plaintiff **[397]** to pay

(*a*) Inserted on amendment of the plea.

the said price of the said scrip certificates; that the said retainer and employment of the plaintiff in the last count mentioned was a retainer and employment of the plaintiff to act within the city of London as a broker, and to purchase as such broker the said scrip certificates in the said last count mentioned for the defendant: that the said alleged purchase of the said scrip for the defendant in the said last count mentioned, was made by the plaintiff within the city of London as a broker; and that the plaintiff was not at the several times of the doing of the said alleged work, and the payment of the said money alleged to have been paid, and of the said retainer, employment, and purchase in the said last count mentioned, or either of them, a broker duly licensed, authorized, or impowered to act or practise as a broker in the premises, or any of them, within the said city of London, contrary to the form of the statute in such cases made and provided.

The plaintiff joined issue on the first three pleas, and took issue on the last.

The cause was tried before Byles, J., at the first sitting at Westminster in Hilary Term last. It appeared, that, in the early part of the year 1857, a company was formed in London called the Hungarian Land Company; that prospectuses were issued, an office taken, and shares issued, and that the defendant was the solicitor to the company.

The plaintiff, who was called, stated, that, in the beginning of August, he called upon Lindo, and suggested to him that it would be for the interest of the company to employ some person to go into the market to buy shares, and requested that he might be employed to perform this operation; that Lindo "acquiesced;" that he thereupon went into the market and bought three lots of shares, which were described in the con-[398]-tract note as bought "on account of Lindo;" and that these notes were from time to time as the shares were bought (the 4th, 5th, and 6th of August) handed by him to Lindo. He admitted that he was not a member of the Stock Exchange, nor a licensed broker, but that he was a "dealer in shares."

It was further proved, that, by the usage of the share-market, the broker, and not the principal for whom he buys, is the person looked to by the seller of the shares for payment on the settling-day.

It appeared that the plaintiff had been compelled to pay 210*l.* to the sellers of the shares; which sum, together with 7*l.* 3*s.* 9*d.* for commission or brokerage, he now sought to recover from the defendant.

The defendant who was called as a witness, stated that he had never authorized the plaintiff to buy the shares for him; that, on seeing his name in the contract-notes, he asked the plaintiff why he had put it in, and told him he would have nothing to do with the shares; and that the plaintiff thereupon said he had been authorized by Nunez, the stock-broker of the company, to do as he did.

Nunez, who was also called, denied that he had ever given the plaintiff any instructions as to the purchase of the shares; but that, on the contrary, he distinctly told him he had no authority.

It further appeared, that the plaintiff had first made this claim upon Nunez, whom he had called before the committee of the Stock-Exchange, to compel him to pay the money; that Lindo appeared as a witness before the committee; and that the committee dismissed the complaint.

On the part of the defendant, it was submitted, that the fourth plea was proved, the plaintiff having according to his own account acted as a broker in the purchase of the shares, charging commission as a broker; and that, upon the authority of *Cope* v. *Rowlands*, 2 [399] M. & W. 149, *Pidgeon* v. *Burslem*, 3 Exch. 465, and *Jessopp* v. *Lutwyche*, 10 Exch. 614, the plea, if proved, was a good answer to the plaintiff's claim.

The case being left to the jury upon the credit of the witnesses, they found a verdict for the plaintiff for 217*l.* 3*s.* 9*d.*; and leave was reserved to the defendant to move to enter a verdict for him on the issue on the fourth plea, if the court should be of opinion that it afforded an answer to the action: and leave was also reserved to amend the plea, if necessary.

Collier, Q. C., accordingly obtained a rule nisi to enter a verdict for the defendant, on the fourth plea, on the ground that that plea was proved, the plaintiff to be at liberty to contend, upon the argument of the rule, if it should be necessary, that judgment should be entered for the plaintiff on that plea non obstante veredicto, on the ground that the plea was bad, and that it did not shew an acting as broker within

the act (6 Ann. c. 16); that scrip certificates in a public company are not within the statute; and that it would not defeat the claim for money paid.

Bovill, Q. C., Geary, and Laxton, now shewed cause. The question is whether the plaintiff is a "broker" within the 6 Ann. c. 16, s. 5, which enacts, "that, if any person or persons from and after the determination of this present session of parliament, shall take upon him to act as a broker, or employ any other under him to act as such, within the said city (London) and liberties, not being admitted as aforesaid (*a*)[1], every such [400] person so offending shall forfeit and pay, to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of 25*l.*, to be recovered by action of debt," &c. A stock-broker has been held to be a broker within that act: *Janssen* v. *Green*, 4 Burr. 2103; *Clarke* v. *Powell*, 4 B. & Ad. 846, 1 N. & M. 492; *Cope* v. *Rowlands*, 2 M. & W. 149. [Byles, J. The judgment in *Clarke* v. *Powell* is almost a plagiarism on that of Best, C. J., in *Gibbons* v. *Rule*, 12 J. B. Moore, 539, 4 Bing. 301, where a ship-broker was held not within the act.] All the cases are noticed in those two judgments. [Crowder, J. Are stock-brokers dealing in foreign stocks brokers within the statute of Anne (*a*)[2]? In *Milford* v. *Hughes*, 16 M. & W. 174, where it was held that a person who hires or procures for another persons to be employed by him in the laying out and surveying of a line of railway, is not a broker within the act, Alderson, B., says: "The Law Dictionary defines brokers to be 'those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a fee or reward.'" In *Wilkes* v. *Ellis*, 2 H. Bl. 555, an auctioneer who sells goods by auction within the city of London was held not to be a broker within the act. So, this plaintiff who was employed to buy and sell shares in an estate in Hungary, cannot be within the act. The statute imposing a tax, ought not by its general words to be held to impose that tax upon persons who were not known at the time, and have only come into existence since its passing. [Crowder, J. [401] Does not this plaintiff come within the definition in the 57 G. 3, c. ix.?] The legal construction of the 6 Ann. c. 16, is not to be affected by what the legislature in the 57 G. 3, c. ix., assume to be its intention. These shares are clearly not "goods, wares, or merchandise," within the statute of frauds: *Tempest* v. *Kilner*, 3 C. B. 249; *Bowlby* v. *Bell*, 3 C. B. 284. [Crowder, J. That is fully settled.]

Assuming that the plaintiff is precluded from recovering the commission, there can be no reason why he should not recover back the money paid. He was employed by the defendant to purchase; and, by the custom, he becomes personally liable to pay: the purchase and the payment are two separate and distinct acts. The statute of Ann. does not make the contract void: it merely says that the broker shall not recover for making it. In *Pidgeon* v. *Burslem*, 3 Exch. 465, 470, Parke, B., says: "It is not disputed that the plea in this case would have been a good answer, if pleaded to so much of the plaintiff's demand as consisted of a remuneration for his services as a broker; the case of *Cope* v. *Rowlands*, 2 M. & W. 149, being a decisive authority that such remuneration could not be recovered. But the plea is pleaded to the whole declaration, including the bills of exchange, and these are said to have been accepted on account of 319*l.* 16*s.* 4*d.* due and owing from the defendant to the plaintiff, for his, the plaintiff's, having as such broker made contracts of purchase and sale of shares, &c., and for his having paid for the use of the defendant such sums as aforesaid, that is, sums paid as incidental to his retainer and employment, upon and by virtue of and in and about the making or completing the said contracts. The words 'as incidental' are ambiguous, and it is difficult to say what is their precise meaning in this plea. In Johnson's Dictionary, the word incidental is said to [402] mean 'incident, casual, &c., not necessary to the chief purpose.' In Webster's, the word incident has, among other meanings attributed to it, 'appertaining to or following the chief or principal.' It by no means follows from the use of this term in the plea,

(*a*)[1] By s. 4, it is enacted that "all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that court shall think fit and reasonable," &c.

(*a*)[2] Time bargains in foreign funds are not within the prohibitions of the stock-jobbing act, 7 G. 2, c. 8: *Wells* v. *Porter*, 2 Scott, 141, 2 N. C. 722; *Oakley* v. *Rigby*, 2 Scott, 194, 2 N. C. 732; *Elsworth* v. *Cole*, 2 M. & W. 31.

that the payment of these sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as broker, it happened that he was also employed to pay the whole or part of the purchase money of the shares for the defendant: but, if so, the plaintiff's disability to act as broker not rendering the contract void, but only disentitling him to any recompense for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied. The case differs altogether from those in which the contract is forbidden, as, under the acts against stock jobbing, or where the purpose for which the money was paid was illegal, as in *De Begnis* v. *Armistead*, 10 Bingh. 107, 3 M. & Scott, 511, cited on the argument." So, in *Jessopp* v. *Lutwyche*, 10 Exch. 614, where, to a declaration for money paid and on accounts stated, the defendant pleaded, —first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and the defendant by way of gaming upon the market-price of shares,—secondly, that the causes of action accrued to the plaintiff as a broker in the city of London, about the purchasing and selling for the defendant in the city of London, of shares, and that the plaintiff was not duly licensed in pursuance of the statute, it was held, on demurrer, that the pleas were bad: Parke, B., saying: "*Pidgeon* v. *Burslem*, 3 Exch. 465, is precisely in point. It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in [403] fact it was so paid; in which case the defendant has no defence." [Willes, J. The gaming act does not create any illegality. Byles, J. It was assumed in that case that "share-brokers" are within the statute.] *Knight* v. *Cambers*, 15 C. B. 562, and *Knight* v. *Fitch*, 15 C. B. 566, were also referred to.

Collier, Q. C., and Archibald, in support of the rule. Neither the 6 Ann. c. 16, nor the 57 G. 3, c. ix., gives any definition of the term "broker." In the argument in *Clarke* v. *Powell*, 4 B. & Ad. 849, Follett says: "In popular language, a broker is a person who makes contracts for others. One of the definitions given of the word broker in Johnson's Dictionary is, 'one who does business for another.' In Jacob's Law Dictionary, brokers are described 'those who make bargains in matters of money or merchandise;' and he enumerates exchange-brokers, corn brokers, brokers of stock, and pawnbrokers. In Blunt's Law Dictionary are mentioned 'exchange brokers, mediators in any contract of buying and selling, or contracts of marriage, and pawnbrokers.' In Cowel there is a similar enumeration. The statute 1 Jac. 1, c. 21, gives the city of London the power of admitting brokers, and describes them as persons who make contracts between merchants and tradesmen." The definition given in the 10 Ann. c. 19, s. 121, seems to be large enough to embrace this plaintiff. By that section, a penalty is imposed on every person "who shall be employed as a broker in the behalf of any other person, to make any bargain or contract for the buying or selling of any tallies, orders, Exchequer Bills, Exchequer tickets, bank bills, or any share or interest in any joint-stock erected by act of parliament, &c., who shall take or receive, directly or indirectly, any sum of money or other reward exceeding 2s. 9d. per cent." The principle of the decision in [404] *Clarke* v. *Powell* seems to be this, that the statute of Anne is to be construed with reference to the exigency of the times and the expansion of commerce. Littledale, J., after referring to the description of brokers given in the 1 Jac. 1, c. 21, says: "Though this was the occupation of regular brokers at that time, it is obvious, that, when a new subject of dealing was created in government securities, those who dealt in the same way respecting such securities, might fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandise." What is the difference in the occupation of a man, whether he buys and sells consols or railway shares? The fourth plea is substantially proved. Then, is it a substantially good plea? It is submitted that it is. In *Cope* v. *Rowlands*, 2 M. & W. 149, Parke, B., says: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." And that has repeatedly been acted upon since. [Crowder, J. The contract with the broker may be void: but the contract to buy

the shares is not void. If the contract for the shares is not void, the party must pay the money; and, if he pays the money, why should he not recover it back?] If the plaintiff recovers the money, it is because it is supposed to have been paid in pursuance of a request, which arises from a retainer and employment to do an illegal act. [Crowder, J. The contract for the sale of the shares to Lindo is perfectly good, though **[405]** the broker acted improperly in making that contract.] The case of *Jessopp* v. *Lutwyche*, 10 Exch. 614, is clearly distinguishable. Parke, B., there says: "It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." Here, the plea negatives any express request to pay the money. And, for the reasons before stated, there is no implied request of which the court can take notice.

CROWDER, J. I am of opinion that the verdict for the plaintiff on the fourth plea must be set aside, and a verdict on that plea entered for the defendant. But, at the same time, I am of opinion that the plaintiff is entitled to judgment non obstante veredicto on that plea, on the ground that the plea is bad. The result will be, that there will be judgment for the plaintiff for the whole amount claimed. If, however, the defendant chooses, he may amend his plea, by confining it to the commission; and then there will be a verdict for him as to that, and the verdict for the plaintiff will be reduced to £219*l*. It appears to me that the plaintiff is not entitled to sue for commission as a broker; and that the plea as applied to that particular item of claim would be a good answer. The question is, whether the plaintiff is a broker within the meaning of the statute of 6 Ann. c. 16. The circumstance of the plaintiff's calling himself a broker and suing as a broker, is not material: we must look at the facts of the case, in order to be enabled to determine whether or not he is a broker within the contemplation of the statute. It is clear that he was not a licensed broker; and therefore, if within the statute, he could not recover his commission. It appears that the shares which were the subject-matter of these contracts were **[406]** shares in a company called the Hungarian Land Company, by whom scrip was issued in the usual manner, and that the plaintiff was employed by the defendant to go into the market and purchase a large number of these shares for him; and for so doing the plaintiff charges the usual broker's commission. We must look at the term "broker" in the 6 Ann. c. 16, as having been used in its general popular sense. It is difficult for us at this day to determine with any degree of accuracy what brokers were at that time: there must be many things now dealt with by brokers that were then wholly unknown. But, the statute having used the term "broker" generally, we must endeavour to ascertain what was the popular understanding of the period. The 1 Jac. 1, c. 21, s. 1, describes the antient brokers in the city of London as persons who dealt "between merchant English and merchant strangers and tradesmen, in the contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandizes to be bought and sold and contracted for within the city of London, and moneys to be taken up by exchange between such merchant and merchants and tradesmen." There is no precise description given of the articles dealt in by those brokers; therefore that statute affords us but little assistance. The whole subject underwent a great deal of discussion in the case of *Clarke* v. *Powell*, 4 B. & Ad. 846, where the court held that a stock-broker is a "broker" within the statute of Ann. The question there arose upon a sale of government securities: but it seems to me to go the full length of deciding that a dealing in any similar securities would constitute a man a broker. In delivering the judgment of the court in that case, Littledale, J., referring to the description of brokers given in the 1 Jac. 1, c. 21, says, "Though this was the occupation of regular **[407]** brokers at that time, it is obvious, that, when a new subject of dealing was created in government securities, those who dealt in the same way respecting such securities might fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandize." He then refers to the 8 & 9 W. 3, c. 20, s. 60, and to the 8 & 9 W. 3, c. 32 (an act to restrain the number and ill practice of brokers and stock-jobbers), and proceeds,- "In the 6 G. 1, c. 18, s. 21 (passed twelve years after the statute of Queen Anne), a penalty is imposed on brokers buying and selling shares in illegal undertakings. The 7 G. 2, c. 8, s. 8, mentions 'brokers' with reference to

transactions of buying and selling stock. Considering the provisions of these statutes, recently before and after the passing of the statute 6 Anne, it appears to us that persons buying and selling government stock and securities for others were considered as brokers at that time, and must fall under that description in the statute in question. If brokers dealing in government stock and securities then existing were so, it does not admit of a doubt that those who dealt in all subsequently-created stock, and securities of the like description, would be so: just as much as merchant brokers who bought or sold a new description of merchandize." It seems to me that the same argument will apply here, and that the present plaintiff is equally a person falling within the description of a broker. I do not think it can make any difference that the shares here dealt in were shares in a foreign company. The dealing in securities of that sort seems to me as much to fall within the definition of a "broker" as the dealing in any other stocks, funds, or securities. For these reasons, I am of opinion that the plaintiff cannot recover for commission.

[408] The next question is, whether, though disabled from recovering the commission, the plaintiff may not recover the money which he paid on behalf of the defendant. It is said that he was as much acting as a broker in paying the money as he was in making the contract, and therefore equally disabled from recovering it back. I am of opinion, however, that the plaintiff is entitled to recover back the money so paid. It appears from the evidence that there exists a usage in the share market that all brokers dealing in shares shall be considered and treated as principals in the transaction, and personally held liable to pay the price. The existence of that usage does not, however, make it part of the duty of the broker as broker to pay the money for his principal. It is incident to his employment in so far as the usage may bind him; but it is not necessarily part of his duty as a broker. If Lindo himself had furnished the money, Smith would equally have been acting as a broker in the transaction. There is nothing in the statute of Anne to prevent the plaintiff from recovering back money paid under such circumstances. *Pidgeon* v. *Burslem*, 3 Exch. 465, and *Jessopp* v. *Lutwyche*, 10 Exch. 614, substantially decide this point; and particularly what Parke, B., says in the latter case,—"The statute relating to brokers only precludes them from recovering remuneration for their services as such;" and, in giving judgment, "It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." And in *Pidgeon* v. *Burslem*, the same learned judge says: "It by no means follows from the use of this term ['incidental'] in the plea, that the payment of those sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as **[409]** broker, it happened that he was also employed to pay the whole or part of the purchase-money of the shares for the defendant; but, if so, the plaintiff's disability to act as broker not rendering the contract void, but only disentitling him to any recompense for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied." So, here, the contract which the plaintiff made for the purchase of the shares being good, by necessary implication a contract arises for the recoupment of the plaintiff of the money which by the usage he was bound to pay for the defendant.

For these reasons, I am of opinion that the plaintiff is entitled to judgment non obstante veredicto on the fourth plea.

Willes, J. I am of the same opinion. I think the plaintiff was clearly acting as a broker within the 6 Ann. c. 16. There are many cases the result of which shews that there exists a class of brokers who did not exist at the time of the statute of Anne; but that persons who deal after the manner of the brokers at that time, though they deal in stocks and other things not known then, are still within the act brokers. The plaintiff, therefore, having contravened the statute, is disabled from recovering his commission. Then, as to the money. It appears that there is a usage amongst persons who deal in shares, similar to that which prevails on the Stock Exchange, that the buying broker is treated as principal, and responsible for the payment of the price of the shares. The members of the Stock Exchange suppose that by this arrangement of contracting in their own names, and abstaining from disclosing the names of their principals, they preclude the seller from having recourse to the real buyer. In this they are probably mistaken. But, be that as it may, the **[410]** usage is, that, if the principal does not provide the money to pay for the shares

on the settling-day, the buying broker must do so himself: and any person dealing in shares is bound by that usage. The question is, whether, where the broker pays money for his principal, he can recover it back. But for the statute of Anne, there could be no doubt upon the subject But, does the broker act as broker in paying the money? I apprehend he does not. He pays the money as a contracting party, according to the usage of the share-market, and not as broker. The plaintiff therefore is entitled to recover back the money paid, but not the commission. But, as it stands at present, the fourth plea professes to be an answer to both. The defendant has proved his plea in point of fact: but, as far as regards the money paid, it is a bad plea, and therefore the plaintiff is entitled to judgment non obstante veredicto. If the defendant chooses, however, to confine it to the commission, he may so amend it, upon the terms of paying the costs of this rule. If no amendment be made, there will be judgment for the plaintiff non obstante veredicto, for the whole amount.

Byles, J. I am of the same opinion. It is a very old and a very sound rule in the interpretation of statutes, that its words are to be construed according to their ordinary grammatical and popular sense, unless so construing them would lead to any inconsistency or repugnancy. If this statute of Anne had passed in the last session of parliament, I apprehend there could have been no doubt that the plaintiff would have been within it. The 6 Ann. c. 16, however, having passed more than one hundred and fifty years ago, we must resort to contemporaneous exposition to enable us to arrive at its meaning. Now, the statutes which passed shortly before and shortly after the statute of Anne, **[411]** which have been referred to, clearly shew that the term "broker" was there used in the sense which is now understood and contended for on the part of the defendant. I should have entertained no doubt whatever, but for some expressions which fell from Best, C. J., in *Gibbons* v. *Rule*, 12 J. B. Moore, 539, 4 Bingh 301. Then, as to the money,—that was not paid by the plaintiff while acting as a broker, but was paid in pursuance of a usage of the share-market, which makes the person who actually buys responsible to the seller for the price of the shares. That, therefore, does not fall in any way within the statute. The result is, that the plaintiff is entitled to recover back the money which was paid by him in respect of a contract which is valid because the statute does not apply to it. The verdict will, therefore, be for the defendant upon the fourth plea: but there will be judgment for the plaintiff thereon non obstante veredicto, unless the defendant elects to amend that plea by limiting it to the commission; in which case the plaintiff will have a verdict for the amount of the money paid only.

Rule accordingly (*a*).

[412] Whitwell *v.* Perrin. May 7th, 1858.

Necessaries were furnished to a ship on the order of the ship's husband (himself a part owner) by whom alone the ship was managed:—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and, on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance.

This was an action for the price of goods supplied by the plaintiff to a vessel at Bristol called the "Eliza," of which the defendant was part-owner.

The cause was tried before Crowder, J., at the last Assizes at Bristol. The facts which appeared in evidence or by admission were as follows:—The defendant had shares in the "Eliza" and in several other vessels. He was registered as owner of the "Eliza," but never interfered with the management. The goods which were the subject of the action were supplied to the ship upon the orders of the plaintiff's father, who was a part-owner, and the ship's husband, and the account had been sent in to Messrs. Perrin & Co., the ship's brokers, who had been in the habit of receiving the

(*a*) The defendant did not amend, and consequently the rule was drawn up to enter a verdict for the defendant on the fourth plea, and a judgment for the plaintiff non obstante veredicto on that plea.

The defendant afterwards brought a writ of error, which was argued in the Exchequer Chamber at the sittings after Trinity Term, 1858, when the judgment was affirmed. Vide post.

freights and paying the ship's disbursements; and bills had been drawn upon them for a portion of the goods, and paid by them; and, on their bankruptcy, the plaintiff proved against their estate for the balance. The defendant was not a member of that firm. There was evidence that he had received a share of profits as part-owner from the ship's brokers.

On the part of the defendant, it was submitted that there was no evidence to go to the jury as against him.

The learned judge was of opinion that there was evidence for the jury, and he accordingly left the case to them, and they found for the plaintiff, damages 68*l.*; and leave was reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that there was no evidence which ought to have been submitted to the jury.

Collier, Q. C., on a former day in this term, obtained **[413]** a rule nisi accordingly. He referred to *Reed* v. *White*, 5 Esp. N. P. C. 121, *Griffiths* v. *Hicks*, 15 Law Times, 349, *Myers* v. *Willis*, 17 C. B. 77, *Brodie* v. *Howard*, 17 C. B. 109, *Hackwood* v. *Lyall*, 17 C. B. 124, and Abbott on Shipping, 10th edit. 73.

Slade, Q. C., and Prideaux, now shewed cause. There was ample evidence to go to the jury that Whitwell, the ship's husband, had authority to bind the owners for necessaries supplied for the ship. *Myers* v. *Willis*, *Brodie* v. *Howard*, and *Hackwood* v. *Lyall*, have no bearing upon the present case. The register is not conclusive evidence of ownership; nor is ownership conclusive of the question of liability: the real question is, whether the debt has been contracted by one having authority to contract on the behalf of the owners.

Collier, Q. C., and W. R. Cole, were called upon to support the rule. It is conceded that the defendant was neither the managing owner nor the person contracted with. The only ground upon which it is sought to make him liable, is, that the contract was made by one who was acting as his agent: but it is clear from the evidence that the plaintiff looked only to the managing owner or the brokers. *Reed* v. *White*, 1 Esp. N. P. C. 121, is very like this case. It was there held, that, if a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part-owner) only, and settles with him alone, he discharges the other owners, particularly if the bill be renewed. In *Rich* v. *Coe*, Cowp. 636, it was held, that, though the master of a vessel be also lessee of it, by agreement with the owners, for a term of years, under covenants on their part that he shall have the sole management of the ship, and employ her for his own sole benefit, &c., and on his part that he **[414]** shall repair her at his own sole cost and charge, &c., the owners are still liable for necessaries furnished for the ship by order of the master, though without their knowledge, or without their being known to the persons who supplied them. Lord Mansfield, in giving judgment, there says: "Whoever supplies a ship with necessaries has a triple security,—1. The person of the master,—2. The specific ship,—3. The personal security of the owners, whether they know of the supply or not. The master is personally liable, as making the contract. The owners are liable in consequence of the master's act, because they choose him. They run the risk, and they say whom they will trust with the appointment and office of master. Suppose the owners in this case had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money, it would have been no concern of the creditors; for, they trust specifically to the ship, and generally to the owners. In this case, the defendants are the owners; and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction? And that is an answer to the observation that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it gave credit to the captain individually as the responsible person, particular circumstances of that sort might afford a ground to say he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated that the plaintiff **[415]** had no notice whatever of the contract." Wherever credit is given to an agent, with knowledge that he is acting merely as agent, the party so dealing with the agent is precluded from afterwards having recourse to the principal: *Paterson* v.

Gandasequi, 15 East, 62: per Lord Tenterden, C. J., in *Thomson* v. *Davenport*, 9 B. & C. 78, 4 M. & R. 110,—"If at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison* v. *Gandasequi*, 4 Taunt. 574, and *Paterson* v. *Gandasequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." That is precisely what the plaintiff has done here. He chose to give credit to the agent, taking bills upon the brokers, and afterwards, on their failure, proving the debt against their estate. That was conclusive evidence of his election to treat with the brokers, to the prejudice of the owners, inasmuch as the earnings of the ship were thereby diverted from their legitimate application, viz. the purchase of supplies. If the plaintiff had intended to charge the owners, he ought not to have proved against the estate of Messrs. Perrin & Co.: *Ex parte Field*, *in re Rogers*, 3 Mont. D. & De Gex, 95.

Williams, J. I am of opinion that this rule should be discharged. There appears to have been evidence which put the point beyond all controversy, that the defendant received a share of the profits arising from the ship, and that he was fully aware that the person who gave the orders for the goods in question was the ship's **[416]** husband, and as such had the management of the ship. That clearly was evidence to be submitted to the jury. It is said there was conclusive evidence here that credit was given, not to the owners of the "Eliza," but to Messrs. Perrin & Co. But I must confess I am utterly at a loss to see any evidence upon which the jury could with propriety have decided in favour of the defendant, but, even if there were any evidence, it was a question for them; and I think they have come to a right conclusion.

Willes, J. I am entirely of the same opinion. The goods in question were ordered by the ship's husband, and were necessary for her use. The defendant received his share of the profits earned by the ship: and there was abundant evidence to shew that he authorized the ship's husband to do what was necessary to keep the ship in an efficient state. To entitle a person who has done repairs or furnished goods for a ship to sue the owners, it is not necessary that the credit should have been actually given to them. But here it is said that the ship's husband must be taken to be the only debtor, because bills on the brokers had been taken from him for the amount. The bills, however, were merely taken for the plaintiff's convenience, to put him in funds. The brokers failing to pay, the plaintiff clearly had a right to pursue his remedy against those who are legally liable, viz. the owners.

Byles, J. Since the case of *Mitcheson* v. *Oliver*, 5 Ellis & B. 419, the law is restored to what it formerly was, viz. that the mere fact of a man being owner or part-owner of a ship, or registered as owner, does not make him liable for work done or goods ordered for the ship: but, as Jervis, C. J., puts it in *Brodie* v. *Howard*, 17 C. B. 109, 117, the question is, with whom was the contract? **[417]** Was the party giving the orders the agent of the owners for that purpose? The mere fact of the goods being ordered by the captain or the ship's husband is no evidence to go to the jury. But here, not only was the defendant beneficially interested, but he knew that Whitwell the elder was acting as the ship's husband, and he received a share of profits. That clearly was evidence to go to the jury that the ship's husband had authority to contract on behalf of the owners.

Crowder, J. I am of the same opinion. I must confess I thought this an undefended cause. The goods were ordered from time to time by the ship's husband, and the account sent in to the ship's brokers, who divided the profits, of which the defendant, who was one of the part-owners, received his share. It is said that the fact of the plaintiff having received bills from the brokers for part of the demand, was a conclusive election on his part to treat them as his debtors, and precluded him from afterwards having recourse to the owners. There is no foundation for that argument. The bills were taken for the plaintiff's convenience. The question for the jury was, whether the orders given by the ship's husband were given by the authority of the defendant. I think there was strong evidence to go to the jury that they were.

Rule discharged.

[418] EVERSFIELD *v.* JOHN NEWMAN AND EDWARD NEWMAN. May 6th, 1858.

[S. C. 6 W. R. 445.]

It is not necessary that the grounds for issuing it should appear in a rule or order for a prohibition.—A. was found taking sand from premises in the occupation of B. (under a lease), and was given into custody by B. on a charge of stealing it. On appearing before a magistrate, A. denying that B. had any right to the land, the charge was dismissed as involving a question of title. A. afterwards sued B. in the county-court for false imprisonment. A prohibition having issued under a judge's order,—the court set it aside, on the ground that no question of title could arise on the hearing.

On the 14th of December, 1857, a plaint was entered in the Shoreditch county-court, at the suit of John Eversfield, against John Newman and Edward Newman, to recover damages for an alleged false imprisonment.

On the 13th of January, 1858, an order was made by Byles, J. (*a*), for a writ of prohibition, to be directed to the judge of the county-court, prohibiting the hearing of the said cause therein. This order was obtained upon an affidavit by Edward Newman, in which it was alleged, amongst other things, that, by an indenture of demise dated the 29th of August, 1854, made between Thomas Blumson of the one part and Edward Newman of the other part, Blumson demised to Edward Newman a piece of ground in Nova Scotia Gardens (describing it), to hold the same to Edward Newman, his executors, administrators, and assigns, for ninety-nine years from the 24th of June then last, at the yearly rent of 60*l.*: That deponent took the said lease for the purpose of using the said piece of ground as a place of deposit for road-dust collected by him in the course of his business as a dust-contractor, and also to enable him to sell the same to builders: That the deponent was informed by his son, the defendant John Newman, that the plaintiff was in the habit of entering upon the said piece of land and taking therefrom some of the road-dust: That the deponent caused the plaintiff to be warned, that, if he took the said road-dust from the said ground, he would be given into custody for stealing the same: That, the plaintiff persisting in taking the said road-dust from the said piece of ground, the **[419]** defendant John Newman gave him into custody, and he was taken to the police-station: That the charge was heard before the magistrate at the Worship Street police-court, when it was stated that the deponent had no right to the said piece of ground, and the magistrate dismissed the charge, on the ground that a question of title was involved in the matter, which had better be taken before a superior court: That the plaintiff had caused the said summons to be issued for the said imprisonment, and that the deponent was advised that a question as to his right and title to the said piece of ground would be probably raised, which the county-court had no jurisdiction to try.

J. A. Foot, on a former day in this term, moved for a rule to shew cause why the order of Byles, J., and the writ of prohibition issued in pursuance thereof, should not be set aside. The affidavit upon which the motion was founded, stated, that, on the 14th of December last, the plaintiff John Eversfield entered a plaint in the Shoreditch county-court against John and Edward Newman for false imprisonment; that the hearing was appointed for the 18th of January, but, on the 13th, the defendant Edward Newman, upon an ex parte application to Byles, J., obtained an order for a writ of prohibition to issue, directed to the judge of the county court, prohibiting the hearing of the cause therein; that the circumstances which gave rise to the said plaint being entered were as follows,—On the 7th of October last, the plaintiff was employed by one Wilson to sift a quantity of sand, and, whilst so employed, he was given into custody by the defendant John Newman on a charge of stealing the sand, and, after remaining in custody a considerable time, he appeared before the magistrate at the police-office, Worship Street, and was then ordered to be discharged; that the plaintiff did **[420]** not claim title to the said land; that he was only a common labourer; and that he was advised and believed, that, if the action was allowed to proceed in the county-court, no question of title to the said land, or any part thereof, would arise, as the plaintiff merely sought to recover compensation for the false imprisonment as before mentioned.

(*a*) Pursuant to the 13 & 14 Vict. c. 61, s. 22.

The learned counsel referred to Bacon's Abridgment, Prohibition (K), pl. 16, where it is said, "In *Mendyke* v. *Stint*, 2 Mod. 271, these things were agreed by the court: 1. That, if any matter appears in the declaration which sheweth that the cause of action did not arise infra jurisdictionem, there a prohibition may be granted at any time: 2. If the subject-matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time: 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or if his plea be not accepted, or is overruled: in all these cases, a prohibition likewise will lie at any time." And also to *In re Still* v. *Booth*, 1 L. M. & P. 440, New County Court Cases, 375, where Wightman, J., says,—"Every writ of prohibition must shew grounds on the face of it, when special grounds are stated on affidavit." He submitted that the application for the prohibition was premature, and that the order should have shewn upon the face of it the ground for the prohibition.

CROWDER, J. I am of opinion that it is not necessary that the order should state the grounds of the prohibition. It would be very inconvenient if it were so: it would be introducing a sort of special pleading, which would be productive of much mischief. Upon the other grounds, the rule, I think, may go, and also for a procedendo.

[421] WILLES, J. I entirely agree that the order need not have shewn upon the face of it the grounds upon which it is issued. The reasons upon which the application is founded are never stated in a rule for a mandamus, or an order to arrest an absconding debtor under the 1 & 2 Vict. c. 110, or for an execution against a shareholder in a joint-stock bank under the 7 & 8 Vict. c. 110, s. 68; and yet, in all these cases, the special grounds must appear by affidavit. It would be introducing needless doubts and difficulties into the administration of the law to hold that the grounds for the prohibition must appear on the face of the order.

A rule having accordingly been granted to set aside the order and the writ of prohibition issued in pursuance thereof, and for a writ of procedendo to the judge of the county-court commanding him to proceed with the plaint,

Beasley now shewed cause. He submitted, that, inasmuch as the affidavits disclosed a possibility of the title to the land coming in question, the jurisdiction of the county-court was ousted.

Foot was not called upon.

CROWDER, J. The rule must be made absolute. On no conceivable view of the matter could the title to the land come in question here. It appears that the plaintiff was in the habit of taking sand from off a piece of land in the occupation of the defendant Edward Newman, and that, being caught in the fact, he was given into custody upon a charge of stealing it. The charge was not of a trespass on the defendant's land, but of stealing his property. For this, the plaintiff has brought an action for false imprisonment. I cannot **[422]** see the remotest possibility of any question of title to the land being brought in question. The cause must be tried in the county-court.

WILLES, J. I am of the same opinion. The title to the land could not possibly come in question here. If the plaint had been for a trespass in removing the plaintiff from the land, and the defendants had justified under a plea in the nature of molliter manus imposuerunt, then the right to the possession of the land might have come in question. But that is not what was done here. The plaintiff was not requested to leave the land, but he was taken into custody on a charge of stealing a chattel belonging to one of the defendants on the land. The county-court judge might well entertain the complaint, even though incidentally the plaintiff thought fit to assert that the defendants had no title: *Dutens* v. *Roberts*, 1 H. Bla. 100 (cited post, p. 432). But it does not appear that he had any intention to do so.

BYLES, J. I also am of opinion that this rule should be made absolute. Upon the affidavit used before me at Chambers, it appeared that the title of Edward Newman to the land was denied before the magistrate, and he was thereby induced to dismiss the charge. The probability that the same question would be raised before the county-court induced me to make the order. Upon consideration, however, it does not appear to me that any question of title could arise, and therefore there is no ground for a prohibition.

Rule absolute.

[423] In the Matter of a Plaint between Emery and Barnett.
May 6th, 1858.

[S. C. 27 L. J. C. P. 216 : 4 Jur. N. S. 634 ; 6 W. R. 634. Referred to, *Howorth* v. *Sutcliffe*, [1895] 2 Q. B. 362.]

A mere assertion of title will not oust the jurisdiction of the county-court : the title must be bonâ fide brought into question.—A. was let into possession of premises as tenant to B., and paid him rent. C. claiming title, A. gave up possession to him in consideration of a sum for crops. In an action in the county-court by B. against A., to recover arrears of rent, and also possession of the premises, Held, that whether C.'s title could be set up or not, depended upon whether A. had been evicted by title paramount, or had voluntarily yielded up possession.

On the 31st of March, 1858, a plaint was entered in the county-court of Shropshire holden at Market Drayton, and a summons thereon served for hearing on the 12th of April, in which William Emery was plaintiff and John Barnett defendant, for the recovery of a house, land, and premises at Stoke Heath, the yearly rent of such tenement being 8l., and for the recovery of 11l. 6s. 3d. rent and arrears of rent due from the defendant to the plaintiff in respect of the same premises. At the hearing it was proved on behalf of the plaintiff, that he verbally let the premises to the defendant from the 25th of March, 1856, at the yearly rent of 8l., and that thereupon the defendant entered and occupied the premises, and in or about the month of February, 1857, paid to the plaintiff one half-year's rent due the 29th of September previously ; that the plaintiff and defendant afterwards signed an agreement or demise in writing, bearing date the 7th of April, 1857, for the yearly tenancy by the defendant under the plaintiff of the said premises from the 25th of March, 1857, at the like rent of 8l. per annum, payable half-yearly, on the 29th of September, and 25th of March in every year ; and it was one of the terms of the said agreement that the said tenancy might be determined by either party upon giving six months' notice at Michaelmas in any year.

It was further proved on the part of the plaintiff, that the defendant offered to give up possession of the premises to him (the plaintiff) prior to the 29th of September, 1857, upon certain terms which the plaintiff **[424]** refused to agree to ; and that, on the 22nd of that month, it was verbally agreed between the defendant and one James Dutton (with the consent of the plaintiff) that the defendant should give up the said premises to the said James Dutton on the following Michaelmas Day, and that Dutton should pay the defendant for his hay on the premises, and that the defendant should pay the rent of the premises to Michaelmas Day ; but that the defendant did not carry out the said agreement, but, on the contrary, gave up the possession of the premises previously to the said Michaelmas Day to one John Stones, who, it was alleged claimed to be entitled thereto.

It was also proved, that, on the 29th of September, 1857, the plaintiff gave the defendant a notice to quit at the then next Lady Day ; and that, on the 2nd of October, 1857, a distress was levied on the premises for 8l., a year's rent due on the 29th of September, under which distress certain goods were seized and sold.

On behalf of the defendant, it was proved that John Stones had, after the signing by the defendant of the agreement above mentioned claimed to be owner of the premises, and, in June, 1857, gave him notice not to pay any more rent to any one ; that the defendant afterwards informed the plaintiff of Stones's claim ; and that the defendant had delivered the possession of the premises to Stones, or to some person on his behalf.

On the part of the defendant it was objected, on the authority of a case of *Mountney* v. *Collier*, 1 Ellis & B. 630, that, the title to the land being bonâ fide in question, the judge of the county-court had no jurisdiction to determine the plaint. The judge thereupon, conceiving that the title was in question, held that he had no jurisdiction, and accordingly declined to proceed.

Prentice, on a former day in this term, upon an affi **[425]** davit of these facts, obtained a rule calling upon the judge of the county court and the defendant respectively to shew cause "why the said judge should not hear and determine the said

plaint, and why such order should not be made as to the costs of and occasioned by this application to the court as to the court should seem fit" (*a*).

Unthank now shewed cause, upon an affidavit stating, that, upon the hearing of the cause, it was proved, on cross-examination of the plaintiff's son, that the defendant had, in June or July, 1857, informed him that a person of the name of Stones had demanded possession of the premises sought to be recovered in the action, and given him due notice not to pay any more rent to the plaintiff, and that the defendant had given up possession of the premises to Stones, who was then in possession thereof, and that he believed the notice received from Stones was after the defendant had signed the agreement of the 7th of April, 1857: That, on the conclusion of the plaintiff's case, it was objected, on the **[426]** part of the defendant, that the judge of the county-court had no jurisdiction to determine the plaint, on the ground that the title to the said premises was in question; but the judge said, that, before he decided that the title was in question, he must be satisfied that the claim was made bonâ fide, and he should require some evidence in support of such claim: That it was then proved on behalf of the defendant, that Stones, accompanied by an attorney, in or about the month of June, 1857, called upon the defendant at Stoke Heath, and demanded possession of the said premises, and gave the defendant notice not to pay any more rent to the plaintiff; and that, in pursuance of such demand and notice, the defendant had, previously to the 29th of September, 1857, upon Stones agreeing to pay him for his growing crops, yielded up possession of the said premises to Stones: That it was further proved on behalf of the defendant, that Stones was then in possession of the premises, which he claimed as heir-at-law of his father, John Stones, deceased, who claimed under the will of Francis Stones, deceased: That the defendant was prepared, by the will of Francis Stones, and by further evidence, to shew that the question of title was raised bonâ fide, and that the claimant John Stones was the person really entitled to the premises: And that the judge, being satisfied that the claim was made bonâ fide, and that the title to land did come in question, declined further to proceed with the cause, saying that he had no power to inquire into the validity of such title.

As a general rule, no doubt, a tenant is estopped from disputing the title of the landlord by whom he has been let into possession. But that which took place here, assuming Stones to have had a good title, was equivalent to an eviction. The question therefore was, whether he was a mere trespasser, or a person **[427]** having title. In *Mountnoy* v. *Collier*, 1 Ellis & B. 630, a plaint was brought in a county-court for use and occupation. It appeared that the plaintiff demised the premises to the defendant for a year from Michaelmas, 1850, and the defendant occupied from that date up to the time of the trial. The defendant paid the rent to the plaintiff for the half-year up to Lady Day, 1851, but refused to pay rent afterwards. It was proved that one J., claiming to be the plaintiff's landlord, had given the plaintiff notice to quit, expiring at Lady Day, 1851, and ordered the defendant not to pay the plaintiff any rent after that day; and that the plaintiff and C., a deceased occupant of the premises in question, had paid 10s. rent to J. The plaintiff contended that this payment was for a part only of the premises; the defendant, that it was for the whole. The defendant offered to prove by declarations of C., the deceased tenant, that C. paid rent for the whole. The judge rejected the evidence; but gave judgment for the defendant, on the ground that the plaintiff's title had expired as to part, and that the rent was not apportionable. On appeal on a case stating the above facts, it was held that the judgment could not be supported; that the evidence ought to have been received; and that if, when

(*a*) The 43rd section of the 19 & 20 Vict. c. 108, enacts that "no writ of mandamus shall henceforth issue to a judge or an officer of the county-court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court, or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county-court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the superior court or judge thereof may by rule or order direct the act to be done; and the judge or officer of the county-court, upon being served with such rule or order, shall obey the same, on pain of attachment; and, in any event, the superior court or the judge thereof may make such order with respect to costs as to such court or judge shall seem fit."

received, it shewed that the defence was bonâ fide, it would sufficiently raise a question of title to deprive the county-court of jurisdiction under the statute 9 & 10 Vict. c. 95, s. 58. [Willes, J. Rent was claimed here for six months after the tenant gave up possession.] Yes. [Byles, J. Must not the tenant, before the estoppel ceases, deliver up the possession to the person from whom he received it?] No case has held that the tenant is bound to resist a bonâ fide claim of title. [Crowder, J. To discharge the tenant, there must be an actual eviction, or something tantamount to it: *Carpenter* v. *Parker*, ante, vol. iii. p. 206. [428] In *Mountnoy* v. *Collier*, the title had expired. But, may the tenant in any case hand over possession to a claimant?] In the case of a lease by mortgagor, if the mortgagee gives notice of his claim, the lessee ceases to be liable on his covenants. [Crowder, J. That is eviction by title paramount.] The tenant is in no case bound to incur costs to free himself from adverse claims. [Byles, J. In *Doe d. Knight* v. *Lady Smythe*, 4 M. & Selw. 347, it was held that a third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as tenant to the lessor of the plaintiff, and paid rent to him under an agreement which has expired. Bovill, Q. C. *Doe d. Bullen* v. *Mills*, 2 Ad. & E. 17, 4 N. & M. 75, 1 M. & Rob. 385, comes nearer. There, A. having, without title, entered upon land, and built a cottage, afterwards accepted a lease (by indenture) from B.: C. claiming the land as his own, paid to A. 20l. to give up the possession to him: and it was held (in ejectment on the demise of B. against C.), that A. had estopped himself from controverting the title of B., and that C. was bound by the estoppel, as having come in under and received the possession from B. Crowder, J. Does not the tenant controvert the title of his landlord by giving up the possession to a stranger? Byles, J. In *Doe d. Manton* v. *Austin*, 9 Bingh. 41, 2 M. & Scott, 107, one T. held premises under a lease from one B., and paid rent to B. and to his personal representatives after his death: on the expiration of the lease, T. surrendered the premises to the defendants: and it was held that the defendants could not dispute the title under which T. came in. Tindal, C. J., there says: "The principle is, that a tenant shall not contest his landlord's title: on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."] That is a totally different case: there, the third party came [429] in by assignment under the tenant. The court cannot interfere, unless they can clearly see that the title could not come in question. The question the judge will have to try will be, whether there was an eviction by title paramount or not. The 50th section of the 19 & 20 Vict. c. 108, gives the landlord the option of proceeding for the recovery of possession against the tenant or "any person holding or claiming by, through, or under him." Here, Stones is not claiming by, through, or under Barnett. Emery cannot place himself in a better position by proceeding against the defendant, than if he had proceeded against Stones; and, if this action had been brought against Stones, the title clearly would be in question. [Byles, J. If the tenant had merely walked out, and Stones had walked in, Stones would not have been estopped from denying Emery's title. But here Stones came in under an arrangement with the tenant.] The transaction was bonâ fide. Unless the court can say that it is impossible that the title can come in question, the case cannot be sent back to the county-court. It would be an usurpation upon the jurisdiction of that court to try the question of bona fides here.

Bovill, Q. C., and Prentice, in support of the rule. The defendant takes premises of the plaintiff, pays him rent, and submits to a distress for subsequent rent. He is therefore clearly estopped from disputing his landlord's title. The rent was payable half-yearly, on the 29th of September and the 25th of March. The action in the county-court was brought to recover half a year's rent due for a period during which the defendant actually occupied the premises, and for a half year accruing since, and also to recover possession of the premises. The answer attempted to be set up, is, that the defendant has yielded up the possession of the land [430] to a stranger, in consequence of a claim of title, and in consideration of a payment of 20l. What right can the tenant, or any one let in by him under such circumstances, possibly have to set up a title adverse to the admitted title of the landlord? [Williams, J. Suppose this had been an action for the rent only, and the tenant had pleaded an eviction by title paramount, would there be here any evidence to go to the jury?] Certainly not. [Williams, J. That seems to be the whole question. If there is any evidence to go to a jury of an eviction by title paramount, the issue cannot be tried in the county court.] In order to oust the jurisdiction of the county court, it is not enough

that a claim of title is suggested; but the proviso in the 9 & 10 Vict. c. 95, s. 58, as to actions "in which the title to any hereditaments shall be in question," extends only to actions in which the question of title actually arises in the course of the trial: *Latham* v. *Spadding*, 17 Q. B. 440.

WILLIAMS, J. I am of opinion that this rule must be made absolute. Upon looking at the affidavits, it seems to be quite clear that the judge declined to hear and decide the case. He appears to have thought that a question of title arose, and that he had no jurisdiction, as soon as he was satisfied that a bonâ fide claim to the property was set up by a third party. He considered that a change of possession was enough to make him hold his hand. I am, however, of opinion that he ought to have gone further, and inquired whether the defendant left the premises by compulsion of Stones, the claimant, or voluntarily. If he found that the defendant was turned out, then the question of title would have arisen, and the case would have come to a point at which the jurisdiction of the county-court ceased, and the judge ought not to have heard any more. If, on the other hand, he found that the tenant went out voluntarily, and [431] that the possession was changed under an arrangement between the tenant and Stones, under which the former was to get a sum of money for going out, no question of title could arise, because, by the ordinary and well-known rule of law, both the tenant and Stones would be estopped from disputing the landlord's title.

CROWDER, J. I am of the same opinion. The judge of the county-court seems to have proceeded upon the notion that a bonâ fide claim of title was sufficient to oust his jurisdiction. That is clearly a mistake. The language of the 58th section of the 9 & 10 Vict. c. 95 is, where the title to land "is in question." Now, it appears here that the defendant was let into possession of the premises as tenant under the plaintiff, and that a person named Stones, claiming to be entitled to them, induced the tenant to go out and give up possession to him. When the matter came before the county-court, Stones having thus been let in, he made what the judge thought was a bonâ fide claim, and so he held that his jurisdiction was at an end. It is a clear rule of law, that a tenant cannot be allowed to dispute his landlord's title. And, if the tenant voluntarily lets another into possession, the person so let in is in the same position as the tenant himself, and is equally estopped. Here, it appears that Stones, the person claiming title, came in after a notice to the tenant not to pay rent to the plaintiff, and, further, that he promised to pay the tenant something for the crops. The tenant, it seems, was anxious to get out of possession, and had offered terms to his landlord. There was some evidence, therefore, that Stones was let in voluntarily by the defendant. It was the duty of the judge, under these circumstances, to decide the first question, viz. whether the letting Stones in was the voluntary act of the defendant, or whether Stones entered compulsorily: [432] in short, whether there was an eviction by title paramount. If Stones came in by the permission of the tenant, he would be in no better position than the tenant himself. But, if the judge arrived at the conclusion that Stones was in by compulsion, then he would have said that the title to the land was in question. The case must, therefore, go back. As to a portion of the claim for rent, viz. for the half-year during which the defendant was in actual occupation of the premises, the judge was at all events bound to hear the matter.

WILLES, J. I am of the same opinion. The matter may be tested in this way. If the county-court judge had decided in favour of the landlord, and a prohibition had been moved for, in order to sustain the application it must have been shewn that the judge disposed of a question of title, and not merely that a claim of title was made before him: and for this reason: the question of eviction depends upon two things,—first, whether the party evicting has a good title,—secondly, whether the tenant is compelled to quit against his will. Without proposing to offer any opinion as to what ought to be the decision of the county-court judge, I will merely observe that it is only necessary to look at the affidavits to see that the tenant was far from being unwilling to go out. It will, however, be for the judge to determine that. If the tenant voluntarily withdrew, the case will be disposed of without determining the title. In *Dobson* v. *Roberts*, 1 H. Blac. 199, it was held, that, where the subject of a suit in an inferior court is within its jurisdiction, the circumstance of a matter incidentally arising in the course of the proceedings which is out of its jurisdiction, will not afford ground for a prohibition, unless it be shewn that the court is proceeding to adjudicate thereon.

BYLES, J. I am of the same opinion. The judge of **[433]** the county-court has not considered the question of eviction at all. He seems to have thought that the transaction amounted to a defence not only to the claim for the half-year's rent which accrued after the alleged eviction, but that the estoppel would override the whole rent due. As to the first half-year, the matter clearly must go back. The decision of the county-court judge as to the rest depends upon the question whether or not there was a voluntary relinquishment of possession by the tenant. Stones's making a claim of title, if the tenant voluntarily yielded to it, would not oust the jurisdiction of the county-court. The defendant must also shew that he was turned out, and that under a claim of title paramount; and, further, that that claim was well founded. Upon both questions, therefore, it is clear that the judge has misconceived his duty, and the case must go back to the county-court.

Bovill, for the plaintiff, prayed that the rule might be made absolute with costs.

WILLES, J. The necessity for the application arises from the fault of the judge, – a judge of a court of record,—who mistakenly supposed that he had no jurisdiction. It is not, therefore, a case for costs.

Rule absolute, without costs.

[434] NEWMAN *v.* ROOK; THE VESTRY OF ST. MATTHEW, BETHNAL GREEN, Garnishees. May 8th, 1858.

Quære, whether a notice of attachment out of the Lord Mayor's court, London, is any answer to an order under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125?—At all events, service of such a notice upon the vestry-clerk of a parish without the limits of the city can have no operation upon a debt due from the vestry to the judgment-debtor.—To entitle the garnishee to a writ under s. 64 he must satisfy the court or judge that he has a real ground for disputing his liability for the debt.

Judgment having been recovered by Newman against Rook for a debt of 152*l.* 10*s.*, and there being a sum of 79*l.* 8*s.* 9*d.* due to the defendant from the vestry of the parish of St. Matthew, Bethnal Green, a summons was taken out on the 28th of April, requiring the vestry to shew cause why the debt should not be attached under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (*a*).

(*a*) The 60th section enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him, before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

The 61st section enacts that "it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before a judge or a master of the court, as such judge shall appoint, to shew cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt."

The 62nd section enacts that "service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debt in his hands."

And the 63rd section enacts, that, "if the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment-debtor, or if he does not appear upon summons, then the judge may

The vestry clerk **[435]** admitted that 79l. 8s. 9d. was due from the vestry to Rook, but alleged, that, on the 21st of April last, he as such vestry-clerk was, when within the jurisdiction of the Lord Mayor's court, London, served with an attachment issuing out of that court against the said vestry, in an action wherein one Goodwin was plaintiff, and Rook was defendant, and the vestry garnishees, whereby all such moneys, goods, and effects as the vestry then had, or which thereafter should come into their hands or custody, of Rook, were attached to answer Goodwin in a plea of debt, and that the debt sworn to by Goodwin was 28l. 12s. The learned judge (Williams, J.) thereupon made an order for the payment over of the balance only.

Beasley now moved for a rule calling upon the vestry as garnishees to pay over the 28l. 12s. A simple notice of an attachment is no answer to an application under this statute. [Willes, J. The operation of the statute is to give the judgment-creditor the same rights exactly as the judgment-debtor himself had. Williams, J. The question is, whether, in order to make the attachment **[436]** from the Lord Mayor's court effectual against the order of this court under the statute, there must not be an execution executed: *Wetter* v. *Rucker*, 4 J. B. Moore, 172, 1 B. & B. 491; *Magrath* v. *Hardy*, 4 N. C. 782, 6 Scott, 627, 6 Dowl. P. C. 749; *Webb* v. *Hurrell*, 4 C. B. 287.] It is clear, that the notice of attachment could not be pleaded in bar to an action brought by the judgment-debtor to recover the debt. It is a mere inchoate lien. The 62nd section of the 17 & 18 Vict. c. 125, binds the debt in the hands of the garnishee from the service of the order; but there is no such general law in favour of the attachment out of the Lord Mayor's court. [Willes, J. In *Holmes* v. *Tutton*, 5 Ellis & B. 65, it was held that the effect of s. 62 is, that the service binds the debt so as to render the judgment-creditor a creditor having security for his debt within s. 184 of the Bankrupt Law Consolidation Act, 1849, but does not give him a lien so as to bring him within the exception in that section, and consequently that the judgment-creditor could not prevail against the assignees. In *Hirsch* v. *Coates*, 18 C. B. 757, this court held that an order upon a garnishee under the 63rd section has no operation upon debts of which the judgment-debtor has already divested himself by assignment. The question is whether a debt attached is not in the same condition as if assigned.] In Locke on Attachment, 20, it is said, that, "when an action is commenced by the defendant in the attachment against the garnishee, it is a sufficient answer by the garnishee to such action, to plead and prove a recovery by foreign attachment at the suit of a creditor of the plaintiff (the defendant in the attachment), and that such creditor had execution of the sum recovered according to the custom of London, and that such execution was executed of the moneys or goods in the hands of the garnishee. But, when no execution is sued against the garnishee, the **[437]** plaintiff may proceed to judgment and execution against the defendant, and in like manner the defendant may sue the garnishee for his debt, notwithstanding the unexecuted judgment. Certified in writing by Brooke, Recorder, in the case of *Robertson* v. *Norroy, King at-Arms*, 7 Ed. 6, 2," Dyer, 83 a. A simple attachment confers no title: it is merely the commencement of an action. Besides, here the debt was not susceptible of attachment at all in the Lord Mayor's court. The vestry of St. Matthew, Bethnal Green, are not within the jurisdiction of that court. A service upon the vestry-clerk, who happened to be in the city, was no service upon the vestry.

Barnard shewed cause in the first instance. The judgment-debtor has filed a declaration of insolvency, and, consequently, according to *Holmes* v. *Tutton*, 5 Ellis & B. 65, if an adjudication takes place, the debt will pass to the assignees, even if the court make the order as prayed. It is only where the garnishee admits that he has in his hands money of the judgment-debtor, that the court will make an order under s. 61. The case of a disputed liability is provided for by s. 64, which enacts, that, "if the garnishee disputes his liability, the judge, instead of making an order that execution shall issue [under s. 63], may order that the judgment-creditors shall be at liberty to proceed against the garnishee by writ, calling upon him to shew cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment-debtor if less than the judgment-debt, and for costs of suit; and the

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order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee, towards satisfaction of the judgment-debt."

proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revisor issued under the Common Law Procedure Act, 1852." [Crowder, J. There can be no need for such an inquiry if the facts are undisputed.] The parties ought not to be **[438]** deprived of the opportunity of putting their defence upon the record. [Willes, J. To entitle the garnishee to have recourse to the 64th section, there must be a substantial dispute.] They dispute their liability to pay the money to this judgment-creditor. [Williams, J. Are the vestry of St. Matthew, Bethnal Green, debtors within the jurisdiction of the Lord Mayor's court?] They were properly served by their clerk within the jurisdiction. [Willes, J. They are not a corporation.] Under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the district board of works is a corporate body; and by the 220th section it is enacted that "any summons or notice, or any writ or other process at law or in equity, or any other matter or thing whatsoever required to be served upon the metropolitan board of works, or any district board or vestry, may, unless herein otherwise provided, lawfully be served by delivering the same personally to the clerk of such respective board or vestry, or by leaving the same at the principal office of such board or vestry." [Williams, J. To entitle you to a writ under the 64th section of the Common Law Procedure Act, 1854, you must satisfy the court or a judge that there is just ground for ordering the writ to issue. The question here is, whether it is a just ground for disputing your liability to pay this debt to the judgment-creditor, that you surmise that a foreign attachment is pending.] There is a material distinction between an attachment of money and an attachment of goods: in the case of the latter, to be subject to attachment, they must be within the jurisdiction; but, in the case of the former, it is enough that the debtor is within the jurisdiction when served with the notice. For instance, a man's account at a West-end banker's may be attached by a service upon one of the firm within the jurisdiction; it being supposed that he has **[439]** the debt in his pocket. [Willes, J. Is every member of a corporation supposed to carry all the debts of the corporation in his pocket? And, does the same presumption extend to the clerk?] It is a fiction which the custom of London sanctions, with a view to favouring commerce.

Williams, J. I am of opinion that this rule must be made absolute. The circumstances of the case are these:—A judgment having been obtained against Rook, the ordinary proceeding takes place under the Common Law Procedure Act, 1854, to attach a debt in the hands of third parties. The garnishees dispute their liability, on the ground that the debt has been attached by process out of the Lord Mayor's court, and contend that that is ground sufficient to induce the judge to direct a writ to issue under the 64th section. I am of opinion that the meaning of that clause is, that, instead of ordering execution to issue against the garnishee, the judge may in his discretion, if he thinks there is sound reason to believe that the garnishee has ground for disputing his liability, direct a writ to issue. Now, here, the only reason suggested why the money should not be paid over is, that the debt has been attached in the Lord Mayor's court. To this it is answered, and I think successfully, that the attachment is altogether void, as not being authorized by the custom of London, as certified to the court by Serjt. Brooke, the recorder, in the case of *Robarthon* v. *Norroy, King-at-Arms*, Dyer, 83 a. The custom so certified is, "that, if a man sue another before the mayor, &c., and a third person is indebted to the defendant in as much as the suit of the plaintiff is for, and by the custom of the law of attachment the third person is condemned, and judgment given against him, notwithstanding the judgment, if no execution be sued out against the third **[440]** person, the plaintiff may resort back to have judgment and execution against the defendant who is his principal debtor; and he (*a*) may also sue the third person for his debt, notwithstanding the judgment unexecuted, &c." The question is whether this is a debt due from a person within the city. The debtors are the vestry of St. Matthew, Bethnal Green. I am clearly of opinion that they are not debtors within the city; and that the case is not in any degree varied by the fact of the attachment having been served upon the vestry-clerk within the city; and consequently that the law of foreign attachment cannot be resorted to here.

Crowder, J. I am also of opinion that this rule must be made absolute. It is unnecessary to decide upon the present state of the law of foreign attachment.

Willes, J. I entirely agree with the reasons given by my Brother Williams for

(*a*) The principal debtor.

making this rule absolute. The vestry of St. Matthew, Bethnal Green, appear to be a corporate body; but they are not in any sense within the city of London. If, indeed, each individual member of the body were to go within the city, the corporation would not be there. As to the second question, it may be very fit to be considered whether the mere service of the notice of attachment from the Lord Mayor's court would prevent the sheriff from taking in execution goods so attached. As to whether it is sufficient for the garnishee to say he disputes the debt, to make it incumbent on the judge to order a writ to issue under the 64th section of the Common Law Procedure Act, 1854, I should say that the mere assertion by the garnishee that he disputes the debt amounts to nothing: there is no substantial dispute until some real answer or defence is set up.

[441] BYLES, J. Upon the last point I am clearly of opinion that the rule must be made absolute. The vestry is a corporate body having no habitat within the city.

Rule absolute, without costs.

WRIGHT *v.* M'GUFFIE. May 8th, 1858.

The court will not at the instance of a defendant, postpone the trial of a cause, on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power.

Wordsworth, Q. C., on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the trial of this cause should not be postponed until the first sitting in Michaelmas Term next.

The action was brought to recover 115*l.* 15*s.* 7*d.*, being the balance alleged to be due from the defendant for work done and goods supplied to a vessel called the "Sea Witch," of which the defendant was owner. The defendant had paid 34*l.* into court. The action was commenced on the 31st of December, 1856: issue was joined on the 27th of January, 1857, and notice of trial given for the sittings after the then Hilary Term.

On the 2nd of February, 1857, an order was made by Willes, J., to postpone the trial on the ground of the absence of a material witness, until the sittings after Trinity Term, upon the defendant bringing 105*l.* into court. No further proceeding was taken until the 10th of December last, when notice of trial was given for the first sitting in Hilary Term last.

On the 4th of January, 1858, the trial was further postponed until the sittings after the present term, upon 50*l.* more being brought into court. The affidavit upon which that order was obtained, stated, amongst other things, that, from information which was partly contained in two letters from the proposed witness **[442]** (John Leuty, the master of the "Sea Witch"), the first of which bore date "at sea," the 4th of June, 1847, and the second "Mauritius," the 10th of July, and partly also from the contents of the *Overland Commercial Gazette*, published at Port Louis, Mauritius, on Saturday, the 11th of July last, the deponent learned that the "Sea Witch" was driven from the Beypoor Roads (Beypoor being the port of her destination on her outward-bound voyage) on the 20th of May preceding, and, after having experienced a heavy gale of wind, during which she sprung a leak, and "was compelled to bear up and stand to the southward, with the intention of making the southern passage to Bombay, but afterwards found it necessary to put into Port Louis, Mauritius, for repairs, at which last-named port she arrived on the 20th of June;" that, by a letter written by Leuty, dated "Off Beypoor, the 2nd of May, 1857," in reply to a letter addressed to him on the subject of the plaintiff's demand, he said, "with regard to Wright, I think you have done perfectly right in defending the case; it is a great imposition;" that, by another letter written to the deponent by Leuty, from Bombay, and bearing date the 3rd of November, 1857, deponent was informed that Leuty had tendered the ship for conveyance of coolies to the Mauritius, and had just received notice that she was accepted, and that he hoped to leave about the 20th of the same month; that, in another letter from Leuty, dated the 17th of November, 1857, the deponent was informed that the ship was still at Bombay, and nearly ready to receive the coolies on board, and that he expected to get a good freight home from the Mauritius, after landing the coolies there; that, in another letter also written by

Leuty from Bombay, and dated the 4th of December last, was the following paragraph, —"At last I have got the coolies on board: and I drop these few lines by the pilot when he leaves me. Things are still in a bad [443] state here; freights 37s. 6d. for Liverpool, and very little to be got at that miserably low rate. I hope things will be better at the Mauritius,"—from which letter, and the fact of its having reached him by the last overland mail, the deponent inferred and believed that the ship had sailed from Bombay for the Mauritius on or about the day of the date thereof, and in the ordinary course of events the ship might be expected to arrive in England in or about the month of April next, but not at any earlier period; that, in the judgment and belief of the deponent, Leuty was a material and necessary witness; and that the application to postpone the trial was not made with a view to delay the plaintiff, but solely that a proper trial of the case might be had.

The further affidavit upon which this motion was founded stated, that, on the 4th of May instant, the deponent received a letter from John Leuty, the master of the "Sea Witch," dated "Bombay, the 8th of April, 1858," in which he states that he had engaged freight for London, and would begin to take in cargo on the 12th, and hoped to be at home in four months and a half from that date.

Morgan Lloyd now shewed cause, upon an affidavit of the plaintiff, in which he swore that he delivered his account for the work and materials and goods in respect of which the action was brought, to John Leuty on the 22nd of December, 1856, when he assented to the charges therein, except the price of the water-closets, which he said he thought were charged too much; that the order of the 4th of January last was made upon an affidavit, in which it was alleged that the captain of the "Sea Witch" was about to take a cargo of coolies from Bombay to the Mauritius, and, immediately on discharging them, to load the ship with a cargo for England, and that he would return to this country in [444] the month of April; that, by a reference to the *Shipping and Mercantile Gazette*, and from information which the deponent had received, he had ascertained that the "Sea Witch" did go to the Mauritius as alleged, but that, instead of taking a cargo thence for England, she returned with a cargo to Bombay; that the deponent had been informed, and believed, that the captain had no intention of returning or bringing the vessel back to England: and that the application for a further postponement of the trial was made merely with a view to delay the payment of the plaintiff's demand. The learned counsel submitted that no ground was laid in the affidavits to justify a further postponement of the plaintiff's claim.

Wordsworth, in support of the rule, submitted that enough was stated to shew that the application was bonâ fide made.

WILLIAMS, J. This case certainly presents some difficulty; but, upon the whole, I am of opinion that the rule should be discharged. The action, it appears, was commenced so long ago as the 31st of December, 1856; and immediately afterwards the defendant became aware that the captain would be a material witness for the defence. It was his duty, therefore, to take all reasonable steps to secure the testimony of a witness who was thus under his own immediate control. Instead of doing so, he allows him to go for seventeen months to different parts of the world. I think the plaintiff, who has got a money demand against the defendant, ought not to be prejudiced and delayed of his remedy by a misfortune of this sort occurring to the defendant by a matter which was clearly under his own control. The order of the 29th of January, 1857, was obtained upon the supposition that the witness would beyond doubt have been back by the sittings after [445] Trinity Term. It was the defendant's duty to take steps to procure his attendance then. He seems, however, to have done nothing, but to have left the matter altogether to chance. I do not think he is entitled to any further indulgence. The cause must be tried in its course. I trust that full justice will be done, notwithstanding the absence of the defendant's witness: but, if there be any failure, he will have himself alone to blame for it.

CROWDER, J. I agree with my Brother Williams in thinking that enough is not shewn here to justify us in further enlarging the time for proceeding to trial. The affidavit upon which the second postponement was granted shewed the condition of the ship in consequence of the gale she encountered in May last: but we have no authentic account of what has become of the ship or the master since that time. If the defendant chooses to employ his captain in proceeding to different parts of the world, it is his own fault that he is not here when wanted. It is now suggested, that,

in all probability the ship will return to England about four months hence. This would make it nearly two years from the commencement of the action to the time of trial. That clearly is too long a delay. Another observation arises here. It is sworn on the part of the plaintiff, that, when his bill was delivered, the defendant objected only to one item. The defendant now alleges that the captain informs him by letter that the whole bill is a gross imposition. He does not, however, condescend upon particulars. The rule must be discharged, the costs being plaintiff's costs in the cause.

The rest of the court concurring,

Rule discharged accordingly.

[446] CRASKE, Administrator of Edward Walker, Deceased, *v.* SMITH AND ANOTHER. May 7th, 1858.

An appeal from a decision of a judge at chambers will not be entertained after the lapse of a term.—The plaintiff recovered 40s. only in an action under Lord Campbell's Act; and the judge on the 21st of August refused to grant a certificate under the 13 & 14 Vict. c. 61, s. 12, that the cause was proper to be tried in the superior court. In the following Michaelmas Term, the plaintiff applied by summons for costs under the 15 & 16 Vict. c. 54, s. 4, and the judge indorsed thereon "no order." An application to the same effect was made to the court in Hilary Term:—Held, that this was in effect an appeal against the decision of the 21st of August, and therefore that the motion was too late.

This was an action under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover damages from the defendants for having, by the negligence of a servant employed by them to drive a waggon and horses, caused the death of one Edward Walker, a labourer.

The cause was tried before Willes, J., and a special jury (summoned at the defendants' instance) on the 4th of July last, when a verdict was found for the plaintiff, damages 40s. The learned judge having left the court before the verdict was returned, the plaintiff's counsel had no opportunity of asking him to certify, under the statute 13 & 14 Vict. c. 61, s. 12, that the cause was a proper one to be tried in the superior court. An application was afterwards (on the 6th of July) made to him for that purpose, but he declined to certify unless the plaintiff's junior counsel could satisfy him that the cause could not have been tried in the county-court. An opinion to that effect having been obtained from counsel, and transmitted to the learned judge upon the circuit, his Lordship on the 21st of August finally refused a certificate.

On the 10th of November last, a summons was taken out calling upon the defendants to shew cause why the master should not be at liberty to tax the plaintiff his costs of the action, under the statute 15 & 16 Vict. c. 54, s. 4. This summons came on to be heard before Willes, J., on the 12th, when he declined to make any order.

Torr, on the 27th of January last, obtained a rule calling upon the defendants to shew cause why the **[447]** master should not be at liberty to tax the plaintiff his costs of the action, pursuant to the 4th section of the 15 & 16 Vict. c. 54, together with the costs of the several applications to the judge for his certificate, and of this application.

Shee, Serjt., and Prentice, now shewed cause. The application is too late. This is in effect an appeal against the decision of the learned judge who tried the cause, and who has refused to certify that "it appeared to him at the trial that there was a sufficient reason for bringing the action in this court." The trial took place on the 4th of July, 1857; the first application to the judge for a certificate was made on the 6th of that month; and the second on the 21st of August; on which last-mentioned day the certificate was finally refused: and this rule was not moved until the 27th of January, 1858. *Orchard* v. *Morsy*, 2 Ellis & B. 206, is precisely in point. There, in a case where the court of Queen's Bench had concurrent jurisdiction with the county-court by statute 9 & 10 Vict. c. 95, s. 128, the plaintiff recovered only 40s. damages: this sum he accepted from the defendant without prejudice to any claim for costs; and he summoned the defendant to shew cause before a judge at chambers why the costs should not be taxed and paid by the defendant to the plaintiff: the judge, considering that a discretion on this point was vested in him by the statute 13 & 14 Vict. c. 61, s. 13, refused to make an order: in the next term but one after this decision, the

plaintiff moved the court of Queen's Bench that the costs might be taxed and paid to him by the defendant,—relying on a decision of the court of Common Pleas (*a*)[1] since the hearing at **[448]** chambers, that the judge, under s. 13, was bound to grant costs: and it was held that the application was too late. Coleridge, J., there says: "It is a rule that the party who intends to complain of the decision of a judge at chambers must come speedily; otherwise, the opposite party may have supposed that everything was settled, and have acted accordingly, so as to disable him from paying the costs."

Torr, in support of his rule. The refusal of the learned judge on the 21st of August to grant a certificate under the 12th section of the 13 & 14 Vict. c. 61, is no bar to an application to the court under the 15 & 16 Vict. c. 54, s. 4. [Williams, J. You were bound to come within a reasonable time.] There is no limit of time for an application under this statute: *Reid* v. *Gardner*, 8 Exch. 651. There, a cause was tried in one of the superior courts in February, 1852, and the plaintiff obtained a verdict, and accepted the damages awarded. In February, 1853, the plaintiff applied for an order for costs under the 15 & 16 Vict. c. 54, s. 4. The defendant had been during the interval abroad. And it was held that the application for costs was in time. [Williams, J. The question there was, whether the application to the judge was in time: here, you come, in effect, to complain of the decision of a judge at chambers. You ought not to have allowed a term to pass over.] The application to the judge under this statute was made during Michaelmas Term; and this rule was moved in the course of the following term. [Crowder, J. The case of *Meredith* v. *Gittens*, 21 Law J., Q. B. 273, is clearly against you. There, the plaintiff, in April, 1851, recovered in a superior court less than 20*l*. In June, a summons for costs, under the 13 & 14 Vict. c. 61, s. 13, was taken out before a judge at chambers, who indorsed it "No order." In January, **[449]** 1852, an application to the same effect was made to the court: and it was held that this could only be by way of appeal from the decision of the judge at chambers, and was therefore too late. Lord Campbell says: "We can only hear this as an appeal against the decision of a judge at chambers, which is brought before us on a suggestion that it is erroneous. In the present case, my Brother Coleridge made 'no order' in Trinity Term. Michaelmas Term elapses; and this rule is not moved for until the end of Hilary Term. It is a very wholesome rule, that all applications to review the decision of a judge at chambers should be made in the ensuing term." And Wightman, J., says: "There must be some limit within which applications to review the decision of a judge at chambers can be made. This must be treated as such an application; and I quite agree with the principles acted upon in *Orchard* v. *Moxsy*" (*a*)[2].]

Williams, J. I am of opinion that this rule should be discharged. I am clearly of opinion that the terminus à quo is, the decision of the learned judge on the 21st of August. That was a complete and final decision; and, if the plaintiff wished to appeal from it, he was bound to come in the course of the following term. He, however, allows the whole of that and nearly the whole of the following term to elapse before coming to the court. We must abide by the rule. An appeal against the decision of a judge at chambers must be made in all cases not later than a term after.

[450] Crowder, J. I am of the same opinion. The cases of *Orchard* v. *Moxsy*, 2 Ellis & B. 206, and *Meredith* v. *Gittens*, 21 L. J., B. Q. 273, seem to me to be conclusive, that an appeal against the decision of a judge is too late if a term has been allowed to elapse. Here, the decision of the judge took place on the 21st of August, 1857; and this rule was not moved until the 27th of January, 1858. The plaintiff could not place himself in a better position in respect of time by taking out another summons in November.

Byles, J., concurring,

Rule discharged, with costs.

(*a*)[1] *Macdougall* v. *Paterson*, 11 C. B. 755. And see *Crake* v. *Powell*, 2 Ellis & B. 210.

(*a*)[2] To make *Meredith* v. *Gittens* strictly in point with the present case, the first application there should have been for a "certificate" under the 13 & 14 Vict. c. 61, s. 12. Whether a motion for a rule under s. 13 could in any sense be said to be an appeal against the judge's exercise of discretion as to certifying under s. 12? *Quære.*

BERWICK *v.* HORSFALL AND ANOTHER. April 22nd, 1858.

[S. C. 27 L. J. C. P. 193; 4 Jur. N. S. 615; 6 W. R. 471.]

Where a written instrument has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury.—A., professing to act as the agent of B., the owner of a vessel in the African trade, under a power of attorney, during the voyage removed to C. (the master) from the command, for alleged misconduct. At the termination of the voyage, the master (who had been permitted to remain on board) sued the owner for wages:—Quære, whether the act of A. in removing C. from the command of the vessel, was one which could be ratified by B. after the voyage was over?

This was an action by the plaintiff as captain of a vessel called the "Cherokee," against the defendants as owners, for wages on a voyage to the coast of Africa and back, between the 18th of October, 1856, and the 30th of May, 1857, at the rate of 14*l.* per month.

The defendants pleaded, never indebted, payment, and a further plea that the plaintiff, whilst in command of the vessel, so grossly misconducted himself as to cause the defendants to dismiss him therefrom; upon which pleas issues were joined.

The cause was tried before Cresswell, J., at the second sitting at Guildhall in last Michaelmas Term, when the **[451]** following facts appeared in evidence:—The ship sailed for the coast of Africa in October, 1856, having on board, besides the captain, a surgeon, a chief mate, and a trading-master named Cheetham. Arrived on the coast, at Benin, Cheetham found that the master, from his habitual drunkenness and brutal treatment of the seamen, was wholly unfit to retain the command of the vessel; and accordingly he caused a court of inquiry to be held pursuant to the Merchant Shipping Act, 17 & 18 Vict. c. 104 (*a*), the result of which was, **[452]** that, by the unanimous judgment of the members of that court on the 13th of December, 1856, the captain was pronounced incompetent to retain the command; and on the 26th

(*a*) The 260th section enacts that "any officer in command of any ship of Her Majesty on any foreign station, or, in the absence of such officer, any consular officer, may summon a court, to be termed a "Naval Court," in the following cases, that is to say,—

"1. Whenever a complaint which appears to such officer to require immediate investigation is made to him by the master of any British ship, or by any certified mate, or by one or more of the seamen belonging to any such ship;

"2. Whenever the interest of the owner of any British ship or of the cargo of any such ship appears to such officer to require it;

"3. Whenever any British ship is wrecked or abandoned, or otherwise lost at or near the place where such officer may be, or whenever the crew or part of the crew of any British ship which has been wrecked, abandoned, or lost abroad, arrive at such place."

The 261st section enacts that "every such naval court as aforesaid shall consist of not more than five and not less than three members, of whom, if possible, one shall be an officer in the naval service of Her Majesty, not below the rank of lieutenant, one a consular officer, and one a master of a British merchant ship, and the rest shall be either officers in the naval service of Her Majesty, masters of British merchant ships, or British merchants; and such court may include the naval or consular officer summoning the same, but shall not include the master or consignee of the ship to which the parties complaining or complained against may belong; and the naval or consular officer in such court, if there is only one such officer in the court, or, if there is more than one, the naval or consular officer who, according to any regulations for settling their respective ranks for the time being in force, is of the highest rank, shall be the president of such court."

The 262nd section enacts that "every such naval court shall hear and investigate the complaint brought before it, or the cause of the wreck or abandonment (as the case may be), and may for that purpose summon and compel the attendance of parties and witnesses, and administer oaths, and order the production of documents, and

he was formally dismissed therefrom by Cheetham, though suffered to remain on board the vessel. The plaintiff had been paid his wages up to the 26th of December.

Cheetham, who was called as a witness on the part of the defendants, stated that he was acting under a power of attorney from the owners, but that the document was lost. The learned judge, being satisfied that [453] sufficient search had been made for the missing document to let in secondary evidence of its contents, Cheetham stated that it gave him a general power over the property of the defendants, and authority to look after their interests, and to act as their representative or plenipotentiary in all that concerned the voyage. He further stated that it was within the scope of the general authority of a trading-master in the African coasting trade to transfer the captain and crew from one ship to another; and that, in many instances, trading-masters had dismissed captains.

The learned judge ruled, as a matter of law, that the plaintiff ceased to be captain from the date of the decision of the naval court by which he was superseded, and that he was not entitled to recover for wages subsequently to that day: and he left two questions to the jury,—first, whether they thought that Cheetham, the trading master, had a precedent authority from the owners to supersede or dismiss the captain for misconduct,—secondly, whether Cheetham did, in point of fact, dismiss the captain on the 26th of December, 1856, and whether the owners ratified his act after the termination of the voyage.

The jury found that there was no proof to satisfy them that Cheetham had such precedent authority; but they found that Cheetham did in point of fact dismiss the captain on the 26th of December, 1856, and that the defendants subsequently ratified what he had done.

The learned judge thereupon directed a verdict to be entered for the defendants, ruling, notwithstanding the finding of the jury upon the first question, that Cheetham had such precedent authority, and that that was a matter for him to decide, and not for the jury.

Brett, in Michaelmas Term last, moved for a new [454] trial, on the ground of misdirection. The decision of the naval court did not amount to a sentence at all. The acts of these courts, from which there is no appeal, are to be construed most strictly. The act of Cheetham, therefore, in dismissing the plaintiff, was wholly unauthorized. The finding of the jury upon that point was conclusive. And it was an act which no subsequent ratification could legalize. It is a general principle that there can be no ratification of an act done on one's behalf by a stranger, if such ratification would affect the intervening rights of a third person. Thus, it has been held that there can be no subsequent ratification of a stoppage in transitu: *Whitehead* v. *Anderson*, 9 M. & W. 518, 526; *Nicholls* v. *Le Feuvre*, 2 New Cases, 81, 2 Scott, 146. [Willes, J. That is because it affects the acquisition of a right by a third party. Thus, in *Bird* v. *Brown*, 4 Exch. 786, C. & T., merchants at Liverpool, sent orders to I., a merchant at New York, to purchase for them certain goods, which were accordingly shipped by I. in five vessels bound to Liverpool, and consigned to C. & T., who, after the receipt of the goods by one of the vessels, stopped payment on the 7th of April, 1846. I. had drawn bills for the goods, partly on C. & T., and partly on R. & Co., with whom C. & T. had dealings. R. & Co., who were merchants at Liver-

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shall conduct the investigation in such manner as to give any person against whom any charge is made an opportunity of making a defence."

The 263rd section enacts that "every such naval court may, after hearing the case, exercise the following powers, that is to say (inter alia),

"1. It may, if unanimous that the safety of the ship or crew, or the interests of the owner, absolutely requires it, supersede the master, and may appoint another person to act in his stead; but no such appointment shall be made without the consent of the consignee of the ship, if then at the place:

"And all orders duly made by any such court under the powers hereby given to it shall, in any subsequent legal proceedings, be deemed conclusive as to the rights of the parties."

And the 264th section enacts that "all orders made by any such naval court, shall, whenever practicable, be entered in the official log book of the ship to which the parties to the proceedings before it belong, and shall be signed by the president of the court."

pool, and who also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and were dated, some on the 25th of March, and the rest on the 30th. On the 8th of May, a fiat in bankruptcy issued against C. & T. The four other vessels arrived at Liverpool respectively on the 3rd, 5th, 6th, and 9th of May; and, immediately on the arrival of each, and whilst the transitus of the goods on board continued, B. & Co., on behalf of I., gave notice to the master and consignees of each ship, claiming to stop the goods **[455]** in transitu. B. & Co. were not the general agents of I., nor had they received from him any authority to make this stoppage. On the 11th of May, the assignees of C. & T. made a formal demand of the goods from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day delivered the whole to B. & Co. On the next day, the assignees made a formal demand of the goods from B. & Co., but they refused to deliver them up, claiming title under the stoppage in transitu. On the 28th of April, I. heard at New York that C. & T. had stopped payment; and, on the next day, he executed a power of attorney to H. of Liverpool, authorising him to stop the goods in transitu. This was received by H. on the 13th of May, and he on that day adopted and confirmed the previous stoppage by B. & Co. I. afterwards adopted and ratified all that had been done both by H. and B. & Co. In trover by the assignees of C. & T. against B. & Co.,—it was held,—first, that there could be no valid stoppage in transitu after the formal demand of the goods by the assignees on the 11th of May, and the subsequent delivery of them to the defendants,—secondly, that the ratification of the stoppages by I. after the conversion by the defendants, had not the effect of altering retrospectively the ownership of the goods; and the reason assigned is, that the goods had already vested in the plaintiffs. Williams, J. The ratification here did not take place until after the termination of the voyage.] In *Right d. Fisher* v. *Cuthell*, 5 East, 491, a lease for twenty-one years contained a proviso, that, in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing under his or their respective hands, the term should cease: and it was held, that a notice **[456]** to determine the lease, signed by two of the three executors of the original lessor, to whom he had bequeathed the freehold as joint-tenants, expressing the notice to be given on behalf of themselves and the third executor, was not good under the proviso, which required it to be given under the hands of all three; and that, the notice being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation. The principle is well stated in Story on Agency, § 245, where it is said that, "although the ratification of an unauthorized act of an agent acting without any authority, or beyond his authority, will in general bind the principal, not only as to his agent, but as to third persons, and give the ordinary rights and remedies both for and against him; yet this doctrine is to be received with some qualifications, or, rather, it is not universally applicable. Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule seems generally applicable. Thus, for example, if a continual claim, or an entry to avoid a fine, or an entry for condition broken, is made by a person having no present authority, the principal may bring an action upon any of these acts, and his ratification or adoption of them will supply the want of an original authority." Again, in § 246, it is said: "On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as **[457]** to bind such third person to the consequences. Thus, if a lease contains a condition that it may be determined by either party upon six months' notice, such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease. The ground of this decision is, that it is a notice to defeat an estate, and the tenant is entitled to such notice as he can act upon with certainty at the time when he receives it, so that he may deliver up the possession at the end of six months, without being liable to further claims in respect to the remainder of the term. The case is distinguishable from that of an entry without

authority for a condition broken; because, in the latter case, the third person's act is not to depend upon the validity of the entry at the time when it is made. The rule omnis ratihabitio retrotrahitur, et mandato priori æquiparatur, seems applicable only to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on the fact whether there be a ratification or not."

A rule nisi was granted "on the ground of misdirection, inasmuch as the act of Cheetham was without precedent authority from the owners, and was not an act which could in point of law be ratified by the defendants after the voyage was over, so as to affect the plaintiff; and that the finding of the naval court was not a sentence superseding the plaintiff."

Edward James, Q. C., and Quain, now shewed cause. Whether the dismissal of the captain was wrongful or not, is quite immaterial in this form of action. The captain can only sue for wages where he has earned them: and here, from the date of his dismissal, on the 26th of December, 1856, the plaintiff ceased to exercise [458] the functions of captain. Cheetham was acting under a power of attorney, of the contents of which, the document being proved to have been lost, secondary evidence was allowed to be given. The learned judge told the jury, that, upon Cheetham's evidence, he had charge of the property of the defendants, and authority to do all that was necessary for their benefit in relation thereto, and that that gave him power to deal with the master as he did,—holding, as a matter of law, that the act of Cheetham was authorized; and, further, that, if the owner ratified what he had done, they were responsible for it. There clearly was no misdirection in that; and the learned judge was fully warranted in directing the verdict to be entered according to his own view of the construction of the document. The general rule upon the subject of ratification is well stated by Tindal, C. J., in *Wilson* v. *Tummon*, 2 M. & G. 236, 242, 6 Scott, N. R. 894, 904, where that learned judge says: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratifed by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 H. 4, fo. 35 (H. 7 H. 4, fo. 24, pl. 1. See 6 M. & G. p 239, n. (*a*)),—that, if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but, if he took it at the [459] time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports, 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as a bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for, once he was a trespasser, and his intent was manifest.'" The rule referred to in the sections quoted from Story on Agency does not apply to this case: neither do the cases as to stoppage in transitu, where the rights of third persons have intervened. And the notice to quit, or to determine a lease, is an exceptional case; because the tenant or lessee is entitled to know at the time it is given whether the notice is a valid and effectual notice or not.

Brett, in support of the rule. The plaintiff, having in contemplation of law performed his contract, sues for wages. The answer set up is, that he was for a justifiable cause removed from the command of the ship, and so earned no wages. The jury having found, upon a question left to them by the learned judge that there was no precedent authority in Cheetham to remove the master from the command of the vessel, it is not competent to the defendants now to insist that there was. [Crowder, J. The question is, whether the evidence warranted what the learned judge laid down as law. He was quite justified in causing the verdict to be entered according to his own opinion of the construction of the authority.] The jury were fully warranted in the conclusion they came to, that [460] Cheetham had not authority to dismiss the

captain. The office of the trading-master is well known in the African trade. He is the agent of the owners for the purposes of trade and barter; but he has no authority over the captain and crew. [Crowder, J. It was proved that many instances had occurred of such agents removing masters.] Assuming Cheetham to have had no precedent authority from the defendants, their subsequent ratification of what was done by him could not render it valid. The reasoning of Lord Ellenborough in *Right d. Fisher* v. *Cuthell*, 5 East, 491, is equally applicable here.

CROWDER, J. I am of opinion that this rule must be discharged. It appears to have been moved on the ground of misdirection; the alleged misdirection being, that the learned judge laid it down that the subsequent ratification by the defendant of the act of Cheetham in dismissing the plaintiff was equivalent to a precedent authority. But it appears from the notes of my Brother Cresswell that he told the jury that there was a precedent authority, and that Cheetham had acted upon that. I am of opinion that he was right. Cheetham stated that he had acted under a power of attorney, which was lost. He gave evidence of its contents. He stated that it gave him the entire charge of the property of the defendants, and that he was to look after their interests, and to act as their representative. Upon that the learned judge said, that, assuming the power of attorney given to Cheetham to have been as alleged, he ruled that Cheetham had authority to dismiss the captain. It seems to me that the learned judge was quite right in this. If the instrument had been before him, it would have been for the court to decide upon its meaning. It must be taken that the power of attorney did contain what Cheetham said it [461] contained: and the learned judge decided upon that assumption. He was requested to leave it to the jury. He said he was of opinion it was not for the jury, but, as he was pressed to do so, he would leave it to them. He, however, directed the verdict to be entered upon his own view of the matter. It seems to me, therefore, that the case is to be determined upon the assumption that there was a precedent authority for what was done by Cheetham; and therefore it is unnecessary to consider the other point, viz. whether this is a case in which there could have been a subsequent ratification. I am far from saying that it is not: it is enough to say that it is unnecessary to decide the point; because, if Cheetham had a precedent authority to act as owner, he had authority to dismiss the captain. On the 26th of December, 1856, therefore, the plaintiff was no longer captain: and, whether the owners had or had not a justification for his summary dismissal, still he cannot sue for wages as captain after that day. If the dismissal was wrongful, the plaintiff may sue the owners for wrongfully dismissing him: if rightful, he is without remedy, nor ought he to have any. Upon this ground, therefore, it seems to me that this rule ought to be discharged. Looking at the notes of the learned judge, I do not perceive that any question was made as to the veracity of Cheetham: nor does it appear that there was any evidence offered to contradict him, or in any way to shake his credit.

WILLES, J. I am entirely of the same opinion. The circumstance of the jury having pronounced an opinion upon it is quite immaterial when you come to look at what the question really was, viz. whether or not certain terms in a power of attorney gave Cheetham, the attorney, authority to remove the captain from the command of the ship. The terms which that instru-[462]-ment were stated to contain were obviously large enough for that purpose. He stated that he was the representative of the owners,—their plenipotentiary in the African trade. Seeing the distance the ship was from home, I do not think it a very far-fetched conclusion that Cheetham should have the extensive powers he professed to have. It turned out that the document which conferred that authority upon him was lost. But the fact of a document being lost, does not make the construction of its contents a question for the jury. The true rule is laid down in *Neilson* v. *Harford*, 8 M. & W. 806. The construction of all written documents is for the court, and not for the jury. It was for the judge, therefore, to say whether or not there was such authority. He thought there was. The jury thought there was not. That, however, was quite immaterial, the question being solely for the court. The learned judge did not leave it to the jury to say whether or not they disbelieved Cheetham; nor was he asked to do so: and the objection now is, not that that was not left to the jury, but that, the jury having come to the conclusion that Cheetham had no authority, we ought to come to the same conclusion.

Byles, J. I fully agree with what has fallen from my learned Brothers, and for the same reasons; and therefore I deem it unnecessary to add anything.

Rule discharged.

End of Easter Term.

[463] In the Exchequer Chamber.

Easter Vacation, 21 Victoria.

Simmons *v.* Taylor, Public Officer of the London Joint-Stock Bank.
May. 10th 1858.

[S. C. 27 L. J. C. P. 248; 4 Jur. N. S. 412. Referred to, *Smith* v. *Union Bank of London*, 1875, 1 Q. B. D. 34; *Suffell* v. *Bank of England*, 1882, 9 Q. B. D. 574.]

Held, by the Exchequer Chamber,—affirming the judgment of the court of Common Pleas,—that the statute 19 & 20 Vict. c. 25, which makes a "crossed cheque" payable only to or through a banker, applies to the state of the instrument at the time of its presentment: and therefore that the banker is justified in paying it otherwise than to or through another banker, if, when presented, it does not bear any crossing on the face of it.—Held also, that the crossing, though made by the drawer himself, forms no part of the cheque of itself, and consequently that its erasure does not amount to a forgery.

This was an appeal against a decision of the court of Common Pleas, in which that court held that the statute 19 & 20 Vict. c. 25, which makes a "crossed cheque" payable only to or through a banker, applies to the state of the instrument at the time of its presentment, and therefore that the banker upon whom a cheque is drawn is justified in paying it otherwise than through another banker, if, when presented, it does not bear any crossing on the face of it: and that the crossing forms no part of the cheque itself, and consequently its erasure does not amount to a forgery: vide ante, vol. ii., p. 528.

The short facts were these:—The plaintiff drew a cheque upon the London Joint-Stock Bank, drawing across the face of it two parallel lines, and writing the words "& Co." at the end of the intervening space, and inclosed the draft so crossed in an envelope addressed to a third person. The cheque by some means fell into the hands of a stranger, who erased the crossing in such a manner, that, when presented at the bank, it was received and paid as an uncrossed cheque. No negligence was imputed to the bank: but the simple question was, whether, it having once been a "crossed cheque," the bankers were justified in paying it otherwise than to or through a banker.

The case was argued in the Exchequer Chamber be-[464]-fore Wightman, J., Erle, J., Crompton, J., Bramwell, B., Watson, B., and Channell, B.

Lush, Q. C. (with whom was C. Addison), for the appellant. The effect of crossing a cheque was thus described by Parke, B., in *Bellamy* v. *Majoribanks*, 7 Exch. 389, 400,—"The crossing a cheque cannot operate as an indorsement to the banker whose name is used, because it was not written with any intent to transfer the property in the cheque to him, and it wants the essential part of an indorsement, the delivery of the instrument to the indorsee. And we think it cannot well be supposed that the usage is to be considered as equivalent to a direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only; for, then the cheque would be altered in a manner which would take it out of the exemption of the stamp-act, 55 G. 3, c. 184, Sched. part 1, which applies to cheques payable to bearer only; and the bankers to whom it was addressed would not be bound to pay to the person named. We are therefore of opinion that a crossing the cheque with the name of a banker cannot have the effect of restricting its negotiability to such banker alone. To hold it to have this effect would be to render the instrument no longer a cheque." That case was followed and confirmed by *Carlon* v. *Ireland*, 5 Ellis & B. 765. Such being the state of the law, the statute 19 & 20 Vict. c. 25 passes with the avowed object of amending it. It recites that "doubts have arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of

commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some **[465]** banker:" and it then proceeds to enact, that, "in every case where a draft on any banker made payable to bearer or to order on demand, bears on its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." That must necessarily have the effect of controlling the operation and the negotiability of the draft. It is no longer payable to any bearer, but only to a bearer who is a banker. Payment to any other is a payment unauthorized by the drawer of the cheque. The obliteration of the words "& Co.," which formed an essential part of the instrument, is a forgery. [Crompton, J. Then, the payment could not be made even "to or through a banker."] If the drawee pays the draft to or through a banker, he pursues the authority. [Crompton, J. Not if it is a forgery. Bramwell, B. The framer of the act was evidently ignorant of the law, and equally ignorant of the effect of the proposed alteration. Suppose I tell my banker that I never cross cheques, and some one to whom I give a cheque chooses to write a banker's name across it,—what is to be the effect of that? Can the crossing thus put on it form part of the instrument? Surely, it can be no more than a caution to the banker.] It was that before the late act. [Bramwell, B. Then it is a more emphatic caution now.] It is submitted that it is impossible to give any operation to the words of the statute, without holding that the crossing has the effect of controlling the word "bearer." The drawer knows that it is customary to cross cheques: when he gives a cheque, therefore, he gives the bearer authority to cross it. **[466]** The question is, did the bankers pay the money in pursuance of the authority of the drawer: *Robarts* v. *Tucker*, 16 Q. B. 560. [Crompton, J. How is the crossing to operate as a direction, unless the instrument bears it on the face of it at the time of presentment?] The erasure is a material alteration of the document, which amounts to a forgery. [Bramwell, B. How can that be said to be a forgery of the instrument which restores it to the state in which it was originally issued? Wightman, J. Suppose the indorsement were struck out by a bonâ fide holder,—what would be the consequence, if the banker refused to pay the draft? Or, suppose the name of a particular banker were struck out, leaving the cheque still a "crossed cheque."] That might not be a material alteration. Here, the direction has been altogether disregarded: the payment was made to a person who was not a banker.

Bovil, Q. C. (with whom was Archibald), for the respondent, was not called upon.

Wightman, J. We are all agreed that the judgment of the court of Common Pleas must be affirmed. The case turns upon the construction of the statute 19 & 20 Vict. c. 25, s. 1, the terms of which are sufficiently clear. The act professes to be "an act to amend the law relating to drafts on bankers." It begins with a recital that doubts have arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker: and it then proceeds to enact, that, "in every case where a draft on any banker, made pay-**[467]**-able to bearer or to order on demand, bears across its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." That clearly only gives the crossing the effect of a direction to the banker upon whom the draft is made, to pay it only to or through another banker, if it appears on the face of the instrument at the time of its presentment This must be so from the very terms of the enactment; for, unless the draft bears the crossing on its face at the time of presentment, it cannot operate as a direction to the person to whom it is presented. Whether that direction is put on the instrument by the drawer himself or by any other person, if he bears the crossing on its face at the time of presentment, the banker who is to pay it can only do so to or through the banker named or to or

through some other banker. If he sees the direction, he is bound to obey it. Here, it appears that the cheque, when presented for payment, had no direction at all upon the face of it, and therefore it was not a draft or order within the contemplation of the act. I entirely agree with the court of Common Pleas in thinking that the crossing is a mere direction to the banker, and must, to be of any avail, appear upon the face of the draft when presented; and that the erasure of it would not constitute a forgery.

Bramwell, B. Concurring, as I do entirely, in what has fallen from my Brother Wightman, I cannot refrain from remarking that this piece of legislation is an abortive attempt to perform the impossible feat of rendering a draft which upon the face of it purports to be payable to the bearer not payable to him. It is [468] a thing which cannot be done: the utmost that can be done is, that which the law had already done before, viz. to make the crossing of the cheque or draft operate as a caution to the banker to use a greater degree of vigilance (*a*)[1]. It may be that the statute has turned that which before was a mere caution to the banker, into an absolute direction to him not to pay the draft otherwise than to or through another banker, when the direction is put on by the drawer of the cheque himself. But, to hold that the direction forms part of the instrument itself, would be to attempt to perform the impossible feat I before alluded to, or to do that which would be equally impossible and inconsistent, viz. to say that the crossing should not affect the rights of the holder, and yet that the banker would not be bound to pay the draft. It is manifest to my mind that a bonâ fide holder of this cheque would have a remedy against the drawer upon it. It is plain that the negotiability of the instrument is not and never was affected by the crossing. I think the crossing operates as a private direction to the banker, and that, if made by the customer, the banker would be liable to him for disobeying it,—the crossing by the customer being tantamount to a direction to the banker to pay the draft only to or through another banker. But, if the crossing is put on by some one other than the maker of the draft, I have a difficulty in seeing how the banker could be held liable for not obeying it. Whoever drew this act must have seen the difficulty, or rather the impossibility, of making the crossing part of the instrument itself, and at the same time preserving the negotiable character of the draft.

The rest of the court concurring,

Appeal dismissed, with costs.

[469] Powis *v.* Butler and Another, Executors of Charles Walton, Deceased. May 11th, 1858.

[S. C. 27 L. J. C. P. 249; 4 Jur. N. S. 614; 6 W. R. 549.]

Held, by the Exchequer Chamber,—affirming the judgment of the court of Common Pleas,—that the executors of one whose name has since his decease been inserted in the last filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials.

Error upon a judgment of the court of Common Pleas on a special case, the question being whether, under the circumstances stated in the case, the plaintiff was entitled to issue execution against the defendants as executors of one Charles Walton, deceased, upon a judgment obtained by him against the official manager of the Royal British Bank on the 2nd of December, 1857, under the 7 & 8 Vict. c. 113.

It appeared on the case that Walton, the testator, died on the 16th of April, 1856, and that his name appeared in the memorial (the last) filed by the proper officer of the company, pursuant to s. 16, in June, 1856. The court below held that the executors were not liable: vide ante, vol. iii., p. 645.

The case was now argued before Wightman, J., Erle, J., Crompton, J., Bramwell, B., Watson, B., and Channell, B.

Beasley for the plaintiff in error. Looking at the various sections of the statute (*a*)[2]

(*a*)[1] Quære, what constitutes vigilance in a banker, who has no option to exercise as to whether he will or will not pay the draft when presented?

(*a*)[2] The learned counsel referred to and commented at great length upon the following sections, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, and 26.

and especially at the 6th and 7th, by which the shareholders for the time being, and their several executors, administrators, successors, and assigns, are incorporated, and at the 21st, which enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act as existing shareholders of the company, and shall be entitled to be re [470]-imbursed, as such existing shareholders only, out of the funds or property of the company, for all losses sustained in consequence thereof," the defendants, as executors of a person whose name appears on the last-filed memorial, are clearly liable. [Wightman, J. The man was dead, when the memorial was filed.] The creditor can only look at the memorial as filed. The courts have already decided that the party against whom execution is sought need not be de facto a shareholder: *Fry* v. *Russell*, ante, vol. iii., p. 665. [Wightman, J. The defendants are charged in their representative character. It is incumbent on the plaintiff, therefore, to shew that the person whom they represent was liable.] He is made so by the express language of the 21st section. [Crompton, J. He had altogether ceased to be a "person" when the memorial was filed.] The statute makes the register conclusive evidence as to who are existing shareholders. [Wightman, J. The statute must receive a fair and reasonable construction.] In Williams on Executors, 5th edit. 1583, it is said: "With respect to the liabilities of executors of shareholders in public companies, where the deed of settlement provides that the company shall continue for a certain term of years, and that the shares of a deceased proprietor shall belong to his personal representatives, but that they shall not be deemed proprietors until they are duly admitted, and have executed the deed of settlement, or done some other act, and then, and not before, they are to become proprietors and receive the dividends, it is established, that, on the death of a shareholder, his estate, and consequently his executors or administrators, in their representative capacity, continue liable until a new personal liability has been created pursuant to the deed:" citing *In re Northern Coal Mining Company*, 13 Beavan, 133. In that case, by a deed of settlement of a public [471] company, it was provided that the company was to continue forty years, "that the shares of deceased proprietors should belong to their personal representatives," but that executors should never be deemed proprietors until they should be duly admitted proprietors, on approval by the directors, and had executed the deed, &c.," and then, but not before, they "were to become proprietors, and entitled to receive the dividends: and it was held, that, upon the death of a proprietor, his estate continued liable, until a new personal liability had been created pursuant to the deed. The master of the rolls (Lord Langdale) there says: The shares do not survive as in ordinary cases, and because they do not survive, but are expressly declared to belong to the personal estate of the deceased proprietor, they must, I think, belong to it, or form part of it, subject to the incidents attending the possession of a portion of the capital or assets of the partnership under the management of the directors, as provided for by the deed; and, if profits or losses arise, I think that a right to a share of the profits, and with that a liability to contribute a share of the losses, are necessarily incident to the shares themselves, or to the right to the shares." The Lords Justices have held that executors are liable as contributories under the winding-up acts. [Crompton, J. That is a totally different matter.]

Phipson, contrà, was not called upon.

Wightman, J. I am of opinion that the judgment of the court of Common Pleas was right, and must be affirmed. The question turns upon the construction to be put upon the 21st section of the 7 & 8 Vict. c. 113, which enacts that "the persons whose names shall appear from time to time in the then last-delivered me-[472]-morial, and their legal representatives, shall be liable to all legal proceedings under this act, as existing shareholders of the company, and shall be entitled to be re-imbursed, as such existing shareholders only, out of the funds or property of the company, for all losses sustained in consequence thereof." In the present case, it may have been the duty of the officer of the company to deliver a memorial between the 28th of February and the 25th of March: but it was not filed until June; and, before the document was filed and became effective as a memorial, the individual whose representatives are now sought to be charged died. The question is, whether, under these circumstances, the deceased comes within the description in s. 21, of "a person whose name appears in the memorial." No doubt the name was on the last-delivered memorial; but it was not, within the fair and reasonable construction of the act, the name of a person,—which must mean a living person. That seems to me to dispose of the whole matter. The defendants

here are sued in their representative character. To render them liable in that character, it must be shewn that the person whom they represent was a person whose name appears on the last-delivered memorial. Being then dead, he was not a person whose name could properly be upon the memorial. I therefore think that the judgment of the court of Common Pleas was right, and must be affirmed.

Bramwell, B. I am entirely of the same opinion, and shall only add a word or two to what has fallen from my Brother Wightman. Looking at the language of the 9th and 10th sections of the 7 & 8 Vict. c. 113, the meaning of the 21st section seems to me to be very obvious. The 9th section enacts that every judgment, decree, or order of any court **[473]** of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding. I do not find it provided in any part of the statute that the judgment is to have a greater effect than that. Now, a dead man could not be a party to the proceeding. The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment, decree, or order against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose: provided that no person having ceased to be a shareholder of the company shall be liable for the payment of any debt for which any such judgment, decree, or order, shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same," &c. A dead man could not be liable as a partner. Then comes the 21st section, which enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal **[474]** proceedings under this act as existing shareholders of the company," &c. That is to say, they are the persons to whom recourse is to be had in the first instance to obtain satisfaction of the judgment. The 21st section was not intended to make any person liable who was not otherwise liable; but to describe what persons are within the one class and what within another.

The rest of the court concurring,

Judgment affirmed.

End of Trinity Vacation.

[475] Cases Argued and Decided in the Court of Common Pleas, and in the Exchequer Chamber, in Trinity Term, in the Twenty-First Year of the Reign of Victoria.

The Judges who usually sat in Banc in this Term, were,—Cockburn, C. J., Williams, J., Willes, J., and Byles, J.

Memoranda.

In the course of the last Vacation, Charles Petersdorff, Esq., of the Inner Temple, John Cross, Esq., of Gray's Inn and the Middle Temple, John Tozer, Esq., of Lincoln's Inn, and William Payne, Esq., of Gray's Inn, were respectively called to the degree of the Coif.

They gave rings with the following mottos:—Serjt. Petersdorff,—"Nec mora nec requies;" Serjt. Cross,—"In Cruce fido;" Serjt. Tozer,—"Et tenui telas, discreverat auro;" Serjt. Payne,—"Reverentia legum."

[476] NOTMAN AND ANOTHER *v.* THE ANCHOR ASSURANCE COMPANY.
June 4th, 1858.

[S. C. 27 L. J. C. P. 275; 4 Jur. N. S. 712; 6 W. R. 688. For subsequent proceedings see 6 C. B. N. S. 536.]

On the 23rd of June, 1853, the plaintiffs (in Glasgow) effected a policy for 2000l. upon the life of A., one of the conditions of the insurance being that the policy should be void if A. should go beyond the limits of Europe without leave of the directors. The premiums were regularly paid each half year down to the 22nd of December, 1857.—One of the plaintiffs, who was the agent at Glasgow of the company, in the confidential report made to them on the 18th of June, 1853, stated,—"A. has for sixteen years past resided principally at Belize, Honduras: his health has not in any way suffered: he intends returning there for a few years, in about a month:" and on the 20th he wrote to them, "A. proceeds to Belize about the end of this month." —On the back of the policy, and of even date therewith, was the following memorandum:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within express." —The extra premium for one year's foreign residence was paid on the 23rd of June, 1853, but A. did not in fact proceed to Belize until the 9th of June, 1856, arriving there "about the middle or latter end of August." He died there on the 13th of August, 1857, within a year of his arrival at Belize:—Held, that the permission to reside "for one year" at Belize was not limited to any particular year, and consequently that the assured were entitled to recover the sum insured.

This was an action brought by the plaintiffs, suing for the benefit of their assignee, Archibald Livingston, against the defendants, for the recovery of 2000l., the amount secured by a policy of assurance effected by the plaintiffs with the defendants on the life of one Michael Finlayson Stirling, deceased, or of such sum for the return of extra premium or other premiums as they might be entitled to recover; and, by the consent of the parties, and by a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

The plaintiffs, at the time of effecting the policy of assurance hereinafter mentioned, were merchants, of Glasgow, trading in co-partnership with one William Skinner, since deceased, under the name and firm of Skinner, Notman, & Co.; and the defendants carried on the business of an assurance company for fire and life, at 67 Cheapside, London.

Mr. M. F. Stirling, deceased, the person on whose life the policy was effected, was a merchant at Glasgow; and the plaintiffs and Skinner, being interested in the **[465]*** life of Stirling, effected with the defendants, on the 23rd of June, 1853, a policy of assurance on his life, for 2000l.; which policy of assurance is in the words and figures following:—

"Life policy with bonus.

"No. 1845. Sum assured, 2000l.

"Anchor Assurance Company, for Fire and Life, 67 Cheapside, London.

"Half-yearly premium, 27l. 11s. 8d.

"Whereas Messrs. Skinner, Notman, & Co. of, &c., merchants, hereinafter called the assured, have proposed to effect an assurance with the Anchor Assurance Company in the sum of 2000l. upon and for the whole continuance of the life of Michael Finlayson Stirling, of No. 73 Villafield Place, Glasgow, aforesaid, merchant, and, as the basis of this assurance, the said assured hath delivered at the office of the said company a declaration in writing, signed by the assured, and bearing date the 18th of June, 1853:

* Pages 465 to 476 are accidentally repeated in the original volume.

"And whereas the said assured has paid to the said company the sum of 27*l.* 11*s.* 8*d.* as a premium or consideration of this assurance for six calendar months until the 22nd of December, 1853.

"Now this policy witnesseth, that, if the said M. F. Stirling shall die before or upon the 22nd of December, 1853, or shall live beyond that day, and the said assured or their assigns shall, on or before that day, and on or before the 22nd of June, and the 22nd of December, in each and every succeeding year during the continuance of this assurance, pay to the said company the premium of 27*l.* 11*s.* 8*d.*, then the funds and other property of the said company shall, according to the provisions of the deed of settlement of the said company, be subject and liable to pay to the said assured, their executors, administrators, or assigns, within three calendar months after satisfactory proof of the death of **[466]** the said F. M. Stirling, and after such other information and evidence respecting the time, cause, or manner of such death as the directors may reasonably require, shall have been received at the principal office of the said company, the sum of 2000*l.* of lawful money of Great Britain, together with such further sum or sums of money (if any) as, according to the rules and regulations for the time being of the said company, shall be apportioned and payable as and by way of bonus or addition to the sum hereby assured.

"Provided always that this policy, and the assurance hereby effected, are and shall be subject to the several conditions printed on the back hereof, so far as the same are or can be applicable: and such conditions shall be considered as forming part of this policy.

"Given under the hands of three of the directors, and sealed with the common seal of the said company, this 23rd day of June, 1853."

(Signed) "FREDERICK JAMES SMITH.
"J. W. WESTHEINER.
"JOHN A. DALBY."

The conditions printed on the back of the policy were in the words and figures following:—

"Anchor Assurance Company.

"Conditions of life-assurance.

"1st. The premium, if payable annually, must be paid within thirty days, if half-yearly, within fifteen days, and, if quarterly, within seven days, next after the day or respective days on which the same shall have become due, or the policy will be void, and cannot afterwards be revived, except at the discretion and with the special permission of the board of directors, and upon satisfactory proof that the person whose life is assured continues in good health. The directors do not ordinarily revive policies under any circumstances after the lapse of twelve calendar months from the time **[467]** of their becoming forfeited; nor at any time, except on payment of the premiums due, and interest at five per cent. per annum.

"2nd. If the premium be made payable half-yearly or quarterly, and the person upon whose life the assurance is effected die before the whole amount of premium for the current year of the policy shall have been paid, the remainder thereof shall be deducted from the sum assured.

"3rd. Every policy effected by a person on his own life, or on his own and any other life or lives jointly, who shall die by his own hands, whether felo-de-se or otherwise, shall be void, except so far as any other person shall have acquired a bonâ fide interest therein by assignment or by legal or equitable lien, provided such assignment or security shall have existed, and notice thereof shall have been given to the company, not less than three calendar months before the death.

"4th. If any statement or allegation contained in any declaration or document mentioned or recited in the policy be untrue; or, if the assurance shall have been made through or in consequence of any misrepresentation, concealment, or fraud; or, in case the person upon whose life the assurance is effected (or either of such persons if more than one) shall go beyond the limits of Europe, or shall die on the seas, except in passing from one part of the United Kingdom to another, or in passing in times of peace in decked vessels from any European port to any other European port; or, being or becoming a military or naval man, shall enter into actual service, without the licence of the board of directors previously obtained; or shall die by duelling or the hands of justice,—this policy shall be void.

"5th. If, for any cause whatever, the policy becomes void, all monies paid in respect thereof will be forfeited to the company.

[468] "6th. The capital stock of 1,000,000*l.*, and other the stock, securities, funds, and property of the said company remaining at the time of any claim or demand made unapplied and undisposed of, and inapplicable to prior claims or demands, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of this policy: and no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall, by reason of this policy, be in anywise individually or personally liable or subject to any such claims or demands, or to be sued in respect thereof: nor shall any director or other shareholder of the company be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares."

In addition to the above-recited conditions, a memorandum, in the words and figures following, was, by authority of the board of directors, indorsed on the said policy of assurance:—

"Memorandum.

"Anchor Assurance Office, 67 Cheapside.

"June 23rd, 1853.

"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of 20 guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed.

"By order of the board of directors."

(Signed) "THOMAS BELL, secretary."

The following is a copy of the declaration which was, and in the policy is stated to have been, the basis of this assurance:—

[469] PROPOSAL FOR A LIFE ASSURANCE.

Questions.	Answers.
1. Christian and surname of the person whose life is proposed to be assured?	Michael Finlayson Stirling.
2. Present residence and profession or occupation?	Glasgow, 73 Villafield Place, or Belize, Honduras, Merchant.
3. Whether married or single?	Married.
4. Place and date of birth?	Glasgow, 30th March, 1820.
What evidence of age will be produced?	Register of birth and baptism.
5. Age next birthday?	Thirty-four years.
6. If had the small-pox or undergone vaccination (cow-pox)?	No. Vaccinated by Dr. Hunter.
7. If had any particular determination of blood to the head, or suffered from apoplexy, palsy, epileptic or other fits, or from insanity?	Never.
8. If suffered from habitual cough, spitting of blood, asthma, inflammation or other disease of the lungs, or from disease of the heart?	Never.
9. If suffered from inflammation or other disease of the bowels, disease of the liver, of the kidneys or other urinary organs?	Never.
10. If suffered from dropsy, fistula, rupture, gout, rheumatism, or any other disease	Never.

Questions.	Answers.
11. If ever met with any accident or serious personal injury, state its nature, and how long since it occurred . .	Never.
12. If ever resided abroad? If yes, state when, where, and how long, and whether the party's health suffered from such residence	Sixteen years in the West Indies: been in Glasgow six months. Health has not suffered in any way whatever.
13. If of sober and temperate habits? .	Temperate.
14. If now and ordinarily enjoying good health?	Very good.
15. Is there any circumstance connected with the health, habits, or otherwise, with which the directors ought to be acquainted, or which would render an assurance on the life more than usually hazardous?	None.
16. Whether the party's parents are alive, and what are their respective ages. If dead, at what age they died, and of what diseases?	Ages. Father, Alive. Mother, Alive. Ages. Father, 44 Dead. Inflammation. Mother, 58 Dead. Constipation.
17. Whether any and which of the party's near relations have died of consumption, or other pulmonary complaint?	None whatever.
[470] 18. What was the original number of the party's brothers and sisters? How many of them are dead, and at what ages did they die?	Original number. eleven. No. Brothers Six Sisters Five Dead. Three: two died in infancy.
19. Whether the party's life has ever been proposed for assurance at any other and what office or offices, and when, and what was the result?	Never.
20. Name and residence of ordinary medical attendant, and how long known to him . . . . . If received medical advice from any other person be so good as state it . .	Never had any regular medical attendant.
21. Name, residence, and profession of an intimate friend, not being a relative, nor interested in the assurance, and how long known to him	Dr. Hunter, Sanchuhall St. Dr. James Miller, Sanchuhall St. Has known him for 25 years.
22. Christian and surname, present residence, and profession or occupation of the person on whose account and in whose favour the policy is to be granted .	Messrs. Skinner, Notman, & Co., Merchants, Exchange Square, Glasgow.
23. Sum to be assured, and term or nature of the assurance	Two thousand pounds.
24. Whether with or without bonus? .	With bonus.
Premiums to be paid yearly, or half-yearly?	Half-yearly.

Signature of party whose life is to be assured. M. F. STIRLING.

We hereby propose to effect the above-mentioned assurance with the Anchor Assurance Company, and declare that the above answers are true and faithful in all respects, and we agree that this declaration shall be the basis of the assurance to be granted by the said company. And we declare that we have not intentionally withheld any information which is calculated to influence the decision of the directors as to the eligibility for assurance of the life proposed and we agree, that, if any statement or allegation contained herein, or in the answers above given, be untrue, or if the assurance shall have been made through, or in consequence of, any misrepre-

sentation, concealment, or fraud, the policy shall be void, and all moneys paid in respect thereof be forfeited to the company, and that such policy shall be subject to a condition to that effect, and to other the conditions usually inserted in the life policies of the said company. (Signed) SKINNER, NOTMAN, & Co.

Dated this 18th June, 1853.

Afterwards, on the 11th day of December, 1854, the said policy of assurance, with the said memorandum thereon, was duly assigned by the plaintiffs, and delivered over to one Archibald Livingston, a writer, of Glasgow, for valuable consideration; and a certified copy of such assignment was lodged with the defendants; and such assignment was thereupon duly marked and entered in the books of the defendants.

[471] The following premiums have been paid to the defendants in respect of the said policy of assurance,—for the half-year ending the 22nd of December, 1853, 27l. 11s. 8d.,—for the half-year ending the 22nd of June, 1854, 27l. 11s. 8d.,—for the half-year ending the 22nd of December, 1854, 27l. 11s. 8d.,—for the half-year ending the 22nd of June, 1855, 27l. 11s. 8d.,—for the half-year ending the 22nd of December, 1855, 27l. 11s. 8d.,—for the half-year ending the 22nd of June, 1856, 27l. 11s. 8d.,—for the half-year ending the 22nd of December, 1856, 27l. 11s. 8d.,—for the half-year ending the 22nd of June, 1857, 27l. 11s. 8d.,—and, for the half-year ending the 22nd of December, 1857, 27l. 11s. 8d. And, in addition to the above payments, a further payment of 20 guineas was made to the defendants on the 23rd of June, 1853, for permission to the life assured to proceed to and reside at Belize aforesaid, according to the memorandum of that date indorsed on the policy as aforesaid; but no other payment of such additional premium has ever been made to the defendants.

The plaintiff, John Notman, was, before and at the time the policy was effected, the agent at Glasgow of the defendants, and through him the policy was proposed and effected. In a report made by him as such agent to the defendants on the 18th of June, 1853 (a copy of which report accompanied and formed part of the case), the following question put by the defendants to the said John Notman is contained, viz. "Are you possessed of any information, or acquainted with any and what fact or circumstance, connected with the actual state of health or habits of the life proposed to be assured, which in reason and fairness may appear to be material, and which therefore ought to be communicated to the directors? If you are, state it fully." The said John Notman made the following answer in **[472]** the said report to the said question: — "Mr. Stirling has for sixteen years past resided principally in Belize, Honduras: his health has not in any way suffered: he intends returning there for a few years, in about a month."

In a letter addressed by the said John Notman to the defendants on the 20th of the same month of June, and received by them on the 21st, he makes the following statement with respect to the said Mr. Stirling: —"Mr. Stirling proceeds to Belize about the end of this month." The said Michael Finlayson Stirling did not proceed to Belize until on or about the 9th of June, 1856, where he arrived about the middle or latter end of August, 1856; and continued there from that time until his death.

In the month of May, 1857, he caught a cold, which brought on an attack of jaundice and diseased liver, of which he died on the 13th of August, 1857, within the space of a year from his arrival at Belize: and he was buried at Belize aforesaid on the same day.

The fact of the death of the said Michael Finlayson Stirling was published in the obituary of a Glasgow newspaper in the course of the month of September last, from which source the plaintiffs and the said Archibald Livingston, the assignee of the said policy, first learnt that the said Michael Finlayson Stirling had left this country, and first learnt that he was dead.

Upon becoming acquainted with the fact of the decease of the said Michael Finlayson Stirling, the said Archibald Livingston communicated with the defendants; and the following correspondence took place:—

"Policy No. 1845. 2000l.

"Michael Finlayson Stirling.

"Glasgow, 22nd September, 1857.

"We beg to intimate that this party died at Belize, **[473]** Honduras, on the 13th

ult., and will thank you to forward to us the necessary forms for proving the death, &c. Of course you are aware that our Mr. Livingston is in right of this policy under a regular deed of assignment duly intimated to your office."

(Signed) "LIVINGSTON & GARDINER."

The following is a copy of the letter of the managing director of the Anchor Assurance Company, in reply: —

"Anchor Assurance Company,
"67 Cheapside, London. 23rd Sept. 1857.

"Gentlemen, —In reply to your letter of the 22nd instant, intimating the death of Michael Finlayson Stirling, assured with this company under policy 1845, and which death took place at Belize, Honduras, I beg to refer you to the conditions of the policy, and to intimate to you, that, inasmuch as the assured had gone abroad without due notice thereof and payment to this company of the extra premiums, as in such case is always done, the policy, as a necessary consequence, has become forfeited, and the company is not liable for any payment in respect of it.

"THOMAS CAVE, Managing Director."

To this reply Archibald Livingston made the following answer:—

"Glasgow, 25th Sept. 1857.

"Re Stirling's policy, 1845.

"Your letter of the 23rd inst. to Messrs. Livingston & Gardiner is to hand; and, before placing myself in anything like a hostile attitude with the Anchor Assurance Company, I wish to state two things by way of explanation regarding the claim which has emerged under this policy,—1. The assured left this country unknown to me, and therefore I could not intimate to the office what I did not know myself. The first and only notice of the change of residence received by me was **[474]** that contained in the newspaper obituary of last week announcing the death, —2. By an indorsation on the policy, under date the 23rd of June, 1853, liberty is granted to the assured to proceed to and reside at Belize, Honduras, upon payment of an extra premium of 20 guineas for one year's residence there, and for so long thereafter as the like extra premium shall from time to time be paid. Now, as I have just learned, the assured did not then go to Belize, and only proceeded thither last year, and died within a twelve month of his landing there, the company have been paid the extra premium fixed by themselves for the whole period of foreign residence exigible under the policy and indorsation thereon.

"Having made you aware of these facts, I now wish to know whether the claim is to be admitted on production of the usual certificates, which I shall at once procure on being furnished with the office forms."

(Signed) "ARCHIBALD LIVINGSTON."

Subsequently to this, the following letters passed between the said Archibald Livingston and the defendants:—

"Archibald Livingston, Esq. "London, 26th September, 1857.

"Sir, —In the absence of Mr. Cave, I have to acknowledge receipt of your letter of yesterday's date. The contingency of Mr. Stirling's leaving the country without your knowledge is one that you took upon yourself when you purchased the policy. The licence given in June, 1853, expired in June, 1854, in consequence of the extra premium not having been paid from time to time, as required by the licence.

"Per pro THOMAS CAVE, Managing Director,
"J. H. WOOD."

"Glasgow, 28th Sept. 1857.

"Policy 1845 (Stirling).

"Sir, —Your letter of the 26th instant has just been **[475]** received. As I wish to have the decision of your board on the claim which has arisen under the policy,

I will thank you to lay the correspondence which has passed on the subject before the directors at their first meeting, and let me know the result.

"ARCHIBALD LIVINGSTON."

"London, Oct. 1st, 1857.

"Policy 1845.

"Sir,—I brought your letters, re this death, before the board at their meeting this day, when I was instructed to inform you that they cannot admit the claim.

"Per pro THOMAS CAVE, Managing Director,
"J. H. WOOD."

The question for the opinion of the court is, whether the plaintiffs are entitled to recover the sum assured by the said policy of assurance, or any and what sum for the return of extra premium or other premiums, under the above circumstances.

If the court shall be of opinion in the affirmative, then judgment is to be entered up for the plaintiffs for 2000l. and costs, or such other sum as the court may direct: but, if the court shall be of opinion in the negative, then judgment of nolle prosequi, with costs of defence, shall be entered up for the defendants.

James Wilde, Q. C. (with whom was John Thompson), for the plaintiffs (*a*). The question is, whether by **[476]** the terms of the memorandum, the party whose life was insured was bound to avail himself of the permission thereby given him at once, or whether, having paid a premium for a year's residence, he was at liberty to go at any period, and reside at the place indicated for one year, in consideration of the 20 guineas extra premium. [Cockburn, C. J. The amount of the premium is calculated with reference to the man's age and state of health at the time of the bargain.] The language of the memorandum is general. The liberty is granted for "a year's residence at Belize,"—to commence, of course, from the time the party first lands there. It no where appears that the sum charged for the extra risk is fixed with reference to the then age of the party. He is to be at liberty to reside at Belize, for one year, go when he may, and for so long thereafter, after the expiration of that one year,—as the extra premium shall from time to time be paid. The language of the policy and of the memorandum is that of the company, and therefore is to be construed, if there be any ambiguity in it, most strongly against them: "Verba chartarum fortius accipiuntur contrà proferentem." In Broom's Legal Maxims, 3rd edit. 529, it is said: "It is a general rule, that the words in a deed are to be construed most strongly contrà proferentem,—regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument; for, as observed by Sir W. Blackstone, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words, and hereby all manner of deceit in **[477]** any grant is avoided; for, men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. Moreover, the adoption of this rule puts an end to many questions and doubts which would otherwise arise as to the meaning and intention of the parties, which, in the absence of it, might be differently construed by different judges; and it tends to quiet possession, by taking acts and conveyances executed beneficially for the grantees and possessors." The same rule of construction is applied in the case of guarantees. Thus, in *Hargrave* v. *Smee*, 6 Bing. 244, 3 M. & P. 573, Tindal, C. J., says: "The question is, what is the fair meaning to be collected from the language used in this guarantee. The words employed are the

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"1. That the licence of the board of directors to the life assured, to reside at Belize, indorsed upon the policy, is for one year's residence at Belize unconditionally, and that the extra premium for such risk having been paid, and the life assured having died at Belize within one year of his arrival and residence there, the plaintiffs are entitled to recover the sum assured.

"2. In the event of the court deciding that the plaintiffs are not entitled to recover the sum assured, that they are entitled to recover the extra premium and such ordinary premiums as may have been paid after the time from which it may be said that the policy became forfeited, and ceased to exist."

words of the defendant in this cause, and there is no reason for putting on a guarantee a construction different from that which the court puts on any other instrument. With regard to other instruments, the rule is, that, if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." And in *Mayer* v. *Isaac*, 6 M. & W. 605, 612, Alderson, B., says: "Undoubtedly, the generally received principle of law is, that the party who makes any instrument, should take care so to express the amount of his own liability as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party." The subject underwent discussion recently in the House of Lords, in *Anderson* v. *Fitzgerald*, 4 House of Lords Cases, 484, where Lord St. Leonards says: "It [the policy] is of course prepared by the **[478]** company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." Assuming, therefore,—though it is not admitted,—that there is any ambiguity here, the same principle of construction must be applied to this instrument. Then, if the policy be void, the plaintiff will be entitled at all events to recover back the 20 guineas extra premium, and the three half-years' premium paid since the time when the policy so became void.

Bovill, Q. C. (with whom was R. E. Turner), for the defendants (*a*). The obvious intention of the parties was that the residence at Belize should commence immediately or within a reasonable time. This is plain from the circumstance of the extra premium being declared to be payable at the same time as the other **[479]** premiums; and these are payable half-yearly. The application is for permission to "proceed to, and reside at," Belize. The words "for one year" have reference to the payment of the premium. The amount of premium for the foreign residence would necessarily vary according to the age of the party at the time of its commencement. In Jenk. Cent. 301, it is said, —'A lease is made for twenty-one years, without mentioning the time of its commencement: it shall begin immediately." [Cockburn, C. J. Every deed dates from the time of its delivery.] No one can fairly doubt the meaning of the parties here: the season of arrival would be an important ingredient in the consideration of the premium: and here the parties were evidently dealing with a view to an insurance of a person upon the eve of starting. [Cockburn, C. J. The company might have placed the matter beyond doubt, by inserting the date from which the year's residence was to commence.] If the argument on the other side be tenable, the party might have gone to Belize for a year's residence twenty years after the date of the memorandum. [Cockburn, C. J. Perhaps that would not have been very unreasonable, seeing that the company would have had the benefit of the ordinary premiums for all the intervening space.] The whole bargain was based on the assumption that Stirling was "about to proceed" to Belize at once. [Williams, J. No doubt he intended and the company expected that his departure would take place at once: but neither party stipulated for it.] He was bound to go within a reasonable

(*a*) The points marked for argument on the part of the defendants, were as follows:—

"1. That the permission given by the defendants to the said Michael Finlayson Stirling to proceed to and reside at Belize, as stated in the memorandum, had expired before the said Michael Finlayson Stirling had left England, and that therefore the policy became forfeited by his departure for Belize in June, 1856.

"2. That the permission given by the memorandum was, a permission to proceed to Belize within a short time after the 23rd day of June, 1853, —at all events, before the 9th day of June, 1856.

"3. That the language of the memorandum itself, and of the policy, and also the other documents which form part of the case, shew that such is the construction to be put upon the memorandum; and that the said Michael Finlayson Stirling was not at liberty, under such permission, to proceed to and reside at Belize at any time after the 23rd of June, 1853.

"4. That, the policy having become forfeited by the departure of the said Michael Finlayson Stirling to Belize in 1856, all sums paid to the office by way of premium, extra premium, or otherwise, are, under the terms of the policy, also forfeited."

time. [Willes, J. What is to be the test of reasonable time,—his convenience or his pleasure?] That would be a question for a jury. Then, as to the return of premiums. [Cockburn, C. J. You need not go into that.]

J. Wilde was not called upon to reply.

[480] Cockburn, C. J. I am of opinion that the plaintiffs are entitled to judgment. In all probability, at the time the agreement was entered into whereby permission was given to Mr. Stirling to go to and reside at Belize on payment of the additional premium for the extra risk, both he and the company supposed that he was about to proceed thither at once, and consequently that his period of residence at that place would commence within a short period, viz. as soon as he should arrive there: but there is no stipulation that he shall proceed to Belize and commence his residence there immediately. By the terms of the agreement, permission is given to Mr. Stirling "to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy." It is true that that language is somewhat ambiguous; and it is doubtful whether the words "for the time aforesaid" have reference to the proceeding to as well as the residing at Belize, or only to the last part of the sentence. I am inclined to think, taking this expression in conjunction with the subsequent words, "and for so long thereafter as the extra premium shall from time to time be paid," that it has reference to the residence only, and not to the time consumed by the voyage. But, admitting that there may be some doubt as to this, I think we are entitled to look at the recital to ascertain the meaning. That recital is as follows:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year," &c. Now, that in terms excludes the time to be occupied in the voyage out. I think the terms of the permission must be construed by that recital: and the effect of the whole is, that **[481]** the person insured was to have twelve months' residence at Belize, independently of the time occupied by the voyage. It is said that that period is to date from the 23rd of June, 1853: but there is nothing to be found in the contract to define the period from which the twelve months' residence is to date. Mr. Bovill has pointed out reasons of considerable cogency why the company should find it to their interest to give such permission for foreign residence commencing at or within a reasonable time after the application. Nothing could be more easy than to express that in plain terms in the instrument itself: the permission might be granted for a residence from a given day to another given day. They have not, however, done so here: the permission is given simply for a twelve months' residence at Belize, without specifying any period from which that residence is to date. This instrument being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them; and there is nothing to shew that the agreement is necessarily to date from the 23rd of June, 1853. Upon the whole, I think that the twenty guineas having been paid for the permission to reside for twelve months, the residence might take place at any time.

Williams, J. I am of the same opinion. As to the first line of argument urged by Mr. Bovill, on the part of the defendants, viz. that the intention of the parties was that the year of residence should commence from the 23rd of June, 1853, I do not feel any difficulty. It is impossible to reconcile that construction of the memorandum with the words used in it. I think, that, if the assured had proceeded to Belize within a reasonable time after the 23rd of June, 1853, and had died before the expiration of the year, there could be no doubt that the money would have been payable, **[482]** provided the death took place within the year of residence. Therefore, I think it is impossible to contend that he was not to have liberty to go and live there a year without the policy being avoided. But I have entertained some doubt whether the intention was not that he should proceed thither within a reasonable time. The memorandum, however, contains no provision to that effect; and therefore I cannot adopt any other view than that suggested by my Lord. Suppose all that passed between the parties was this, that Mr. Stirling had said to the company, "I want to go and reside for a year at Belize; what must I pay?" And the answer was, "You must pay twenty guineas; and, if you wish to reside there for a longer period, you must pay twenty guineas for every additional year." If that were all that passed, there would be no agreement for any particular year.

WILLES, J. I am of the same opinion. I am by no means surprised at the point having been raised by the company; nor do I think it was an unreasonable thing for them to take the opinion of the court upon it. Both parties were evidently under an impression that Mr. Stirling intended to proceed to Belize within a reasonable time after the permission was granted. The company expected that, and that the policy would practically be on the life of a person going to reside there within a short time. That I quite see. If the company had taken care to embody that intention in an express stipulation, it would have been a condition, and would have placed the matter beyond all doubt. They have not, however, done so. They merely recite that the life assured is "about to proceed to and reside at Belize, in the state of Honduras," which can only mean that he bonâ fide intends to go. They then go on to say, that, "an extra premium of twenty guineas **[483]** having been paid for the extra risk of such residence for one year, permission is thereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid." That necessarily implies that the party was to be at liberty to take the voyage. The only use of the expression "about to proceed to," &c., is, to control the permission afterwards given. The licence stands, therefore, as a clear licence to reside at Belize for a year, in consideration of the payment of the twenty guineas. The stipulation is not expressed in such a form as to induce the court to hold it to amount to a condition.

BYLES, J., having advised on the case when at the bar, took no part in the discussion.

Judgment for the plaintiffs.

KITCHIN *v.* WILSON AND ANOTHER. May 29th, 1858.

To entitle a plaintiff to an order to dispense with personal service of a writ of summons upon one of two defendants, members of a firm sued as acceptors of a bill of exchange, it is not enough to shew that he has gone abroad, and has no private residence here: the affidavit must shew upon the face of it reasonable grounds for inducing the court to conclude that he is evading service of the writ.

The 17th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) enacts that "the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and, in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to **[484]** the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit." And the 7th section of the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), enacts that "the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act."

This action was brought by the indorsee against the defendants as acceptors of a bill of exchange for 498*l.* 15*s.*, dated the 17th of October, 1857, and payable three months after date. The defendants are merchants carrying on business together in partnership at Liverpool. A writ under the Bills of Exchange Act, 1855, had been served personally upon M'Iver, one of the defendants, but it had been found impossible to serve the other defendant. Upon application to M'Iver, he stated that the defendant Wilson was in America, that he did not know his precise address there, that he had recently addressed a letter to him at the Post-Office, New York, and that he had no private residence here. Upon an affidavit stating these facts,

Malcolm moved for an order under the 17th section of the Common Law Procedure Act, 1852, that the plaintiff be at liberty to proceed as if personal service had been effected upon Wilson. [Crowder, J. What special circumstances are disclosed in your affidavit, to bring the case within the act?] The debt is a partnership debt; and one partner has been duly served.

[485] Per Curiam. There is nothing to shew that the absent partner is keeping out of the way to evade service. The case is clearly not within the statute.

Rule refused.

GILKES *v.* LEONINO. May 28th, 1858.

[S. C. 4 Jur. N. S. 537; 6 W. R. 620.]

The defendant, on the 19th of August, 1853, contracted to purchase of the plaintiff a parcel of Chassum waste-silk, "to arrive in all probability in January and February next, but further particulars will be furnished respecting the name of ship or ships in the next mail or on receipt of the next after that." The second mail after the 19th of August arrived in London on the 19th of September. No name of any ship was then communicated to the defendant; and, on the 18th of January, 1854, the defendant wrote, —"We give you one week from this day's date to give to us the name of the ship on which the 20,000 lbs. of Chassum is on board, and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last. To this the plaintiff replied on the same day,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19, 8, 53, by informing you that it is already arrived, and that you will receive invoice in due course." On the 19th, the defendant wrote, —"Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for in the course of to-morrow; in default of which we shall act as indicated in our letter of yesterday." The names of two ships were given on the 24th and 25th of January:—Held, that the defendant's offer to renew the contract not having been in terms accepted by the plaintiff, the defendant was at liberty to retract it; and that his letter of the 19th of January was a sufficient retractation.

This was an action against the defendant for not accepting certain silk pursuant to contract.

The declaration stated that the plaintiff, at the request of the defendant, agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, a large quantity, to wit, 20,000 lbs. of Chassum waste-silk, at 9d. per pound, the said silk to arrive in London probably in January or February, 1854, but further particulars to be furnished respecting the name of the ship or ships in the mail next after the making of the said agreement, or on receipt of the mail next after that: and it was also agreed between the plaintiff and the defendant that the silk should be equal to a sample in possession of the broker: Averment, that afterwards, and before the month of Janu-**[486]**-ary, 1854, had elapsed, the defendant waived the said agreement so far as it related to particulars respecting the name of the said ship or ships being furnished in the mail next after the making of the said agreement, or on receipt of the mail next after that, and the defendant gave to the plaintiff the further time of one week from the 18th of January, 1854, for the particulars being furnished by the plaintiff to the defendant respecting the name of the said ship or ships; and, in consideration of the premises, and that the plaintiff would furnish particulars respecting the name of the said ship or ships within the said period of one week, and would observe the said agreement in all things on his part to be observed, except as to the part thereof so waived as aforesaid, the defendant promised the plaintiff to accept the said silk and pay for the same at the rate and in manner aforesaid: That the said quantity, to wit, 20,000 lbs., of Chassum waste-silk equal to the said sample having arrived in London aforesaid in two ships, that is to say, the "Chalmers" and the "Benares," he, the plaintiff, within the week next ensuing the said 18th of January, 1854, furnished to the defendant the names of the said ships as the ships in which the said silk had arrived, and he, the plaintiff, then tendered and offered, and then and ever since had been ready and willing to deliver, the said silk to the defendant, and he, the plaintiff, had observed all things necessary to entitle him to have the said silk accepted and received and paid for by the defendant according to the said agreement: Yet that

the defendant, disregarding his said agreement, had not accepted or received the said silk, or any part thereof, although a reasonable time for his accepting and receiving the said silk had elapsed before the commencement of this suit; and the defendant had wholly refused to accept and receive the same; whereby the [487] plaintiff had lost and been deprived of the benefit of the said sale of the said silk.

The defendant pleaded,—first, that the plaintiff did not agree to sell, nor the defendant to buy, the said silk as in the declaration first alleged,—secondly, that the defendant did not promise as in the declaration alleged,—thirdly, that he, the defendant, did not waive the said agreement so far as it related to the said particulars respecting the name of the said ship or ships, or give the plaintiff the further time alleged for the particulars being furnished by the plaintiff respecting the name of the said ship or ships, as alleged,—fourthly, that the alleged agreement in the declaration mentioned was made by corresponding bought and sold notes, and upon the terms thereof, and not otherwise; and that the terms of the bought-note, wherein the defendant was described as Leonino Brothers & Co. were as follows [setting it out]: That further particulars were not furnished to the defendant respecting the name of the said ship or ships in the mail next after the making of the said alleged agreement, or on receipt of the mail next after that, although both those periods, and a reasonable time for furnishing the said further particulars, had elapsed long before the alleged waiver and giving of time, whereby the said contract was broken by the plaintiff, and the defendant discharged from its fulfilment: And that, after the alleged waiver, giving of time, and promise, and before the plaintiff had accepted, assented to, or acted upon the same, or either of them, and before the plaintiff had agreed to furnish the alleged particulars within the said period of one week, or to observe the said agreement except as to the part alleged to have been waived, the defendant retracted his alleged waiver and promise, and gave notice thereof to the plaintiff,—fifthly, that the said quantity equal to the said sample [488] did not arrive in the said ships as alleged, sixthly, that the plaintiff did not within the said week furnish to the defendant the names of the said ships, as alleged.

Upon these several pleas the plaintiff joined issue.

The cause came on for trial before Jervis, C. J., at the sittings in London after Trinity Term, 1855, when a verdict was by consent found for the plaintiff, subject to the opinion of the court upon the following case,—the damages to be referred, if the decision of the court should be in favour of the plaintiff:—

The plaintiff, during the period to which the case refers, was a merchant carrying on business in London. During the same period, the defendant also was a merchant carrying on business in London, under the firm of Leonino Brothers.

Mr. H. W. Eaton was a silk-broker carrying on business in the city of London; and in the sale and purchase of the silk in question was the broker and agent of the plaintiff and defendant respectively.

On the 19th of August, 1853, a contract was made between the plaintiff and the defendant, through the said Mr. Eaton, as their respective broker and agent, for the sale by the plaintiff to the defendant of a parcel of Chassum waste-silk, the terms of which contract are contained in bought and sold notes made and signed by the said Mr. Eaton as the agent and broker of the said parties respectively. The following is a copy of the sold-note which was sent by the said Mr. Eaton to the plaintiffs:—

"London, 19th August, 1853. Sold for account of Mr. Gilbert Gilkes a parcel of Chassum waste-silk, 20,000 lbs., at 9d. per lb., East India Company's terms; to arrive in all probability in January and February next; but further particulars will be furnished respecting the name of ship or ships in the next mail or on receipt of the next after that. It is also understood [489] that the silk is to be equal to sample in possession of the broker. Should the ship sink, this to be considered no sale.

"Henry W. Eaton, 33 Old Broad Street."

[A copy of the bought-note, which was in the same terms, was also set out.]

Chassum waste-silk was and is imported chiefly from India.

At this time, in regular course, two mails from India arrived overland in this country in each month. It was usual to notify by mails thus arriving the sailing of vessels for England; and information of the fact of sailing reached England in this way a considerable time before the vessels themselves could reach their destination.

The departure of vessels for this country which in due course would arrive in January and February might thus have been known here in the preceding months of September and October.

The mail referred to in the bought and sold notes as the "next mail" was received in London from Calcutta on the 28th of August, 1853; and the mail therein referred to as the "mail next after that," was received in London on the 19th of September, in the same year.

The plaintiff was unable to furnish, and did not furnish, to the defendant, on receipt of the said mails, or either of them, particulars of any ship or ships as the ship or ships in which the said silk contracted to be sold by the plaintiff to the defendant, or any part thereof, was shipped.

Shortly after the 19th of September, 1853, viz, on the 22nd of that month, the defendant wrote and sent to Mr. Eaton the following letter:—

"By your contract of the 19th August, it was agreed, that, on the arrival of the July mail from India, at the latest, you were to furnish us with the name of the vessel on which were shipped the 20,000 lbs. Chas-**[490]**-sum bought through you. We beg, therefore, you will do so."

Mr. Eaton, having communicated to the plaintiff the contents of this letter, on the following day wrote and sent to the defendant, by the plaintiff's direction, the letter following:—

"London, 23rd September, 1853.

"I am in due receipt of your letter of yesterday, and have been in communication with my principal respecting the parcel of Chassum. I regret that by this last mail from India he has had no advice of the vessels by which it was to be sent; but any particulars respecting it that may arrive by the next mail shall be immediately transmitted to you."

On the 24th the defendant wrote and sent the following letter to Mr. Eaton:—

"We are in receipt of your letter of yesterday, informing us that you are still unable to furnish us with the name of the vessel by which the parcel of Chassum we bought through you was to be sent. This being contrary to the clause in your contract of the 19th August last, wherein it was stipulated that we should have the name of the vessel on the arrival of last mail, at the latest, we beg to protest against this deviation from the contract: and we have to hold you and your principal responsible for any damage which may arise to us from this irregularity."

Mr. Eaton thereupon sent a copy of the last-mentioned letter to the plaintiff, inclosed in the letter following:—

"London, 24th September, 1853.

"Upon informing my buyer that I was unable to give him particulars of the ships by which the parcel of Chassum sold for you, to arrive on the 19th of August last, was to be sent, he has sent me a letter, the copy of which I now annex, protesting against **[491]** the irregularity in not conforming to the clause in the contract which states that the names of the ships were to be furnished on receipt of the last mail from India."

After this, the following correspondence passed relating to the Chassum waste-silk purchased by the defendant from the plaintiff as aforesaid. The letters were respectively written and received by the persons by and to whom they respectively purport to be written and addressed, and they were so written and received in the order in which they are set out, and on the days on which they respectively bear date. Mr. Rodwell, to whom two of the letters were addressed, and by whom one of them was written, was the managing-clerk of Mr. Eaton.

"London, 12 mo., 13, 1853.

"Henry Rodwell (at H. W. Eaton's, 33 Old Broad Street).

"It is important for me to know whether your buyer wishes to have the 20,000 lbs. Chassum delivered to him at 9d., in accordance with the terms of contract. Please let me know definitely in the course of the day. "GILBERT GILKES."

"London, 12 mo., 16th, 1853.

"Henry Rodwell (at H. W. Eaton's, 33 Old Broad St.).

"Not having a reply to my inquiry of the 13th relative to the 20,000 lbs. Chassum at 9d. per lb., I write to request thou wilt inform thy buyer, that, if he does not decide to accept my offer to cancel the contract by the end of the present week, I shall consider him bound to accept delivery at the price above stated, and act accordingly. The fairness of this course I am sure thou wilt admit.

"GILBERT GILKES."

"Mr. Gilbert Gilkes. "17th December, 1853.

"Sir,—As requested by you, I have seen Messrs. **[492]** Leonino & Co. upon the subject of your contract dated 19th August, 1853, agreeing to deliver to them certain Bengal Chassum during the months of January and February, 1854, also to give them the names of the ships in which it was to arrive, on receipt of the next mail, or the next but one after date of the contract. I am sorry to say that the only reply I can obtain from them is, that it is their intention to claim of you compensation for the loss they have sustained by your not performing the latter condition of this contract I will of course do all in my power to induce them to change their determination. "For H. W. EATON, HENRY RODWELL."

"H. W. Eaton Esq., Old Broad Street. "London, 10th January, 1854.

"Dear Sir,—We beg to hand you on the other side our claim for damage sustained for the non fulfilment of your contract of the 19th August, 1853, for 20,000 lbs. of Chassum. Damage, 3d. per lb., making 250l., for which please send me a cheque, or to name your principal in order that we may claim from him the amount.

"LEONINO BROTHERS."

"Mr. Gilbert Gilkes. "13th January 1854.

"Sir. -I beg to inclose you a copy of the contents of a note just received from Messrs. Leonino Brothers, to which I beg your immediate attention.

"HENRY W. EATON."

The above letter of the 10th of January is the letter of which copy was then inclosed.

"Henry W. Eaton. "1 mo., 14, 1854.

"I am duly in receipt of thy note accompanying a copy of one from Leonino Brothers relative to the contract for 20,000 lbs. Chassum at 9d. per lb., to be delivered in this and the following month. I am very much surprised at the manner in which they write, as the time for delivery is not yet arrived ; and more **[493]** especially so when I take into account the proposal made to me to allow them to cancel the contract. Under the circumstances, I can do no other than deliver the Chassum to contract, which I intend to do in the course of this and the following month. I shall feel obliged by thy informing them of this. "GILBERT GILKES."

"Messrs. Leonino Brothers. "17th January, 1854.

"I beg to hand you a copy of a letter just received from my principal, Mr. Gilbert Gilkes, in reply to your letter of the 10th instant, a copy of which was forwarded to him. "H. W. EATON."

The above letter of 14th of January is the letter of which a copy was then inclosed.

"Mr. Gilbert Gilkes. "London, 18th January, 1854.

"Sir,—Mr. H. W. Eaton having sent us copy of your letter to him 14th instant, in reply we beg to state that we give you one week from this day's date to give to us the name of the ship on which the 20,000 lbs. of Chassum is on board ; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last on your part, and shall then take such measures as we may deem necessary for the protection of our interests.

"LEONINO BROTHERS."

On the same 18th of January, 1854, and immediately after the receipt by him of the letter from the defendant last set forth, the plaintiff applied to Mr. Spensley, a silk-broker then carrying on business in London, to procure for him 20,000 lbs. of Chassum waste-silk equal to the above-mentioned sample; and, in order to enable him to do so, the plaintiff produced and gave to Mr. Spensley a sample of the said silk.

[494] On the same day, the said Mr. Spensley secured for the plaintiff the refusal of 41 bales of Chassum waste-silk which had been brought from Calcutta to London in the ship "Chalmers"; and Mr. Spensley informed the plaintiff thereof, and at the same time informed him that he expected to secure for him the refusal of another parcel of Chassum waste-silk sufficient to make up the 20,000 lbs., which last-mentioned parcel of silk had been brought from Calcutta to London in the ship "Benares." The plaintiff's object in thus applying to Mr. Spensley was, to obtain the means of delivering 20,000 lbs. of Chassum waste-silk to the defendant at the contract price, if the defendant would receive the same as for and in fulfilment of such contract.

On receiving this information, the plaintiff, on the same day, wrote and sent to the defendant the following letter:—

"Leonino Brothers. "18, 1 mo., 1854.

"Gentlemen,—Your favour of this date is duly received, and I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19, 8, 53, by informing you that it is already arrived, and that you will receive invoice in due course. "G. GILKES."

On the 18th of January, 1854, Mr. Spensley secured for the plaintiff the refusal of 55 bales of Chassum waste-silk, being the aforesaid parcel of silk which had been brought to London in the "Benares": and, on the following morning early, he informed the plaintiff thereof.

Except as above may appear, no notice or intimation was given to the defendant of what occurred between the plaintiff and Mr. Spensley, or of any steps taken by Mr. Spensley in consequence.

After this, the following correspondence passed rela-**[495]**-tive to the said silk, and the aforesaid contract for the same, between the plaintiff and the defendant.

The letters were respectively written and received by the persons by and to whom they respectively purport to be written and addressed, and were so written and received on the days on which they respectively bear date, and in the order in which they are set out. Mr. Cotterill, the writer of one of the letters, was the attorney of the defendant, and Mr. Beavan, the writer of another of them, was the plaintiff's attorney.

"Mr. Gilbert Gilkes. "London, 19th January, 1854.

"Sir, -Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for in the course of to-morrow; in default of which, we shall act as indicated in our letter of yesterday. "LEONINO BROTHERS."

"Leonino Brothers. "1 mo., 23, 1854.

"Gentlemen,—Referring to my note to you of the 18th instant, I beg to inquire when it will be convenient for you or your broker to compare the 20,000 lbs. Chassum to contract with the sample. "GILBERT GILKES."

"Mr. Gilbert Gilkes. "London, 23rd January, 1854.

"Dear Sir,—We have your letter of this date, and beg, as a preliminary to answering it, to know by what ship the Chassum you offer us has arrived.

"LEONINA BROTHERS."

"Leonino Brothers. "1 mo., 24, 1854.

"Gentlemen,—In compliance with yours of yester-**[496]**-day, received this morning, I now forward you samples of 41 bales of Chassum ex 'Chalmers' Nos. 1 41, to your

contract. The remaining quantity I purpose sending to morrow, with all particulars. You will find them generally better than sample contracted for.

"GILBERT GILKES."

"Mr. Gilbert Gilkes. "January 24th, 1854.

"Sir,—Messrs. Leonino Brothers have shewn me their contract and correspondence with you. They consider you were bound to give them the name of the ship soon after she sailed, that is, as soon as information of her sailing had been received here: and they cannot accept in satisfaction of your contract a cargo which has been here for two or three months, and has been repeatedly offered for sale to them and others. Therefore, as you have not properly met their applications, they desire me, on their behalf, to give you notice that they consider the contract violated by you, and at an end; and that they will not take the silk per 'Chalmers,' or any other from you. "W. H. COTTERILL."

"Messrs. Leonino Brothers. "1 mo., 25, 1854.

"Gentlemen,—In accordance with my letter of yesterday, I beg to inform you that the name of the vessel by which the rest of the Chassum deliverable to your contract has arrived, is the 'Benares.' In consequence of your solicitor's letter, to hand this morning, I do not send the samples, as he therein informs me you decline to receive any silk whatever from me, or to this effect. "GILBERT GILKES."

"Messrs. Leonino Brothers. "London, 26 January 1854.

"Gentlemen,—Mr. Gilkes has consulted me on the subject of your refusal to accept 20,000 lbs. of Chassum silk pursuant to contract. I have, therefore, to request **[497]** the name of your solicitor, to whom I may send process, instead of troubling you personally. "WILLIAM BEVAN."

The "Chalmers" sailed from Calcutta, on the 27th of April, 1853, with the said 41 bales of silk on board, and arrived in London on the 7th of October, 1853: and the "Benares," with the said 55 bales of silk on board, sailed from Calcutta on the 21st of August, 1853, and arrived in London on the 6th of December, in the same year. The said 41 bales and 55 bales together made up 20,000 lbs. of Chassum waste-silk; and such silk was equal to the sample mentioned in the bought and sold notes. The plaintiff would have delivered the said silk to the defendant within a reasonable time after the 25th of January, 1854: but the defendant refused to receive the same, contending that he was not liable so to do under the above-mentioned circumstances.

The defendant is to be at liberty to contend that the statements in the case as to Mr. Spensley, and what was done by him, are irrelevant, and would have been inadmissible in evidence for the plaintiff: and, if the court shall be of that opinion, such statements are to be treated as struck out of the case.

The court are to draw any inferences of fact from the premises, which the jury ought reasonably to have drawn.

The question for the opinion of the court is, whether the plaintiff is entitled, under the above-stated circumstances, to recover in this action; and the verdict is to be entered on the several issues as the court shall direct.

Montague Smith, Q. C. (with whom was Unthank), for the plaintiff (*a*). The facts stated in the special **[498]** case clearly sustain the declaration. Assuming that the naming of the ship or ships was a condition precedent as the contract originally stood (*b*), the plaintiff performed his contract as amended by the new term introduced by the subsequent correspondence. The mail by which the name of the ship should have been communicated arrived in London on the 19th of September, 1853. The plaintiff being unable to comply strictly with the terms of the contract in that respect, a correspondence ensued between him and the defendant; and, on the 18th of January,

(*a*) The points marked for argument on the part of the plaintiff, were,—"That the naming of the ship was not a condition precedent, or, if it was, that it was waived; and that such waiver could not be retracted by the defendant after it had been acted on by the plaintiff by his procuring the necessary silk through M. Spensley, as mentioned in the special case."

(*b*) See *Greaves* v. *Legg*, 9 Exch. 709, 11 Exch. 642.

1854, the latter wrote,—"We give you one week from this day's date to give us the name of the ship on which the 20,000 lbs. of Chassum is on board; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last." Upon the receipt of this letter, the plaintiff procured the necessary quantity of silk of the quality and description contracted for, and on the same day gave the defendant notice of its arrival, by a letter in which he said,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19, 8, 53, by informing you that it is already arrived, and that you will receive invoice in due course." That was a clear acceptance of the terms of the waiver. [Crowder, J. The plaintiff does not even then communicate the name of the ship.] By the terms of the defendant's letter, he had a week to do so. [Cockburn, C. J. You say, that, provided the silk was of the description and quality contracted for, it need not have been afloat at the time of the contract?] It is not necessary to go so far: the vessels in **[499]** which the silk tendered was brought were afloat at the time the contract was made. On the 19th, the defendant wrote,—"Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information,—which we now ask for in the course of to-morrow; in default of which, we shall act as indicated in our letter of yesterday." That was no retractation of the offer of the preceding day. [Cockburn, C. J. The letters of the 23rd seem rather to intimate that both parties considered the matter still open. On the 18th, there is an offer to waive a breach already incurred: on the same day, there is a sort of qualified acceptance of the waiver; and, on the 24th and 25th, the defendant is informed of something which if he had known it before would have induced him to withhold his waiver. The question is, whether the defendant could retract his waiver after it had been accepted by the plaintiff.] And acted upon by his procuring the requisite quantity of silk. This is, in truth, not so much a waiver, as a new contract upon the terms of the old one other than the time for giving the name of the ship. If the defendant could retract his offer of the 18th of January, the facts hardly amount to a retractation. He had given seven days for communicating the ships' names; and the name of the one was given on the 24th, and the other on the 25th, and the stipulated quantity of silk out of those ships (which was equal to the sample) was offered within the seven days. [Williams, J. When do you say there was a contract to give the names within seven days?] When the plaintiff assented to the proposal, by his letter of the same date. [Cockburn, C. J. **[500]** That letter does not adopt the new contract in the terms of the defendant's offer. The plaintiff's letter in substance says, "You do not want the name of the ship: you shall have the goods."] The invoice would necessarily mention the ships' names. Besides, it was enough if the plaintiff assented to give the names of the ships within the seven days.

Atherton, Q. C. (with whom was Cohen), contrà. By the terms of the contract, the plaintiff undertakes not later than the arrival of the second mail from the date (which proved to be the 19th of September, 1853), to notify the names of the ship or ships by which the silk was to arrive. The contract is dated the 19th of August, 1853. It contemplated not only that the silk which was its subject was afloat at the time, but that it was on board a ship or ships the sailing of which had not yet been ascertained in this country; two mails being allowed for that purpose. [Cockburn, C. J. Would not silk by the "Chalmers" and the "Benares" have satisfied the contract, if the names of those vessels had been communicated to the defendant on the 14th of January?] Those ships were not in the contemplation of the parties at the time of the contract. "The Chalmers" had sailed from Calcutta nearly four months before. On the 19th of September, 1853, therefore, there was a clear breach of the contract: and there is no pretence for saying that there was any waiver of that breach, or any new contract, down to the 18th of January, 1854. Now, what was the state of things on that day? The "Chalmers" sailed from Calcutta on the 27th of April, and arrived in London on the 7th of October, 1853: and the "Benares" sailed from Calcutta on the 21st of August, and arrived here on the 6th of December, 1853. The fact of those vessels having sailed would be known in this country in June and **[501]** October respectively. What does the defendant offer by his letter of the 18th of January, 1854? He says,—"We give you one week from this day's date to give us the name

of the ship on which the 20,000 lbs. of Chassum is on board." Whatever be the construction of that offer, it was not accepted so as to make it obligatory as a new contract on the part of the plaintiff. No ship is named; but the defendant is told that the silk contracted for has already arrived, and that he will receive the invoice in due course. There is no evidence of the plaintiff's having accepted the defendant's offer in the sense in which he must have accepted it to entitle him to succeed upon these pleadings, viz. as having taken upon himself a binding obligation, so as to give the defendant a cause of action for a breach of that new contract. The defendant, therefore, had a perfect right to retract his offer.

M. Smith, in reply. The defendant's letter of the 18th of January gave the plaintiff seven days to name the ships. [Cockburn, C. J. Yes, provided there was an adoption of the terms of the offer, so as to give a cause of action for the breach of it.] The plaintiff's answer amounts to an assent,—"The silk has arrived, and you will receive invoice in due course." The defendant might reasonably infer from that that the plaintiff meant to comply with the offer which had been made to him. There is no evidence of any retractation of the offer before the name of one ship was given; and it was not necessary that the names of both should be given: it was enough if that came before the expiration of the seven days. By his letter of the 23rd, the defendant treats the offer as still open.

COCKBURN, C. J. I am of opinion that the defendant is entitled to the judgment of the court. The facts lie **[502]** in a narrow compass. The action is brought for the breach of a contract for the purchase of a large quantity of silk upon a condition which is admitted to be a condition precedent, viz. that the name or names of the ship or ships by which the silk was to come should be furnished by the next mail or on receipt of the next after that. The second mail after the date of the contract arrived in this country on the 19th of September, 1853; but no ship's name was communicated. On that day, therefore, the plaintiff broke his contract, and the defendant was entitled to consider it at an end. Instead, however, of availing himself of the breach, the defendant, on the 18th of January, 1854, writes to the plaintiff offering him a week's further time. Upon the letter conveying that offer, and the plaintiff's answer, the question mainly turns. The defendant writes,—"We give you one week from this day's date to give us the name of the ship on which the 20,000 lbs. of Chassum is on board; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last on your part, and shall then take such measures as we may deem necessary for the protection of our interests." The plaintiff's answer to that is,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19, 8, 53, by informing you that it is already arrived, and that you will receive invoice in due course." The declaration sets out the contract, and avers that the defendant waived the same as far as it related to the particulars respecting the name of the ship or ships being furnished by the arrival of the second mail, and that the defendant gave the plaintiff a week's further time from the 18th of January, 1854, for the particulars being furnished to him respecting the name of the ship or ships, that within the week next ensuing the said 18th **[503]** of January, 1854, the plaintiff furnished to the defendant the names of the said ships, and tendered the silk, but that the defendant refused to accept the same. The fourth plea, which is the material one, states, that after the alleged waiver and giving of time, and before the plaintiff had accepted, assented to, or acted upon the same, and before the plaintiff had agreed to furnish the alleged particulars within the said period of one week, the defendant retracted his alleged waiver and promise, and gave notice thereof to the plaintiff. The question is, whether the plaintiff accepted the defendant's offer in the terms in which it was made, before the defendant retracted it. The defendant's offer is couched in plain terms,—"I give you one week to name the ship." The plaintiff's answer amounts in effect to this,—"You are now proposing that I should within a week furnish you with the name of the ship in which the silk is: but that is altogether unnecessary; the silk is arrived, and you shall receive the invoice in due course." He does not even say, "You shall have the name within the time you mention." It appears to me that Mr. Atherton's argument is well founded. The fair way to judge of the matter is, to consider what would be the situation of the parties if the defendant had sued the plaintiff for not furnishing the name of the ship or ships within the week. The answer of the plaintiff would have been,—"I did not promise to furnish the name

within that time." It may very fairly be said that this was a captious proceeding on the part of the defendant: but, the plaintiff being altogether at his mercy, he had an undoubted right to prescribe the terms upon which alone he would renew the contract. He did prescribe certain terms; and, unless the plaintiff accepted his offer in the terms in which it was made, the defendant clearly had a right to revoke his offer. I think it is clear that **[504]** the plaintiff's letter was not an acceptance, so as to create a binding contract, and therefore that the defendant was entitled to revoke the offer.

WILLIAMS, J. I am of the same opinion. I entertain considerable doubt whether the plaintiff ever did name the ships within the meaning of the contract. But it is unnecessary to consider that: for, I think it clear that the plaintiff has failed to prove his right of action as developed in the declaration. The declaration does not rely on the waiver, except as raising a new contract: and the question is, whether that contract is made out. Assuming it to be a contract which would be binding on both sides, there is no proof of it. The plaintiff's letter of the 18th of January is no acceptance of the defendant's offer. He evidently shrinks from coming to any terms about naming the ship: he evades the question. If it could have been made out upon the facts that there was a contract that was binding between the parties notwithstanding the plaintiff had not accepted the offer in its terms, possibly the declaration might have been amended, to meet that view of the case. But it seems to me that that is impossible. The defendant says,—"If you will furnish me with the name of the ship within a week, I will consent to consider the contract as a still existing contract." The plaintiff might have fixed that proposal by naming the vessel at once. But it seems to me that a one-sided contract like that may be retracted before acceptance. And this offer was retracted.

CROWDER, J. I am of the same opinion. I also must say that I entertain considerable doubt whether the names of the ships were given in accordance with the intention of the parties. But it is unnecessary to decide that, because the plaintiff's letter of the 18th **[505]** of January, 1854, clearly was no acceptance of the proposal contained in the defendant's letter of the same date. I think the fourth plea was made out. Looking at the two letters, it seems to me to be clear that the defendant's letter was a conditional offer to renew the contract, provided the name of the ship was given within a week. The language of that letter evidently refers to a ship which had not yet arrived, and must have been so understood by the plaintiff. That is clear, from the expression used, "on which the 20,000 lbs. of Chassum is on board." The plaintiff in answer writes,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19, 8, 53, by informing you that it has already arrived, and that you will receive invoice in due course." Can that be said to be an acceptance of the defendant's offer? The plaintiff's letter shews that he understands the defendant's proposal as having reference to goods "expected to arrive." It is giving the go-by to the defendant's offer. The defendant had a right to prescribe terms, arbitrary though they seem to have been. There was nothing like an acceptance on the 18th: and, on the following day, there comes that which appears to me to be a clear retractation of the defendant's previous offer,—changing the offer of a week to a day. For these reasons, it seems to me that the fourth plea is proved, and that it affords a sufficient answer to the declaration.

Judgment for the defendant.

[506] ROBERTS *v.* THE GREAT WESTERN RAILWAY COMPANY. 1858.

[S. C. 27 L. J. C. P. 266; 4 Jur. N. S. 1240. Explained, *Booth* v. *North Eastern Railway*, 1867, L. R. 2 Ex. 180.]

The first count of the declaration stated that the defendants were the owners and occupiers of a railway, and of a station thereon for the loading, unloading, &c., of cattle carried thereby, and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed and were obliged to pass in going from the station to a certain common highway near thereto; and that the defendants, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into and upon the railway; but that they omitted to make and maintain such fences,

whereby a bull of the plaintiff, lawfully being in the yard, on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train:—Held, that there was no liability upon the company, either by the common law or by the statute 8 & 9 Vict. c. 20, s. 68, to fence their yard from the railway, and consequently that the count disclosed no cause of action.—The second count alleged that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that, whilst the bull was lawfully in the close, the defendants and their servants negligently and wrongfully, chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial, it appeared that the bull, with other cattle which had been brought by the railway being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern such as were ordinarily used by porters in his hand, and that the light startled some of the beasts, and caused the plaintiff's bull to run upon the line, where it was knocked down and killed by a passing train:—Held, no evidence for the jury that the company's servants had been guilty of negligence.

This was an action against the Great Western Railway Company, for negligence.

The first count of the declaration stated, that the defendants were the owners and occupiers of a certain railway, and of a station thereon for the landing, unloading, and delivery of cattle carried on and by the said railway, and of a certain yard adjoining the said station and the said railway, into and through which yard cattle carried and brought on and by the said railway to the said station were used and accustomed, and were of necessity obliged, to pass in going from the said station to a certain common highway near thereto; and that the defendants, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the said railway, so as to prevent cattle lawfully being in the said yard from straying thereout into and upon the said railway: yet that the defendants did not make or maintain good, sufficient, or any fences between the said yard and the said railway; whereby a bull [507] of the plaintiff, lawfully being in the said yard on his way from the said station to the said common highway, without any default or negligence on the part of the plaintiff, strayed from the said yard into and upon the said railway, and was upon the said railway by a locomotive engine and train of carriages of the defendants, and driven by their servants, run down, killed, and lost to the plaintiff.

The second count stated that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made or maintained any fences for preventing cattle being in the said close from straying thereout into or upon the said railway; and while the said bull of the plaintiff was lawfully in the said close, the defendants and their servants carelessly, negligently, wrongfully, and improperly chased, startled, and frightened, the said bull, so that he, being so chased, startled, and frightened, ran, rushed, and strayed out of the said close into and upon the said railway, and upon the same was by a locomotive engine and train of carriages of the defendants, and driven by their servants, run down, killed, and lost to the plaintiff.

The third count stated, that, the defendants being carriers of cattle for hire, the plaintiff delivered to them as such carriers, and they as such carriers received from him, certain cattle of the plaintiff, to wit, a bull, to be carried by them for the plaintiff from Oswestry to Wolverhampton, and there, to be delivered by them to the plaintiff, for reward to them in that behalf; yet that the defendants, whilst they so had the said bull for the purpose aforesaid, did not take due and proper care of the same, but wholly neglected to do so, and so carelessly, negligently, and improperly carried the same, and took such bad care thereof, that, [508] by their negligence, carelessness, and improper conduct in that behalf, the said bull became and was lost to the plaintiff. Claim, 100l.

The defendants pleaded, —first, not guilty, —secondly, to the last count, that the plaintiff did not deliver to the defendants, as such carriers as therein mentioned, the said cattle, on the terms therein alleged, —thirdly, to the last count, that the said cattle therein mentioned were delivered to and received by the defendants to be

carried and delivered as in that count mentioned, under and subject to certain just and reasonable conditions made by the defendants, and known and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said cattle that is to say, that the said company was to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, from being trampled on or bruised or otherwise injured in transit, from fire, or from any other cause whatsoever; and that the said loss in the said last count mentioned arose in and during the delivery of the said cattle by the defendants to the plaintiff at Wolverhampton aforesaid under the terms of the said conditions, and not otherwise.

The plaintiff joined issue on all the pleas

The defendants also demurred to the first count, the ground of demurrer stated in the margin being, "that it does not appear that there was any obligation on the defendants to make or maintain any fence between the said yard and the railway." Joinder.

The cause was tried before Watson, B., at the last Spring Assizes at Oxford. The facts which appeared in evidence were as follows:—The plaintiff, in March, 1857, sent the bull in question with other beasts by the defendants' railway from Oswestry for Wolverhampton, in the care of a drover. When the train arrived [509] at Wolverhampton, the drover and his assistants let the beasts out of the trucks on to the platform, and thence into a yard belonging to the company adjoining the railway, but not fenced therefrom. They received no assistance from the company's servants. Whilst the beasts were in the yard, a porter belonging to the railway came out of the office into the yard with a lantern in his hand, it being dark. The light or "bull's eye" of the lantern startled the beasts, when three of them went on to the line, and were killed by a passing train. One of the animals so killed belonged to the plaintiff.

On the part of the plaintiff it was submitted, that the evidence shewed that the accident to the bull was the result of negligence on the part of the company's servant in going incautiously into the yard with a light of a description which would naturally alarm cattle; and that the company were guilty of negligence in omitting properly to fence the yard from the railway.

For the defendants it was contended, that there was no obligation on the company to fence between the yard and the railway, that "not guilty" merely put in issue the fact whether the fence was made or not, and not the duty alleged in the first count, and that there was no evidence to go to the jury in support of the second count.

The learned judge directed a verdict to be entered for the plaintiff, for 34l., the value of the bull, upon the first count, because there was no traverse of the alleged obligation to fence,—reserving leave to the defendants to move. As to the second count, he ruled that there was no evidence to go to the jury, and he directed a verdict to be entered for the defendants, inasmuch as the servant of the company in going into the yard with a light on a dark night was doing no more than was necessary and within the ordinary scope [510] of his duty. And, as to the third count, he held that the defendants were entitled to the verdict, the cattle at the time of the accident being out of the custody and care of the company, and, if still in the company's care, the company were protected by the notice stated in the third plea, which was put in. And he reserved a general leave to the defendants to move to enter the verdict on these facts, if the court should think fit, upon either count.

Pigott, Serjt., in Easter term last, accordingly moved to enter a verdict for the defendants on the first count, or to arrest the judgment. The learned judge directed the verdict to be entered for the plaintiff on the first count, because there was no traverse of the duty therein alleged. But all the authorities are clear that you cannot take a traverse of a duty which is alleged to flow from certain premises. Now, all that is alleged by way of foundation for the duty to fence is, that the defendants were the owners and occupiers of the railway and of the close or yard adjoining. [Willes, J. The declaration should have gone on to allege that the locus in quo, by reason of the want of fence, was more than ordinarily dangerous,—like a trap-door in a shop. Unless that is the meaning of the declaration, it is bad: but that question will arise when the demurrer comes on to be argued. Since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 143-145, a motion in arrest of judgment is not your proper course. This is an action for an omission to perform a duty. The

16th of the Pleading Rules of Hilary, 1853, provides, that, "in actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." Byles, J. Is not the obligation to fence [511] admitted?] The allegation of the duty to fence is mere surplusage, and could not be traversed. Thus, in *Brown* v. *Mallett*, 5 C. B. 599, it was held, that, where a declaration, after stating certain facts, alleges that it thereupon became the duty of the defendant to do a certain act, such allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously stated facts, as an assertion that the defendant became thereby bound by law to do the act,—and not as a distinct substantive allegation. So in *Cane* v. *Chapman*, 5 Ad. & E. 647, 1 N. & P. 104, a traverse of an inference of law was held bad on demurrer. In *Seymour* v. *Maddox*, 16 Q. B. 326, the declaration stated that the defendant was possessed of a theatre, and of a stage therein on which dramatic entertainments were given, and of a dressing-room for chorus-singers, and of a floor underneath the stage, in which floor was a cut or hole, and along which floor the performers at the theatre were accustomed to pass from the said dressing-room to the back of the stage; that the plaintiff was hired by the defendant to sing on the stage as a chorus-singer; that it then became the defendant's duty to cause the floor to be so sufficiently lighted, and the hole so fenced, as to prevent accident to persons passing from the dressing-room to the stage; and that the defendant, well knowing the premises, suffered the floor to be insufficiently lighted, and the hole to be open without any sufficient fence, so that the plaintiff was injured by falling into the hole: and it was held, on motion in arrest of judgment, that the declaration was bad, because the facts stated did not raise the duty a breach of which was complained of, and that the express allegation of duty would not aid. Lord Campbell there says: "I confess that I at first thought, that, where a relation, from which a particular duty may arise, is alleged, and the particular [512] duty is also alleged, it might be shewn in evidence that in fact such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions shew that the allegation of duty is in all cases immaterial, and ought never to be introduced; for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing." The 68th section of the 8 & 9 Vict. c. 20, imposes no duty upon the company to fence between the station and the railway (*a*). The allegation of duty, therefore, is superfluous, and could not be traversed; and we have taken issue on the allegation that the accident occurred by reason of the defect of fences. The point reserved for the court is, whether the duty as alleged is put in issue.

Huddleston, Q. C. (with whom was M'Mahon), also moved for a new trial on the second and third counts, in the event of the plaintiff succeeding on the demurrer; or to enter the verdict for the defendants on the second count; or for a new trial, on the ground of misdirection, there being evidence for the jury, and the learned judge having refused to leave it to them; and also for judgment non obstante veredicto on the third plea. The second count stated that a certain bull of the plaintiff was lawfully in a close adjoining the defendants' railway, and along which railway there were no fences for preventing cattle being in the close from straying thereout upon the railway, and that the defendants, by their servants, negligently frightened and chased the plaintiff's bull, and caused it to go upon the line, where it was killed. Now, the evidence was, that, on the arrival of the bull at the Wolverhampton station, it was put with other cattle in a yard adjoin-[513]-ing the railway, where cattle were ordinarily left until taken away; that there was no fence between the yard and the railway; that the cattle arrived after the proper time; and that it was the practice of the company to leave the owners to take their own cattle from the trucks to the yard; and that a servant or porter of the company by incautiously holding a lantern before the beasts caused three of them to run upon the line. On the part of the plaintiff it was submitted that this was cogent evidence of negligence, for which the company were liable. There was no evidence on the other side; and yet the learned judge held that there was nothing to leave to the jury. The third count charges the defendants with negligence as common carriers. The plea to that count is, that the bull was delivered to the defendants to be carried subject to certain conditions, amongst others, that the

(*a*) See *The Manchester, Sheffield, and Lincolnshire Railway Company, Apps., Wallis, Resp.*, 14 C. B. 213.

defendants were to be free from responsibility in respect of any loss arising in the loading or unloading, from suffocation, from being trampled or bruised or otherwise injured in transit, from fire, or from any other cause whatsoever; and that the loss in the third count mentioned arose in and during the delivery of the bull by the defendants to the plaintiff under the terms of the said conditions. Assuming that the defendants might protect themselves by a reasonable condition, they must be held strictly within the conditions they make. The plea alleges that the loss in question arose "in and during the delivery," but not that it occurred during the transit or the unloading. Suppose the transit commences with the loading and terminates with the unloading,—the company are not protected by the condition after the unloading. [Willes, J. The servants of the owner had the bull under their own charge after the unloading and delivery. This point can only help you, provided you are entitled to a verdict on the third count.] **[514]** The defendants are responsible for the cattle until they are delivered off their premises.

Willes, J. With reference to the motion of my Brother Pigott, I am of opinion that there ought to be no rule. As to the arrest of judgment, that course can only be necessary where the defendant stands in peril of the plaintiff's succeeding against him unless the judgment is arrested. But the defendants are in no such peril as this record now stands, because they have been allowed to demur to the first count of the declaration. The validity of the first count will be considered upon the argument of that demurrer. A judgment for the defendants upon the demurrer will be more advantageous for them than any judgment which could be pronounced upon this motion; because, in that case, the costs will follow the legal event; whereas, if we were to arrest the judgment, the defendants would get no costs, but would have to pay the plaintiff his costs of the issues upon which he succeeds. The rule to arrest the judgment, therefore, would be worse than useless. As to the other branch of my Brother Pigott's motion, viz. to enter the verdict for the defendants upon the first count,—that turns upon the effect of the plea. The count alleges that the defendants were possessed of a yard adjoining their railway, into and through which yard cattle brought by the railway to the station were accustomed and were of necessity obliged to pass in going from the station to the highway; and that, by reason of that juxtaposition, the defendants were bound to make and maintain good and sufficient fences between the said yard and the railway: it then goes on to say that the defendants did not fence in pursuance of that duty, and that, in consequence of that neglect of duty, and without any default on the part of the plaintiff, a bull belonging to the plaintiff, being lawfully in the yard on his way from **[515]** the station to the highway, strayed into and upon the railway, and was killed. To this the defendants plead not guilty. My Brother Pigott now contends that the plea of not guilty puts in issue, not merely whether the company made the fence or not, but also whether it was their duty to fence. It is plain that that cannot be so, if the count is sufficient in point of law. Not guilty merely puts in issue the fact of the performance of the duty as alleged. But my Brother Pigott says that there is no sufficient allegation of duty, and that not guilty puts everything in issue. I do not think it necessary to enter into the question whether or not the duty is sufficiently alleged. The inclination of my opinion is that it is not: but I shall reserve the consideration of that until the demurrer comes on to be argued. But, assuming that the count is an improperly constructed one, and that the duty is insufficiently alleged, the question is whether the rule of pleading which prevents the putting in issue matter of inducement, is inapplicable to a declaration in which the duty the breach of which is charged is insufficiently alleged. I apprehend the rules of pleading are to be construed and applied without reference to the question whether the declaration is proper or not. If a declaration alleged that the plaintiff was possessed of a messuage, and of a right of way appurtenant thereto, and that the defendant obstructed the way, and the defendant pleaded not guilty,—that would put in issue only the alleged obstruction. I am quite satisfied that the meaning of the rule is as I have stated; and, from such experience as I have had, I cannot entertain a doubt that that is what is acted upon by pleaders. If any serious doubt upon the subject could be entertained, we should be disposed to grant a rule; but, as we cannot entertain any, there will be no rule.

[516] As to Mr. Huddleston's motion, that raises some other questions for consideration. The second count is founded upon this, that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners, which

railway was without fences, and that, whilst the bull was so in the close, a servant of the company alarmed the bull, and caused him to stray upon the railway, where he was killed. The facts seem to have sustained the count, if there was any evidence upon which the jury might find that the act of the servant was negligent. We think that is a point which is worthy of discussion. But, with regard to the third count, we think there should be no rule. The third count states that, the defendants being carriers of cattle for hire, the plaintiff delivered to them as such carriers, and they as such carriers received from him, a certain bull, to be carried by them for him from Oswestry to Wolverhampton, and there delivered to him, and that, by reason of their negligence, the bull was lost. The third plea states that the bull was delivered to the defendants to be carried subject to certain conditions whereby the defendants were absolved from all responsibility in respect of loss or damage arising from injury in the transit, from fire, or from any other cause whatsoever. We need not enter into any question as to the validity of the plea; for, on not guilty, the plaintiff fails. It appears that the cattle were driven into the yard by the plaintiff's own servants; and that the company did nothing more than accommodate the plaintiff with the use of the yard for the purpose of placing the cattle therein. The count therefore charging the defendants as carriers wholly fails. The result will be, that my Brother Pigott's rule is altogether refused, and that Mr. Huddleston's rule is refused as to the third count, but granted as to the second.

[517] Scotland (with whom was Pigott, Serjt.), in support of the demurrer (*a*). The count alleges the obligation to fence between the railway and the yard as a positive duty on the part of the company. No such duty, however, is imposed upon them by the common law; and the duty imposed upon them by the 68th section of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20 (*b*), is not more extensive than the common law **[518]** duty, to fence against the lands of adjoining owners and occupiers: *Ricketts* v. *The East and West India Docks and Birmingham Junction Railway Company*, 12 C. B. 160; *The Manchester, Sheffield, and Lincolnshire Railway Company, App., Wallis, Resp.*, 14 C. B. 213. There is no allegation that the plaintiff's beast was in the station yard under any contract with the company; and therefore

(*a*) The points marked for argument on the part of the defendants, were,—

"That the facts stated in the declaration do not raise any such duty or obligation on the part of the defendants as that which is alleged:

"That there was no absolute obligation on the defendants to make and maintain a fence between the railway and the adjoining yard and station, of which the defendants were the owners and occupiers:

"And that, at most, the duty of the defendants was to provide a place reasonably safe and fitted for the unloading and delivery of cattle with proper care and management; and that the declaration did not shew that the said station and yard were otherwise than reasonably safe and fitted for such purpose."

(*b*) That section enacts that "the company shall make and at all times hereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof; also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary styles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:" and the section concludes with a proviso "that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid, compensation instead of the making of them."

the case falls within the principle laid down in *Blackmore* v. *The Bristol and Exeter Railway Company*, 27 Law J., Q. B. 167. That was an action by the administratrix of a man who was accidentally killed by the breaking of the chain of a crane of which the company allowed the gratuitous use to the owners of heavy goods carried at mileage rates: and Coleridge, J., in delivering judgment, said: "As regards mileage goods, the crane was placed there in virtue of no contract with consignor or consignee, but just as any other convenience erected and allowed to be used by the public, in order to induce people to send their goods by the railway. A covered and convenient station is erected for passengers, but the purchase of a railway ticket would not entitle the passenger to an action if the station was uncovered or inconvenient (*a*)[1]. He may be considered as licensed to use it, so as to excuse a trespass, but he has no greater right." It is consistent with this declaration, that the company were guilty of **[519]** no negligence whatever: there is nothing on the face of the declaration to shew that the place was more than ordinarily dangerous: *Toomey* v. *The London, Brighton, and South Coast Railway Company*, ante, vol. iii., p. 146.

Huddleston, Q. C. (with whom was M'Mahon), contrà (*a*)[2]. It seems from the case of *Ricketts* v. *The East and West India Docks and Birmingham Junction Railway Company*, 12 C. B. 160, that no statutable duty is cast upon the company by the 8 & 9 Vict. c. 20, s. 68, to fence against their own premises: but the common law imposes upon every person possessed of a place to which the public have a right of access the duty of making it reasonably safe. It is like the case of a trap-door in a shop. [Willes, J. There the public come by invitation.] So, here, the company are the owners of the yard, the place to which cattle are brought by the railway and left until they can be taken away. The company are bound to keep it in a safe and proper state. [Crowder, J. Whence arises the legal obligation on the company to fence between the yard and the railway?] They are bound to fence by reason of its being a dangerous place. [Crowder, J. The declaration does not allege it to be a dangerous place; nor does it shew anything like a **[520]** cause of action. Willes, J. You do not even shew that the bull was under the defendants' charge.]

Scotland was not called upon to reply.

CROWDER, J. I am of opinion that this declaration is insufficient. It alleges that the defendants were the owners and occupiers of a certain railway, and of a certain station thereon for the landing, unloading, and delivery of cattle carried on and by the said railway, and of a certain yard adjoining the said station and railway, into and through which yard cattle carried and brought on and by the railway to the station were used and accustomed, and were of necessity obliged, to pass in going from the station to the highway; and that the defendants, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the said yard from straying thereout into and upon the railway; and assigned for breach that the defendants did not make or maintain good, sufficient, or any fences between the said yard and the railway, whereby a bull of the plaintiff, lawfully being in the yard on the way from the station to the highway, without default or negligence on the plaintiff's part, strayed from the yard upon the railway, and was killed. I am of opinion that no legal liability is cast upon the company to make or maintain any fence between their station yard and the railway. If it could be shewn that the defendants had been guilty of any negligence in the performance of any duty cast upon them by law, no doubt an action would lie against them. But nothing of the kind is alleged. All that is stated is, that the accident arose from the want of a sufficient fence between the yard and the railway: and, as no such duty is by law cast upon the **[521]** defendants, no ground of action is disclosed. There must, therefore, be judgment for the defendants upon this demurrer.

(*a*)[1] See *In re the Caterham Railway Company*, ante, vol. i., p. 410.

(*a*)[2] The points marked for argument on the part of the plaintiff, were,—

"1. That the count is good in substance, inasmuch as it shews by necessary and reasonable intendment that it was the duty of the defendants to make and maintain fences between the yard and the railway, in order to prevent cattle, in passing from the station to the highway, from straying out of the yard on to the railway:

"2. That the allegation of such duty is an allegation of fact, and not simply an inference of law from the other facts previously stated in the count, and on these pleadings is admitted."

WILLES, J. I am of the same opinion. It is quite consistent with this declaration that the bull was allowed to remain in the yard until it suited the convenience of the owner to take it away, and that it never was in the company's custody at all. It may be that there is some nicety in the question, arising from the circumstance of the defendants carrying on a dangerous trade: but it is unnecessary to go into that. This declaration, being quite consistent with a state of facts which would give rise to no liability at all, is clearly bad.

Judgment for the defendants.

Huddleston, Q. C., and M'Mahon, were now called upon to support the rule to enter a verdict for the plaintiff upon the second issue. The question here turns upon the second count, which states that the plaintiff's bull was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made or maintained any fences for preventing cattle being in the said close from straying thereout into or upon the railway, and that, whilst the bull was lawfully in the said close, the defendants and their servants negligently and wrongfully chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. To this there is a plea of not guilty only. The evidence was, that the bull, with other cattle which had been brought by the railway, being in the station yard, a place unlighted and unfenced from the railway, a porter came out of the office with a lantern in his hand, the light from which star-**[522]**-tled some of the beasts, and caused three of them (the plaintiff's bull being one of them) to run upon the line, where they were killed by a passing train. Surely that was evidence from which the jury would have been warranted in holding that the company's servant had been guilty of negligence. The judge, however, thought there was no evidence, and nonsuited the plaintiff. [Cockburn, C. J. There was no evidence to shew that the porter knew that there were cattle in the yard. And, if he had known it, would it have been prudent to go amongst them in a dark night without a light?] It was for the jury to say whether there was negligence or not. [Cockburn, C. J. There must be evidence of it.] It was evidence of negligence, that the cattle were left in an unfenced place. There would have been no necessity for the porter's lantern if the place had been properly lighted. The place being dangerous, there was the greater need of care and caution on the part of the servants of the company. It was upon the whole a question for the jury whether under the circumstances a reasonable degree of care had been used by the company's servants.

COCKBURN, C. J. I am of opinion that this rule must be discharged. I think the learned judge was quite right in ruling that there was no evidence to go to the jury in support of the charge of negligence against the company. It appears that the cattle were placed in the station yard in their transit from the railway to the highway, and that, whilst they were there, a porter came from the office into the yard, in the ordinary course of the performance of his duty, carrying an ordinary porter's lantern in his hand, and that some of the beasts, the plaintiff's bull among others, frightened at the light, ran upon the railway, and got run over and killed. If it could have been shewn that the ser-**[523]** vant of the company had used the lantern in a negligent manner so as to alarm the cattle, there would have been a case to go to the jury. But it is not because cattle happen to be in the yard, that the porter is not to use the light which he is in the habit of using in the ordinary course of the performance of his duty. If, indeed, the man had come out into the yard without a light, and had in consequence run against and startled the bull, and so caused it to run upon the line, it might fairly have been said that he was guilty of negligence. I see nothing in the evidence that could fairly lead to the conclusion that the porter made any other than a proper use of the lantern, or that there was any negligence on his part.

WILLIAMS, J. I am entirely of the same opinion. If there was any ground at all for imputing negligence to the company, it was that they did not provide a reasonably safe and sufficient landing place for cattle brought by the railway to the Wolverhampton station. If that had been made out against them, and it had been shewn that the bull had been frightened and killed by reason of the insufficiency of the landing place, the plaintiff might have established a well founded complaint. That, however, is not the charge here: it is that the porter was guilty of negligence in coming into the yard with a lantern whilst the cattle were there: and the plaintiff failed to substantiate that.

WILLES, J. I am of the same opinion. The cattle had been delivered to, and were at the time of the accident in the custody of the plaintiff himself, and he ought to have taken care to prevent injury accruing to them from the lawful and ordinary acts of the company's servants, especially as he knew the yard was **[524]** unfenced, and had before intimated his opinion that it was a dangerous place. There was no evidence to shew that the porter was acting otherwise than in the lawful and ordinary manner. The lantern he carried was the usual porter's lantern, and the place and the occasion justified its use.

BYLES, J. I cannot think that my Brother Watson was wrong in saying that there was no evidence of negligence here; and, that being so, it clearly was his duty to withdraw the case from the jury.

Rule discharged.

THE LONDON AND CONTINENTAL ASSURANCE SOCIETY *v.* REDGRAVE.
June 4th, 1858.

[S. C. 4 Jur. N. S. 616.]

It is not competent to a shareholder in a completely registered joint-stock company, who has executed the deed of settlement, with a recital therein that the whole number of shares have not been subscribed for, to defend himself against a claim for calls, on the ground that the directors have proceeded to carry on business with less than the stipulated amount of capital subscribed.

This was an action for calls. The declaration was as follows:—

"The London and Continental Assurance Society, the plaintiffs, being a joint-stock company, and having obtained a certificate of complete registration, and duly incorporated and entitled to sue according to the statute 8 & 9 Vict. c. 20, intituled an 'Act for the registration, incorporation, and regulation of joint-stock companies,' by, &c., sue, &c., for that the defendant, before and at the time of the commencement of this suit, as and being the holder of 125 shares in the said London and Continental Assurance Society, was and is indebted to the said society in the sum of 115l. for and in respect of certain instalments of capital then due and payable in respect of the said shares; and the defendant hath not paid the same; whereby an action **[525]** hath accrued to the said society to demand and have the same of and from the defendant: And the plaintiffs also sue the defendant for money payable by the defendant to the plaintiffs for the forbearance of moneys due and owing from the defendant to the plaintiffs and by them forborne to the defendant at his request for long spaces of time elapsed.

Third plea, that the defendant, before the complete registration of the said company under the said act of parliament, subscribed for certain shares in a company to be called "The London and Continental Assurance Society," and which said company had been and then was provisionally registered under the said statute, and was a company the capital whereof was to be 100,000l. sterling in 10,000 shares of 10l. each; that the defendant never at any time subscribed for or consented or agreed to be the holder of any shares or share in any other company than a company whose capital and shares were to be of the amount and number thereinbefore mentioned; that he never was, and is not, a holder of any shares or share in the company in the declaration mentioned, except under and by virtue of the said subscription thereinbefore mentioned: That the said company so to be called the London and Continental Assurance Society, having complied with the requisites of the said act of parliament with respect to complete registration, afterwards became and was completely registered under the said act, and the same thereupon became and was and is the company in the declaration mentioned: That the said intended capital never was or could be raised, and that the said number of shares was never subscribed for or taken, but only a small part thereof, not amounting to two-thirds of the said number of 10,000 shares, and that the said company could not and did not at any time procure subscribers to or holders of any greater number of the said pro-**[526]**-posed and intended shares than was thereinbefore mentioned, and that the company to which the defendant so subscribed as aforesaid never was formed: That the defendant never at any time after his said subscription for the said shares in the said intended company as aforesaid

agreed or consented that the said company should commence or carry on business with the said number of shares which had been so subscribed for as aforesaid, or with any less number of shares than the said proposed and intended number of 10,000 shares; and that he had never at any time derived or received any profit, emolument, benefit, or advantage whatsoever from the said company, or in respect of his having so subscribed for and agreed to hold such shares as aforesaid: And that the said interest in the declaration mentioned was claimed in respect of the said instalment of capital in the first count mentioned, and not otherwise.

Second replication to the third plea,—that this action was brought against the defendant as a shareholder of the said company, and for that the defendant, according to the provisions of the said act, executed the deed of settlement of the aforesaid company in respect of and as the holder of the said 125 shares in the said first count mentioned, which said number of 125 shares was and is expressed opposite to the defendant's signature and seal thereto; by which said deed, being an indenture made between the several persons (except the persons parties thereto of the second and third parts) whose names and seals were thereunto respectively subscribed and affixed, and who were thereinafter called "the subscribers," of the first part, Sir Charles Douglas of the second part, and Hew Dalrymple of the third part,—after reciting, amongst other things, that the subscribers had agreed to form a society or joint-stock company for the purposes there-[527] inafter expressed, and to raise a capital of such amount and in such shares as thereinafter specified: and that each subscriber had taken one or more shares in the said capital, and the number or numbers of his share or shares was or were expressed opposite to his respective signature and seal thereto; and that, on the 8th of August, 1854, the society was provisionally registered, and it was intended to obtain the complete registration thereof under the acts of parliament for that purpose passed in the seventh and eighth years and in the tenth and eleventh years of the reign of her present Majesty,—in consideration of the premises, every subscriber (except the said Hew Dalrymple), but as concerning only the acts and defaults of himself, his heirs, executors, administrators, and not otherwise, did thereby covenant with the said Sir Charles Douglas (as a trustee on behalf of the said society), and with his executors and administrators, in manner following, that is to say,—that the subscribers, and such other persons as should thereafter become entitled to shares in the capital of the society (thereafter called "the shareholders"), and each of them, would, when thereunto in accordance with these presents required, pay the amount of deposit and calls due upon his respective share or shares, and would perform, fulfil, and keep all the several engagements, obligations, and conditions therein contained, and in all other respects observe, conform to, and abide by the rules and regulations of the society, and that the qualification of a director should be the ownership of not less than 100 shares in the capital of the said society, and that the defendant and divers, to wit, five others should be and were thereby appointed the first and the then directors of the said society, with power to add to their number as therein prescribed, until the first ordinary general meeting, and that the directors should have full [528] powers to allot and appropriate, upon such terms and conditions as they should think fit to prescribe as to recalling or cancelling any such allotments or appropriations of the shares of the capital of the society so far as the same had not been then taken or subscribed for, and having regard to the rights of all persons desirous of becoming shareholders, as the board of directors should approve, and to reserve for investment during a period of twelve months from the date of these presents such portion of the said capital, not exceeding 5000 shares, as the board of directors should think fit, and to re-allot and re-appropriate any share or shares the allotment whereof should be recalled or cancelled, as occasion might require, and from time to time to declare and make calls in respect of such shares, for such sums of money, to be paid at such times and in such manner as the board of directors should think fit, and that no call should exceed the sum of 1l. per share, and that a period of at least three months should intervene between the payment of any call and the payment of the next or the subsequent call,—and that, if any shareholder should fail to pay any call upon or in respect of his share or shares at the time appointed for the payment of such call, the board of directors should have power to sue such shareholder for the amount of such call in any court of law or equity, or other court having competent jurisdiction, and might recover the same, with interest after the rate of 5l. per cent per annum, calculated from the day on which such call ought to have been paid: And that such deed of

settlement, which was so executed by the defendant as aforesaid, contained no provision or condition that the said intended capital should be raised, or that the said number of shares should be subscribed for or taken, or a part thereof amounting to two thirds of the said number of 10,000 shares, or prohibiting the said com- [529] pany from commencing or carrying on business, as in the said third plea in that behalf alleged.

To this replication, the defendant rejoined that the said company was completely registered under the said act of parliament in the declaration mentioned on the 13th of December, 1854; and that, on the 9th of January, 1855, the defendant resigned his office of director of the said company, and that such resignation was duly accepted, to wit, by the board of directors thereof, at a meeting of such board on the 22nd of January, 1855; and that, from the time of his said resignation, he had not in any manner interfered in the concerns of the said company.

To this rejoinder the plaintiffs demurred, the grounds of demurrer stated in the margin being, that the "defendant's having ceased to be a director affords no answer to this action, which is against him as a shareholder; and, if it could be an answer, the defendant should have stated that he ceased to be a director before the calls were made or became due." Joinder.

Bovill, Q. C. (with whom was Baylis), in support of the demurrer (*a*). The real question is, whether, having signed the deed of settlement, the defendant can [530] defend himself against a claim for calls, on the ground that the company has proceeded to carry on business with less than the stipulated amount of capital subscribed for. It is submitted that he cannot. Before a joint-stock company can be completely registered there must be a deed of settlement: but the moment that is executed, the parties are incorporated and the company is formed. By the interpretation clause of the 7 & 8 Vict. c. 110, s. 3, par. 5, the word "subscriber" is declared to mean "any person who shall have agreed in writing to take or have taken any shares in a proposed company or a company formed, and who shall not have executed the deed of settlement or a deed referring thereto;" and par. 6 defines "shareholder" to mean "any person entitled to a share in a company, and who has executed the deed of settlement or a deed referring to it, or, in the case of mutual assurance societies, any person who shall be an assured member thereof." The defendant, therefore, clearly is a shareholder in this company. The 7th section enacts that "it shall not be lawful for any joint-stock company hereafter to be formed for any purpose within the meaning of this act, &c., to act otherwise than provisionally in accordance with this act [s. 4], until such company shall have obtained a certificate of complete registration as hereinafter provided: and no joint-stock company shall be entitled to receive a certificate of complete registration unless it be formed by some deed or writing under the hands and seals of the shareholders therein," &c. Then the 25th section enacts, "that, on the complete registration of any company being certified by the registrar of joint-stock companies, such company and the [531] then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company," &c. And then s. 55 enacts, "that, if any shareholder fail to pay any instalment of capital due upon or in respect of any share held by him, when the same shall become due, it shall be lawful for any

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That the declaration and replication are good, and the plea and rejoinder bad, and that, inasmuch as it is admitted that the defendant executed the deed of settlement in respect of the shares for calls on which he is sued, he is properly sued in the statutable form of declaration by the plaintiffs, a completely registered company; but neither the act of parliament nor the deed prohibit the plaintiffs from suing the defendant for calls in consequence of all the capital not being raised or shares subscribed for, as alleged in the plea; and that the defendant's having ceased to be a director does not discharge him from his liability for calls as a shareholder, as pretended in his rejoinder; and that, even if it could, the rejoinder should have stated that he ceased to be a director before the calls became due."

such company, and they are hereby authorized, to sue such shareholder for the amount in an action of debt in any court having competent jurisdiction in respect of the same; and that, in the declaration in any such action, it shall be sufficient to state only that at the time of the commencement of the suit the defendant, as the holder of certain shares (stating how many) in a certain company or undertaking, as the case may be (naming it), was indebted to the company in a certain sum (stating the amount of the instalments, or so much thereof as is sought to be recovered), for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same," &c. The defendant here is sued in the statutory form as a shareholder in an incorporated company. The answer the defendant attempts to set up is, that, before the complete registration of the company, he subscribed for shares in a company the capital whereof was to be 100,000*l.*, in 10,000 shares of 10*l.* each; that two thirds only of that number of shares were subscribed for; and that he never agreed or consented that the company should commence or carry on business with less than the **[532]** number originally specified. The replication states that the action is brought against the defendant as a shareholder, that he executed the deed of settlement, and that the deed did not contain any provision or condition that the company should not commence or carry on business with any less number of shares subscribed than 10,000. [Cockburn, C. J. You contend, that, by executing the deed of settlement, the defendant shews his assent to the directors proceeding with less than the prescribed amount of capital?] The deed constitutes a new agreement. [Cockburn, C. J. Is there anything in the deed affirmatively giving the directors power to carry on the business of the company?] That does not appear upon this record. The original contract is superseded by the execution of the subscribers' agreement. This was decided in *Watts* v. *Salter*, 10 C. B. 477, where Parke, B., in delivering the judgment of the Exchequer Chamber says: "The plaintiff having executed the deed, has agreed under his hand and seal that the provisional directors shall do all that is therein contained; and by that deed he is bound, unless he was induced by fraud or misrepresentation to execute it. It has been contended that the directors had no power under the deed to deal with any part of the money until the whole amount had been subscribed. I do not, however, agree in that construction. If such had been the plaintiff's intention, he should have taken care not to execute a deed which did not express it. No such express stipulation is to be found on the face of the deed: and none can be implied." The distinction between "subscriber" and "shareholder" is pointedly taken in the case of *The Galvanized Iron Company* v. *Westoby*, 8 Exch. 17. The party exercises his option when he executes the deed. The 7th section of the 7 & 8 Vict. c. 110 contemplates that all the subscribers will not execute the deed.

[533] Field, contrà (*a*). It is submitted, first, that the defendant is not liable at all, - secondly, that he is at all events not liable to be sued in the statutory form. The plea alleges, and the replication admits, that the capital of the company was to consist of 100,000*l.*, in 10,000 shares of 10*l.* each; and then it goes on to allege that the defendant never agreed or consented that the company should commence or carry on business with any less than the proposed number of 10,000 shares. The defendant has a right to say that the company to which he proposed to become a subscriber never was formed at all. [Cockburn, C. J. It appears by the declaration that the defendant executed the deed, and that the deed contained a recital that the whole capital had not been subscribed, and it also contains an unqualified covenant to pay calls. Is there anything in the subsequent provisions to control that?] There is nothing in the deed, as set out in the replication, in terms controlling that covenant: but, on the other hand, there is nothing to shew that the company was formed. [Cockburn, C. J. The deed starts with a statement that the whole number of shares had not been allotted; and in the mean time the parties agree that the concern shall

(*a*) The points marked for argument on the part of the defendant, were, -

"That the plea is good and the replication bad; that it appears that the company to which the defendant subscribed was never formed, and that the defendant never consented to its concerns being carried on with a smaller capital than the one originally agreed on, and, under these circumstances, it will be contended that the defendant never became a shareholder, and is not liable for calls; and that, whatever might have been the case, had the action been upon the deed mentioned in the declaration, the plaintiffs cannot recover upon the present pleadings."

go on. Suppose there had been no preliminary agreement, but that there had been nothing but this deed,—could it be said **[534]** that a party executing the deed did not thereby become liable to pay calls? The covenant is positive and not conditional on all the shares being subscribed for.] It is submitted that the deed here is as much conditional as were the agreements in *Pitchford* v. *Davis*, 5 M. & W. 2, and *Fox* v. *Clifton*, 4 M. & P. 676, 6 Bingh. 776, 2 M. & Scott, 146, 9 Bingh. 115. [Cockburn, C. J. There, the parties agreed to become members of an association upon a condition which was not performed. But here, the defendant waives his right to insist upon the entire number of shares being subscribed as originally proposed, and testifies that by executing the deed. Does it lie in his mouth afterwards to insist upon the condition? He knew when he signed the deed (for, the deed recites the fact) that the entire sum had not been subscribed.] At all events, the defendant is not liable in the statutory form. The proper remedy for non-payment of calls is, by action upon the covenant which is referred to in the replication. [Byles, J. That covenant does not supersede the right of action for calls expressly given by the statute.]

COCKBURN, C. J. I am of opinion that our judgment must be for the plaintiffs. There is no doubt that this association was originally formed under an arrangement that its capital should consist of 100,000l., in 10,000 shares of 10l. each, and that that number of shares was not subscribed for. But the defendant has thought proper to execute the deed of settlement of the company; and in that deed it is recited that "the subscribers had agreed to form a society or joint-stock company for the purposes thereinafter expressed, and to raise a capital of such amount and in such shares as thereinafter specified," &c.; and then the deed contains provisions which clearly shew, that, at the time of the execution of the deed, all the parties thereto were **[535]** aware that the shares had not been subscribed for to the full extent originally proposed, but that, nevertheless, it was intended that the company should go on with such number of subscribers and such amount of capital as had already been obtained. That being so, and there being nothing in the deed to shew either expressly or by implication that the directors were not to go on until all the shares had been taken up, but, on the contrary, it being manifestly contemplated that they should proceed at once, and as by the terms of the covenant the engagement on the part of the shareholders to pay calls is not made conditional upon all the shares being subscribed for, but it is absolute and unconditional, there is nothing upon this record to negative the defendant's liability. Without, therefore, in any respect interfering with the decisions,—to which I entirely assent,—which have established the non-liability of a party subscribing to an undertaking of this sort upon conditions which are not complied with, it seems to me that the defendant is liable to be sued for calls, and that in the form pointed out by the 55th section of the statute.

WILLIAMS, J. I am of the same opinion. The company has obtained a certificate of complete registration, to obtain which the provisions of the 7 & 8 Vict. c. 110, s. 7, must have been complied with. That section requires, as a preliminary to complete registration, that the company shall be formed "by some deed or writing under the hands and seals of the shareholders therein." The defendant has executed that deed. He is therefore a "shareholder" within s. 3, and consequently a person liable to be sued for calls under s. 55.

WILLES, J. Assuming that Mr. Bovill has failed to shew that there are any provisions in the deed autho-**[536]**-rizing the directors to proceed to carry on business without having the whole of the contemplated capital subscribed for, I think Mr. Field has also failed to relieve himself from the pressure of that part of the replication which alleges that the deed does not contain any provision or condition that the company should not commence or carry on business with less than 10,000 shares subscribed. *Dickenson* v. *Valpy*, 10 B. & C. 128, 5 M. & R. 126, and that class of cases, are altogether inapplicable here, because in all of them there was an implied condition that the directors should not proceed without having obtained subscriptions for the stipulated amount of capital. Here, the replication shews that the defendant, when he executed the deed, knew that the whole number of 10,000 shares had not been subscribed for, without shewing that there was any stipulation that the concern should not be commenced without the full capital. If it should turn out at the trial that the deed in extenso is inconsistent with what is stated in the replication, the defendant may succeed upon never indebted. But, upon the pleadings as they appear before us on this demurrer, there must be judgment for the plaintiffs.

BYLES, J. I am of the same opinion. It appears from the replication that the defendant has executed a deed which contains an express and unqualified covenant to pay calls. My Lord asked Mr. Field in the course of the argument, if there was any provision in the deed to restrain that covenant: but the learned counsel could not point out any part of the deed as set out on the record which restrains the generality of the covenant to pay. And, as to any part of the deed not set out, the replication alleges that there is no provision which expressly or impliedly prevents the directors from proceeding with the business of the society **[537]** with fewer subscribers than were originally contemplated. Upon these grounds, I am of opinion that the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

BAYLIS *v.* LE GROS AND OTHERS. May 28th, 1858.

[S. C. 4 Jur. N. S. 513.]

A general covenant to repair, and further to repair, within three months after notice from the lessor, are separate and independent covenants; and a right of re-entry attaches for a breach of the former, though no notice be given under the latter.—A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an under-tenant whom he found there to let them to him as a yearly tenant, and subsequently received rent from him:—Held, a sufficient re-entry to avoid the lease.

This was an action of ejectment brought by the plaintiff by writ dated the 12th of February, 1855, to recover possession of a certain factory for the manufacturing, dyeing, and finishing of crapes, with the out-houses, buildings, yards, and other appurtenances to the same belonging, situate in the parish of Tottenham, in the county of Middlesex.

The defendants defended for the whole of the premises; and the cause came on for trial before Jervis, C. J., at the sittings at Westminster after Hilary Term, 1856, when a verdict was taken by consent for the defendants, subject to the opinion of the court upon the following case:

By a lease of the said premises made the 28th of September, 1850, between one Stephen Barnewell of the one part, and James Baylis (the late father of the plaintiff), of the other part, in consideration of the rents and covenants therein reserved and contained on the part of the said James Baylis, his executors, administrators, and assigns, to be paid and performed, he the said Stephen Barnewell demised and leased unto the said James Baylis, his executors, administrators, and assigns, the said premises, To hold the same unto the said James Baylis, his executors, administrators, **[538]** and assigns, from the 29th of September, 1850, for and during and unto the full end and term of twenty one years from thence next ensuing, and fully to be complete and ended, determinable nevertheless as thereinafter mentioned, at the yearly rent or sum of 165*l.* 15*s.*, payable quarterly, on the four usual quarterly days of payment.

The lease contained, on the part of the lessee, his executors, administrators, and assigns, the usual covenant to pay the said rent, and also a covenant to pay, or cause to be paid, during the continuance of the said term, the sewers-rate and all other taxes, rates, charges, and assessments whatsoever, parliamentary, parochial, or otherwise, which then were or thereafter should be imposed, charged, or assessed upon or in respect of the said premises, or any part thereof, or the rent thereof (the property-tax only excepted); and also a covenant during the said term at his or their own costs and charges well and sufficiently to repair, uphold, support, amend, and keep the said premises, with the appurtenances, and every part thereof, in, by, and with all manner of necessary reparations and amendments when, where, and as often as the same should be requisite, and also to paint or cause to be painted in a good and workmanlike manner with two coats of good oil colour at the least twice during the first seven years, and afterwards once in every three years of the remainder of the said term, all the outside wood and iron work of the said premises, and such other parts thereof as should have been usually painted, and also to paint or cause to be painted in the manner aforesaid once in every seven years of the said term all the

inside wood and iron work of the said premises, and such other parts thereof as should have been usually painted: And further that it should be lawful for the said Stephen Barnewell, his executors, administrators, [539] or assigns, with workmen or others, twice or oftener in every year during the said term, at reasonable and convenient times in the day time, to enter into and upon the said premises, or any part thereof (except any rooms where any secret process may be carried on by the said James Baylis, his executors, administrators, or assigns, in the way of his business), to view and examine the state and condition thereof, and, if found necessary upon such view and examination, to give to the said James Baylis, his executors, administrators, or assigns, or leave at or upon the said premises for him or them, notice in writing to repair and amend the same within three calendar months then next following, within which period of three calendar months the said James Baylis, his executors, administrators, and assigns, would repair, amend, and make good all such repairs and amendments as should be mentioned in such notice, according to the true intent and meaning of those presents.

The lease also contained a proviso as follows:—"Provided always, that, if the said rents hereinbefore reserved, or any part thereof, shall be unpaid by the space of twenty-one days next after the same shall have become payable, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded, or if the said James Baylis, his executors or administrators, shall assign, let, or underlet, or in any manner part with the possession of the said premises, or any part thereof, to any person or persons whomsoever, for the whole or any part of the term for which they are intended to be demised, without the licence or consent of the said Stephen Barnewell, his executors, administrators, or assigns, in writing under his or their hand or hands, first obtained for so doing, or if the said James Baylis, his executors or administrators, or any of them, [540] shall become bankrupt or bankrupts, or shall assign his or their estate or effects, or any part thereof, in trust for his or their creditors, or shall take the benefit of any act or acts of parliament passed or to be passed for the relief of insolvent debtors, or shall compound for the payment of his or their debts, or if any execution shall be levied upon his or their goods or chattels, or if this indenture shall be sold by the sheriff under any execution to be levied as aforesaid, or if he or they shall not perform the covenants herein contained which by him or them ought to be performed,—then and in any of the said cases it shall be lawful for the said Stephen Barnewell, his executors, administrators, or assigns, into the said premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, retain, re-possess, and enjoy as in his and their first or former estate."

The said James Baylis, the lessee in the said lease mentioned, carried on the business of a crape finisher at the said premises until his death, and had thereon machinery and plant. He died on the 23rd of October, 1850, having previously made a will, dated the 12th of October, 1850, whereby he gave and bequeathed the said premises, together with the said lease, unto his said wife, one Joseph Fletcher, and the plaintiff (on his attaining twenty-one years), his executors.

On the 14th of November, 1850, the widow, Rebecca, alone proved the will: the plaintiff being at the time of his father's death a minor.

The said widow, after the death of her husband, carried on at the same premises the business of a crape-finisher until her death in February, 1853.

On the 1st of June, 1851, and during the minority of the plaintiff, the said widow, Rebecca, having become indebted to the said Joseph Fletcher in the sum of 2500*l.*, by a deed of mortgage and assignment, bear-[541]-ing date that day, assigned to the said Joseph Fletcher all the machinery, plant, steam-engine, implements of trade, and tenant's fixtures, stock-in-trade, household furniture, plate, linen, and other chattels (leases or terms for years excepted), with a proviso for redemption by and re-assignment to her on re-payment of the said sum of 2500*l.* and interest on the 4th of January then next, together with future advances not exceeding in the whole 3000*l.*

The machinery and other chattels assigned by the above-mentioned deed comprised the machinery and plant which belonged to the said James Baylis, deceased.

On the same day as the above assignment was executed, the said widow, Rebecca, by a separate memorandum deposited with the said Joseph Fletcher the said lease of the said factory, dated the 28th of September, 1850, as a further security for the re-payment of the 2500*l.* and interest, and such further advances as aforesaid. The

said memorandum was by an error dated the 1st of June, 1850, instead of the 1st of June, 1851.

On the 22nd of June, 1852, the plaintiff came of age; but he did not come in to prove (according to leave reserved) his father's will until February, 1855, as hereinafter mentioned.

On the 1st of November, 1852, the said Joseph Fletcher died, having previously made a will, whereby he appointed certain persons executors (hereinafter called Fletcher's executors), to whom he bequeathed all his property. Fletcher's executors duly proved his will immediately after his death.

The widow, Rebecca, died intestate, in February, 1853. Letters of administration to her estate were taken out by the plaintiff on the 21st of December, 1854, as hereinafter mentioned.

Shortly before and on the 24th of October, 1853, the **[542]** premises were dilapidated and out of repair, so as to be a breach of the following covenant, that is to say, —"And also will during the term hereby granted, at his and their own costs and charges, well and sufficiently repair, uphold, support, amend, and keep the said premises, with the appurtenances, and every part thereof, in, by, and with all manner of necessary reparations and amendments, when, where, and as often as the same shall be requisite, during the said term, and also will paint or cause to be painted in a good and workmanlike manner with two coats of good oil colour at the least twice during the first seven years of the said term, and afterwards once in every three years of the remainder of the said term, all the outside wood and iron work of the said premises, and such other parts thereof as shall have been usually painted; and also will paint, or cause to be painted, in the manner aforesaid, once in every seven years of the said term, all the inside wood and iron work of the said premises, and such other parts thereof as shall have been usually painted."

The sum of 7l. 18s. for poor-rates in respect of the premises, upon a rate made on the 17th of June, 1853, was unpaid on the 24th of October, 1853.

The sum of 3l. 18s. 4d. for rates in respect of the premises made by the local board of health for the parish of Tottenham on the 10th of September, 1852, viz. the highway-rate and the general district rate, and the sum of 8l. 4s. 9d. for similar rates made on the 23rd of September, 1853, were unpaid on the 24th of October, 1853.

The sum of 1l. 19s. 6d. for church rates made in respect of the premises, upon a rate made the 26th of August, 1853, was also unpaid on the 24th of October, 1853.

The said Stephen Barnewell was called at the trial, **[543]** and stated, that, on the 24th of October, 1853, he,—having first inspected the said premises with his attorney, and after consulting him, and knowing that the premises were then out of repair, and that the rates were unpaid,—made a verbal agreement with the defendants, whereby it was agreed that the defendants should occupy the said premises as tenants to him, Barnewell, until Lady-Day, 1854, conditionally, that is, provided that the defendants should complete a contemplated purchase from Fletcher's executors of the plant, machinery, &c., then in and upon the said factory and premises, the defendants paying to the said Barnewell rent at the rate of 150l. per annum, and paying the premiums of insurance in respect of the said factory and premises, and agreeing to let the said S. Barnewell know on or before the 10th of January, 1854, whether the defendants were desirous of continuing the tenancy for another year after Lady-Day, 1854.

The said S. Barnewell, in reply to the question "How came you to let the premises to the defendants?" said, "I let them with the intention of decidedly putting an end to the lease, and taking possession." This question was objected to on the part of the plaintiff; but the learned judge decided to receive the evidence, subject to the objection. The witness further stated that the defendants were in possession of and used the fixtures in and upon the premises before the said 24th of October, 1853, but not till that day with his licence; that the first rent the witness received from the defendants was on the 3rd of February, 1854; and that he had received it regularly from that time.

The defendants occupied the premises under such agreement until Lady Day, 1854; and the following **[544]** correspondence took place between the said S. Barnewell and the defendants:

"Messrs. Le Gros & Co. "Coventry, October 29th, 1853.

"Gentlemen,—In your letter you do not say whether you arranged about the

balance of insurance against the old tenants. I cannot afford to lose it, having paid the amount. Upon receiving a letter from you stating you will pay it, -say 12l.,—I will consent for you to be tenant from Michaelmas last to Lady-Day next, upon the terms stated, to inform me January 10th whether you should wish to continue tenant. Upon receipt of your letter, I will write Mr. Jury to walk over and see that the condition of the lease has been complied with, and then release Fletcher's representatives, and hold you as tenant for the term stated. Your paying me, as agreed, insurance from August to Lady-Day, and rent also, will bring matters near the same thing: still, I prefer matters to go on as talked over with you when in London.

"STEPHEN BARNEWELL."

"Walton-under-Edge, 1 November, 1853.

"Dear Sir,—Your favour of the 29th ult. has been forwarded to me here. I did not forget what you had said to me as to the balance, between 11l. and 12l., against you in the matter of insurances, when we made our final agreement with Fletchers: but, being told by Mr. Pearce, that, if we did not buy the plant from them, they would remove it in time to avoid the payment of this current quarter's rent, and then he would consider it quite right to evade the payment of anything else he could legally in connection with the said plant, I saw it would be quite useless to make any allusion to your claim. We are willing to pay the rent and the insurance from Michaelmas last to Lady-Day next, at the rate Baylis paid you, and engage to state **[545]** before the 10th of January next whether we wish to continue your tenants. I would have been pleased in being of assistance to you in recovering what Fletcher or Baylis owe: but I could not be quite so pleased in having to pay it ourselves; nor do I think it would be just. Moreover, we are striving to bring down current expenses at Tottenham: and, if we are successful to a sufficient extent, we would find it very much more convenient to our trade to stay there than removing of the finishing to this place, which is about one hundred miles from the warehouse. You must not think of burthening us with Baylis's or Fletcher's arrears of debts.

"LE GROS, THOMPSON, & BIRD."

"Coventry, November 3rd, 1853.

"Dear Sirs,—I have no wish that you should pay me for other people's debts. At the same time, I think you will excuse me asking you to fulfil your promise at any rate, viz. to pay the 16l. insurance to Lady-Day and the rent for the half-year from Michaelmas to Lady-Day. It is all very well for Mr. Pearce to talk of evading rent or any other just payments: but I can only say, that, if you do not occupy it, I shall take such proceedings at law as I am advised to do. I have before told you that they cannot part with or give possession without my consent: and, as to his removing before quarter day to avoid rent, if I thought he would do so, I would put in Chancery and get an injunction against such proceedings. If, however, I understand your letter that you will pay the rent and insurance to Lady-Day next from Michaelmas, that is all I can ask you: but be pleased to observe the insurance must be the amount agreed, 16l. The insurance afterwards can be regulated according to agreement, that is, if you would like to continue as tenants, notice to that effect being given January 9th next ensuing.

"S. BARNEWELL."

[546] By an assignment dated the 5th of November, 1853, Fletcher's executors assigned to the defendants all the plant, machinery, &c., comprised in the before-mentioned assignment, dated the 1st of June, 1851, with the exception of the furniture and household linen.

On the 9th of January, 1854, the defendants gave Barnewell notice of their intention to quit the premises at Lady Day, 1854.

The following correspondence passed between Barnewell and the defendants:—

"Messrs. Le Gros & Co. "Coventry, January 10, 1854.

"Gentlemen,—I have received your notice: and, as you are not likely to want the premises, I should be glad if you would allow me a board 'To let' to be hung on the chimney-shaft. It may perhaps get me a tenant by Lady-Day: and I hope it will, as

I do not like empty houses. I shall be glad also to receive your cheque for the quarter's rent and insurance, as agreed,—

"Say, half-year's rent	£41	8	9
Half of insurance, as agreed to Lady-Day, 1854 . .	6	0	0
	£47	8	9

"S. BARNEWELL."

"Coventry, February 3rd, 1854.

"Gentlemen,—I inclose receipt for rent in part due St. Thomas last; and shall be obliged by your interest in letting the factory. "S. BARNEWELL."

"Coventry, March 2nd, 1854.

"Gentlemen,—As I have not taken any steps at present towards letting the premises you now hold, I shall be glad to hear from you as early as convenient whe-**[547]**-ther you accept the last terms offered you, or whether it is your intention to leave on the 25th instant. "S. BARNEWELL."

Barnewell also stated, that, between the 2nd and 21st of March, 1854, he verbally agreed to let to defendants the said premises for another year; and the defendants continued tenants to Barnewell for such year, and thence forward, and paid rent to Barnewell up to the time of the trial.

The following correspondence also took place between Barnewell and the defendants:—

"Coventry, March 21, 1854.

"Dear Sirs,—The amount due to me, according to agreement, this 25th of March, is, 57l. 8s. 9d., which includes the 16l. agreed to be paid for insurance to the above. From the 25th March, I will insure for 2000l. on the buildings, &c., instead of 3000l., as formerly, you paying the amount I pay to the office, above the 150l. for rent of factory: and, if you will insure your stock in the same office, the Imperial, I shall be glad. I am interested in its welfare; and I believe you cannot find one more highly respectable. "S. BARNEWELL."

"London, 22nd March, 1854.

"Dear Sir,—We have yours of yesterday's date. We are very willing to favour the Imperial, if there is any gain in it: but, as it is agreed we should effect the insurance for 2000l. (see your letter to us, 8th February last), we shall to-morrow ascertain what the Imperial will charge, and what the Lancashire (in which we have some interest) will charge; and, as they are both undeniably good and safe, the cheapest shall have it. "LE GROSS, THOMPSON, & BIRD."

"Coventry, March 31st, 1854.

"Gentlemen,—Your cheque 40l. 13s. 9d. is at hand, which will leave a balance on your agreement of **[548]** 8l. 17s. 6d. As follows is a copy of my memorandum taken in your own warehouse:—

"Half-year's rent to Lady Day, 1854				£75	0 0
Insurance to that time				16	0 0
				£91	0 0
Cash received	£80	13	9		
Income-tax	2	3	9		
				82	17 6
Balance . .				£8	2 6

"S. BARNEWELL."

"Coventry, July 28, 1854.

"Dear Sirs,—My rent-book is always at my residence at Counden; and I have written to you from my warehouse. This will account for the apparent discrepancies. The memorandum made in my books at your own warehouse was as follows:—'Messrs. Le Gros will pay the rent Baylis is paying, to Lady-Day, and 16l. insurance; and to inform me in January about its continuance.' A second memorandum,—'Messrs. Le Gros & Co. will continue on the premises till Lady-Day, 1857, at 150l., and insurance for 2000l.' Is the above right or not? If you imagine for one moment that I should allow you to occupy my premises without insuring, you are mistaken. No reasonable man could expect it. The premises are insured to Michaelmas at the rate of 15l. 15s. per annum, which sum must be paid by you. As to Baylis's correspondence, if you refer again, you will find the rent was to be 150l., the insurance 15l. 15s. for 3000l., as stated by Mr. Baylis, but which afterwards turned out 22l. 4s. 9d. This was explained to you before, and ought not to require it again. I shall be glad to receive a cheque for the amount of rent and insurance due Midsummer last.

"S. Barnewell."

[549] Mr. Pearce was also called on behalf of the defendants at the trial, who stated that he acted as solicitor for Fletcher and his executors, and in particular for the executors in negotiating for the before-mentioned assignment of the plant, &c., by Fletcher's executors to the defendants, dated the 5th of November, 1853: and he also stated that he held, as such solicitor, the original lease before mentioned, but that no act was ever done to take possession of the premises, but that it was purposely avoided, and that the defendants declined to take the lease, and that there was never any arrangement between the defendants and Fletcher's executors about the premises themselves.

On the 11th of December, 1854, the plaintiff became and was duly adjudged to be a bankrupt.

On the 21st of December, 1854, the plaintiff took out letters of administration to the estate of his mother; and, on the 24th of February, 1855, he obtained probate of his father's will.

The court were to draw inferences as a jury.

The question for the opinion of the court is, whether, under the circumstances of the case, the plaintiff is entitled to succeed in the said action of ejectment. If the court should be of opinion that the plaintiff is so entitled, then the verdict is to be entered for the plaintiff; otherwise, the verdict is to stand for the defendants.

C. Wood (with whom was Montague Smith, Q. C.), for the plaintiff (*a*). There has been no breach of cove-**[550]**-nant so as to work a forfeiture; and, if there has been, Barnewell never took advantage of the forfeiture, or did anything that was equivalent to a re-entry. In order to establish the alleged forfeiture, the defendant

(*a*) The points marked for argument on the part of the plaintiff, were,—

"1. That the facts stated in the case do not amount in law to any forfeiture of the lease of the 28th of September, 1850, either by reason of non-repair, the non-payment of rates, &c., or the bankruptcy of the plaintiff:

"2. That the mere fact of the premises being out of repair, without notice to repair and amend, as provided for in the lease, would not in law enure as a forfeiture:

"3. That it does not appear in the case that there were any arrears of rates due on the 24th of October, 1853, or that the rates so stated to be then unpaid, were unreasonably overdue; and that therefore in law there was no forfeiture by reason of the same being unpaid, as therein stated:

"4. That there could be no forfeiture in 1853, by reason of the plaintiff's bankruptcy, as it did not occur till December, 1854:

"5. That if, by reason of any of the above causes, a forfeiture accrued before the 24th of October, 1853, yet the facts do not shew that Barnewell did anything to take possession of the premises in consequence of the same, or anything which would in law put an end to the lease:

"6. That the facts shew, that, if even this was a forfeiture in October, 1853, yet that Barnewell waived such forfeiture, by subsequently receiving the rent reserved in the said lease from the defendants or others in possession of the premises:

"7. That the lease of the 28th of September, 1850, is still in full force."

must rely upon a breach of the covenant to repair or to pay rates, or on the bankruptcy of the plaintiff. As to the want of repair, —no forfeiture accrues by reason of the breach of a covenant for repairs framed like this. [Cockburn, C. J. If the lessee is bound to repair, independently of the inspection and notice, the forfeiture clearly attaches upon the premises being suffered to be out of repair.] The obligation to repair pre-supposes a want of repair. Does a forfeiture arise the first moment that the premises are out of repair? If not, it follows that the lessee must have a reasonable time for doing the repairs. [Cockburn, C. J. The lessee covenants to repair and keep in repair the premises demised, and there is a power to the lessor to **[551]** enter and view the state of the premises, and to give the lessee notice of any want of repair, and a further covenant by the lessee to do the repairs within three months after notice, —do you say that the first covenent is merely introductory of the second?] The whole constitutes one covenant. [Williams, J. It is settled law that these are separate covenants: *Doe d. Goatly* v. *Paine*, 2 Campb. 520; *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, 7 D. & R. 98.] Bayley, J., says, in *Doe d. Morecraft* v. *Meux*,— "The landlord in this case had an option to proceed on either covenant, and, after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant, for not keeping the premises in repair. But that is very different from insisting upon the forfeiture." [Cockburn, C. J. He treats the two as independent covenants.] The court was only considering whether or not the forfeiture was waived. In *Horsfall* v. *Testar*, 7 Taunt. 385, 1, J. B. Moore, 89, it was held that a covenant to repair at all times, when, where, and as often as occasion should require during the term, and at furthest within three months after notice of want of reparation, is one covenant; and it cannot be stated as an absolute covenant to repair at all times when, where, and as often as occasion shall require during the term. [Cockburn, C. J. There, the whole clearly formed one entire covenant.] *Wood* v. *Day*, 7 Taunt. 646, 1 J. B. Moore, 389, rather looks the other way: but the case is distinguishable from the present, inasmuch as there the term was ended; here, it is still subsisting. In *Sicklemore* v. *Thistleton*, 6 M. & Selw. 9, the plaintiff demised a messuage and farm to J. T. at a rent payable quarterly; and the defendant covenanted that J. T. should pay the rent and observe the covenants, and that, in case J. T. should neglect to pay the rent for forty days, the defendant would pay on **[552]** demand: and it was held that the defendant was not chargeable until after forty days, and demand made. Lord Ellenborough says: I cannot help thinking this is a qualified covenant, and that the stipulation, that, 'if the lessee shall neglect to pay for forty days, the surety shall pay on demand,' which must have been introduced in case and for the protection of the surety, does, in reasonable construction, pervade and restrain the former covenant." [Cockburn, C. J. None of us entertain a shade of doubt. *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, 7 D. & R. 98, and *Wood* v. *Day*, 7 Taunt. 646, 1 J. B. Moore, 389, are distinct authorities to shew that the covenant to repair, and the covenant to repair within three months, are separate and independent covenants. Independently of authority, we should have felt no doubt.] Assuming that to be so, still there is nothing in this case to shew any forfeiture has been incurred. To constitute a forfeiture for non repair, a reasonable time must be given for doing the repairs: *Doe d. Baker* v. *Jones*, 5 Exch. 498. There is no allegation here that a reasonable time had elapsed. [Cockburn, C. J. Is not that necessarily involved in the statement that "shortly before and on the 24th of October, 1853, the premises were dilapidated and out of repair, so as to be a breach of the covenant?"] There is nothing to shew how long the premises have been out of repair. [Cockburn, C. J. They are said to have been in a state of dilapidation: to be so, they must have been out of repair for a considerable time. That is the fair inference from the statement.] The law always leans against forfeitures. [Cockburn, C. J. I have yet to learn that the law altogether disregards the interest of the landlord. I must confess, I see no hardship in the forfeiture being insisted upon here.] Then, has the landlord taken advantage of the breach? Barnewell says, that, on the 24th of October, 1853, **[553]** knowing that the premises were out of repair, and that the rates were unpaid, he made a verbal agreement with the defendants that they should occupy the premises as tenants to him until Lady Day, 1854: and, in reply to the question, "How came you to let the premises to the defendants?" he said, "I let them with the intention of decidedly putting an end to the lease, and taking possession." The court cannot take notice of the intention with which an act is done. Besides, Barnewell's subse-

quent correspondence with the defendants shews that he did not on the 24th of October, 1853, intend to treat the lease as no longer subsisting. It is to be observed, too, that no notice of this dealing with the under-tenants was given to the lessee.

Bovill, Q. C. (with whom was C. Pollock), for the defendants (*a*)[1]. [Williams, J. How did the defendants originally come in? Wood. The fact does not appear in the case: but it must be assumed that they came in under the plaintiff. Crowder, J. The landlord, being entitled to re-enter upon a forfeiture, lets the premises to a tenant whom he finds there, and receives rent from him. Is not that a taking advantage of the forfeiture?] The case states, that, "between the 2nd and 21st of March, 1854, Barnewell verbally agreed to **[554]** let to the defendants the said premises for another year, and the defendants continued tenants to Barnewell for such year, and thenceforward, and paid rent to Barnewell up to the time of the trial." [Cockburn, C. J. That is conclusive.]

Cockburn, C. J. I am clearly of opinion that a forfeiture has been incurred here. The lease in question contains a general covenant by the lessee, his executors, &c., to repair and keep the premises in repair: and also a covenant that it should be lawful for the lessor, his executors, &c., to enter at all convenient times to view the condition of the premises, and to give the lessee notice of any want of repair, requiring him to do such repairs within three months, and that the lessee, his executors, &c., should within that period repair accordingly. These two covenants are quite separate and independent. The authorities are all clear to that effect: and they coincide with the common sense of the thing. It would indeed be monstrous, if, giving credit to his tenant that he will duly perform his engagement, the landlord abstains from harassing him with continual inspection, and then should find himself debarred of his remedy for a breach of a positive covenant. I cannot entertain the slightest doubt that there has been a forfeiture here. As to the entry also, my mind is equally free from doubt. Finding the premises in a dilapidated state, the landlord comes upon them and enters into an agreement with a man he finds in possession, to become his tenant,—intending thereby to act upon the forfeiture and to oust the lessee. I think that was quite sufficient to constitute an entry by the landlord so as to put an end to the lease.

Williams, J. I am quite of the same opinion. *Roe* **[555]** *d. Gouldy* v. *Paine*, 2 Campb. 520, is distinctly recognized in *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, 7 D. & R. 98; and the two cases together shew that the law is clearly settled, that the general covenant to repair, and also to repair within a certain time after notice, are separate and independent covenants. Such has undoubtedly been the understanding of the profession for several years (*a*)[2]. As to the other point, if Barnewell had entered and desired the person he found upon the premises to go out, and then desired him to resume possession as his tenant, the case would have been clear beyond all doubt (*b*). They did not go through that idle ceremony: but the facts set out in the special case shew a re-entry by the landlord, and something more

Crowder, J. I also am clearly of opinion that the general covenant to repair, and the covenant to repair after a three months' notice, are separate and independent covenants. I never heard it doubted before. If Mr. Wood is desirous of questioning the propriety of the decision in *Doe d. Morecraft* v. *Meux*, he must do so in a court of

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(*a*)[1] The points marked for argument on the part of the defendants were as follows:—

"1. That, at the commencement of this action, the plaintiff had no such title to the premises in question as would enable him to maintain it against the defendants:

"2. That the covenants of the lease from Barnewell to the plaintiff's father were broken; that a right of re-entry accrued to Barnewell; and that he duly exercised such right:

"3. That there was a forfeiture of such lease, and that the forfeiture has never been waived:

"4. That the acts of Barnewell and those claiming or acting under him amounted to a determination of the lease."

(*a*)[2] See Woodfall's Landlord and Tenant, 7th edit. by Horn, 93: Smith's Landlord and Tenant, by Maude, 201.

(*b*) See *Doe d. Baker* v. *Cowdell*, 9 C. B. 714.

error. Then it is said there has been no re-entry. The landlord, however, is in and occupying the premises by a tenant who is paying him rent. I think that is the strongest possible case of entry.

Judgment for the defendants.

[556] CORBY *v.* HILL. May 25th, 1858.

[S. C. 27 L. J. C. P. 318; 4 Jur. N. S. 512; 6 W. R. 575. Distinguished, *Hounsell* v. *Smyth*, 1860, 7 C. B. N. S. 744. Adopted, *Pickard* v. *Smith*, 1861, 10 C. B. N. S. 479. Distinguished, *Bolch* v. *Smith*, 1862, 7 H. & N. 744. Referred to, *Gautret* v. *Egerton*, 1867, L. R. 2 C. P. 375; *Smith* v. *London and St. Katharine Docks Company*, 1868, L. R. 3 C. P. 333. Distinguished, *Castle* v. *Parker*, 1868, 18 L. T. 367. Referred to, *Watkins* v. *Great Western Railway*, 1877, 46 L. J. C. P. 821. Followed, *White* v. *France*, 1877, 2 C. P. D. 308. Referred to, *Dublin, Wicklow and Wexford Railway* v. *Slattery*, 1878, 3 App Cas. 1206; *Burchell* v. *Hickisson*, 1880, 50 L. J. C. P. 102. Considered, *Heaven* v. *Pender*, 1883, 11 Q. B. D. 512. Referred to, *Tolhausen* v. *Davies*, 1888, 57 L. J. Q. B. 395; 58 L. J. Q. B. 98; *Harris* v. *Perry*, [1903] 2 K. B. 226; *Latham* v. *Johnson*, [1913] 1 K. B. 405]

The owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage:—Held, that A. was liable to an action.—Held also that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inasmuch as such an allegation, if traversed, would have presented an immaterial issue.

This was an action against the defendant for negligently leaving certain slates upon a certain road, whereby the plaintiff's horse was injured.

The declaration stated, that, before and at the time when, &c., the plaintiff was lawfully possessed of a certain carriage, and of a certain horse drawing the said carriage, which said horse and carriage were under the government and direction of a servant of the plaintiff, and which said horse and carriage were then, with the consent of the owners and occupiers of the land and road and carriage line thereinafter mentioned, during the night-time, under such care and government as aforesaid, lawfully in and lawfully being driven along certain land and a certain road or carriage line, part of and crossing the said land then belonging to and occupied by certain persons other than the plaintiff and the defendant, and leading to a certain public building known as the Hanwell Lunatic Asylum, for the purpose of proceeding to the said building; that the defendant then negligently, carelessly, and improperly kept and continued upon and across the said road or carriage line, part of the said land, a stack of slates, and divers other things and materials, without placing or keeping any light or signal near them, or adopting any means whatever to shew that the said slates and other materials were upon or across the said land, road, or carriage line; by reason whereof it was then impossible for the servant of the plaintiff to see or avoid the said slates, materials, or other things; and that, by reason thereof, the said horse drawing the said carriage, while being driven by the said servant as aforesaid, ran into, upon, [557] and against the said stack of slates or other materials and things, and was greatly bruised, wounded, and injured: special damage.

The fourth plea stated that the defendant had lawfully placed, kept, and continued the said slates and other things and materials across the said land and road or carriage line by the license of the owners and occupiers of the said land, road, or carriage line, before the consent of the owners and occupiers of the said land, road, or carriage line as in the declaration alleged; and that the said consent so given to the defendant was in full force at the time when, &c.; and that the alleged damage was not sustained by any breach of duty of the defendant. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—The carriage-road or way in question was a private road leading from the turnpike-road to the Hanwell Lunatic Asylum and to the residence of the superintendent, Dr. Saunders. The defendant, a

builder, was employed to do certain work at the asylum, and, with the consent of the owners of the land, stacked certain slates and other materials upon a portion of the road, without taking the precaution of placing a light near them at night; in consequence of which, the plaintiff's servant, who was driving a horse and carriage along the private road to the residence of Dr. Saunders, not seeing the slates, drove against them, and seriously injured the horse.

In answer to questions put to them by the learned judge, the jury found that the defendant had the consent of the owners of the property for placing the slates and materials where he placed them, but upon the usual terms of properly providing for the safety of the public, or of such of the public as had permission to [558] use the way; that there was negligence in leaving the stack without a proper light; and that that negligence was chargeable upon the defendant, in conjunction with the owners of the soil.

It was insisted, on the part of the defendant, that the fourth plea was an answer to the action.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the fourth plea, if the court should be of opinion that the action would not lie under the circumstances.

Huddleston, Q. C., now moved to enter a verdict for the defendant pursuant to the leave reserved, or to arrest the judgment. The declaration discloses no cause of action; or, at all events, the fourth plea, with the finding of the jury thereon, affords a complete answer. [Cockburn, C. J. If the proprietors of the lunatic asylum hold out a road to such of the public as have occasion to go there, it hardly lies in their mouth to say that they could place or permit another to place thereon an obstruction calculated to render the way dangerous.] *Stone* v. *Jackson*, 16 C. B. 199, comes very near this case. There, in an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle, but that the owner of the premises, as often as he saw them, turned them back: and it was held that the defendant was not liable. [Williams, J. The plaintiff was not a trespasser here, as the woman was in that case.] In *Deane* v. *Clayton*, 7 Taunt. 489, 1 J. B. [559] Moore, 203,—the dog-spear case, where the law was much considered, but without any definite result to the parties (*a*),—Dallas, J., in the course of a very elaborate judgment, thus propounds the law: "If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but, if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put, of a ditch, I may not dig it so as to interfere with any public or private right; but, within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited, of the horse straying from the common and falling into the pit (*b*), and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that the plaintiff could shew no right for the horse to be there; and yet that a horse might, in the night or day, stray from an open common into adjoining land, not separated by any fence, was, as a probable consequence, as much to be foreseen as that a hare might spring up, and a dog chase; or, if the horse had escaped from the owner, and he had sustained damage in the pursuit, would [560] that have given him a right to damages for the consequences of an escape, which he ought in strictness to have prevented? I may not keep a mischievous bull in a field through which there is a right of way; but, when there is no right of way, I am entitled so to do, as was stated by Lord Kenyon

(*a*) Except that the plaintiff retained his verdict, the court, on a motion for a new trial, being equally divided in opinion.

(*b*) *Blithe* v. *Topham*, 1 Roll. Abr. Action sur Case (N.), translated, 1 Vin. Abr. 554, pl. 4; Cro. Jac. 158.

in one of the cases cited at the bar (*a*)[1], and this, by way of illustration, for the very purpose of shewing the distinction in question. The only case cited on this part of the subject as bearing the other way, is that of *Townsend* v. *Wathen*, 9 East, 277; but in facts and circumstances it has no resemblance to the present. The object in the former was, to attract, in order to destroy the dog; and in this, the immediate purpose was to keep the dog from a situation in which he might incur destruction. In *Townsend* v. *Wathen*, the enticement was made to operate beyond the line of the defendant's property, and to the destruction of the dog where the dog had a right to be; and this enticement constituted the foundation of the action. It is in effect, but the common case of nuisance. But no decision has established that a trap placed by a man in his own land, and not calculated to operate so as to allure beyond, or even within the limit of such land, would be a trap unlawfully placed." *Jordin* v. *Crump*, 8 M. & W. 782, supports the same view. [Cockburn, C. J. These cases are a long way off the present. Suppose the owner of the premises himself places the obstruction upon a road which he holds out as the access to his house,—could he justify it?] That, it is submitted, is not this case. [Cockburn, C. J. I think it is. The place where these slates and rubbish were negligently stacked and left was the way commonly used by all persons having lawful occasion to go to the house.] The fourth plea alleges that per-
[561]-mission was given to the defendant to place the slates where they were deposited before the permission given to the plaintiff to use the way. Suppose this had been a new district, with a road in the course of formation, and a person lawfully proceeding along it fell into a hole on the side of it, would he have any remedy? [Byles, J. Yes, if there was a right of way there: *Barnes* v. *Ward*, 9 C. B. 392 (*a*)[2].] In *Deane* v. *Clayton*, Gibbs, C. J., says: "Considering the case upon the general principles of law, I conceive, that, as far at least as civil rights are concerned, every man may guard his own land by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb." What legal right of the plaintiff did the proprietors of this asylum invade when they gave the defendant permission to place his slates upon the road in question? [Williams, J. In that case, as in *Jordin* v. *Crump*, the only question was, to what extent a man may employ dangerous means for the purpose of protecting his own property: those cases have nothing whatever to do with the principle which must govern this case. Cockburn, C. J. We all entertain a very strong opinion against you upon this point. What have you to urge in arrest of judgment?] The declaration does not allege that the slates were improperly placed upon the land without the consent of the owners, nor does it state anything to shew that they were placed there under circumstances which imposed upon the defendant any duty towards the plaintiff or any other person who might obtain permission to use the way in question. **[562]** [Williams, J. The declaration shews that the plaintiff was lawfully using the way with the permission of the owners, and that he sustained an injury from the defendant's negligence.] In *Southcote* v. *Stanley*, 1 Hurlst. & N. 247, the declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; and that, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff: and it was held that no cause of action was disclosed. [Cockburn, C. J. There, the declaration charged no act of commission: here it does.]

Cockburn, C. J. I am of opinion that there should be no rule in this case. This action is brought by the plaintiff on the ground that whereas there was a road leading

(*a*)[1] *Brock* v. *Copeland*, 1 Esp. N. P. C. 203.

(*a*)[2] See *Hardcastle* v. *The South Yorkshire Railway and River Dun Company*, 4 Hurlst. & N. 67.

from the main or turnpike-road to the Hanwell Lunatic Asylum and to the residence of Dr. Saunders adjoining thereto, and the plaintiff, having lawful occasion to be on the land, was on it by the leave and licence of the owners thereof, the defendant negligently obstructed the way by placing thereon certain slates and other materials without giving notice or warning of the obstruction by light or other signal, and that, by **[563]** reason thereof, the plaintiff's horse was driven against the obstruction, and injured. To this declaration the defendant, by his fourth plea,—not denying the leave and licence stated in the declaration,—says that the slates and materials were placed on the road by the licence of the owners and occupiers of the land before the consent given to the plaintiff to use the said road, that the consent so given to the defendant was in full force at the time of the accident, and that the injury complained of was not the result of any breach of duty on his part: and it has been contended by Mr. Huddleston that the owners of the soil, and consequently also any person having leave and licence from them, may, as against any other person using the way by the like leave and licence, erect an obstruction thereon without incurring any responsibility for injury resulting therefrom, unless in the case of a holding out any allurement or inducement to such other person to make use of the way. It seems to me that the very case from which the learned counsel seeks to distinguish this, is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which **[564]** they might safely go. If that be so, a third person could not acquire the right to do so under their licence or permission. The case is entirely distinguishable from those which have been referred to. In those, the plaintiff was in the position of a wrong-doer, a trespasser: whereas, here, the plaintiff was at the time he sustained the injury complained of in the course of using the way upon the invitation of the owners of the soil. We must take it as the jury have found it, that, though the defendant had the leave and licence of the owners of the soil to place the slates upon the road, such licence was to be exercised with reasonable precautions and a due regard to the safety of all persons using the way. I doubt whether the finding of the jury might not have been objected to. I incline to think, that, where a general leave and licence is given to use a road as a means of access to a certain place, any subsequent leave to place an obstruction there would be inoperative, and therefore I think the evidence does not justify the finding upon the fourth plea. But the jury having coupled it with a finding that the leave granted to the defendant was to be exercised with a due regard to the protection of the public, we must presume it to have been so qualified. I therefore think there is no ground for disturbing the verdict. Then comes the question whether there is anything to entitle the defendant to have the judgment arrested. The ground upon which that is sought is, that the declaration does not shew that the obstruction complained of was erected without the permission of the owners of the soil. I am of opinion that it was not necessary that the declaration should allege that. It was enough for the plaintiff to aver that there was a road which he was entitled, as of right, or by the owners' permission, to use, and that the defendant negligently and improperly placed an obstruction thereon, whereby the plaintiff sustained an injury. **[565]** It was altogether unnecessary for the plaintiff to go on and negative the fact of permission having been given to the defendant by the owners of the soil; for, it was not to be presumed that they would have done that which would have been in fraud of the leave and licence granted to the plaintiff.

Williams, J. I am of the same opinion. As to the arrest of judgment,—The declaration in effect avers that the plaintiff was lawfully using a certain road leading to the Hanwell Lunatic Asylum, and that the defendant did an act which rendered it impossible for the plaintiff to use the road without encountering peril. It alleges that the defendant did this negligently, carelessly, and improperly, and that amounts to an allegation that he did it without any lawful excuse. After verdict, at all events,

it must be assumed that the judge told the jury that the declaration must be construed in a sense which would make it good, – that the act of the defendant was without excuse arising from ignorance or misadventure or inevitable necessity. I see no reason why the plaintiff should not have a remedy against such a wrong-doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it. All the cases referred to, with one exception, are cases where the question has been as to the remedy which a trespasser has for an injury resulting to him from the manner in which the proprietor of the land has dealt with it. They therefore have nothing to do with the case before us, where the plaintiff is not a trespasser. The case of *Southcote* v. *Stanley*, 1 Hurlst. & N. 247, I conceive, stands entirely upon the relation of host and guest, and was decided upon this principle, that one who chooses to become a guest can-[566]-not complain of the insufficiency of the accommodation afforded him. As to the objection that the declaration does not allege that the defendant placed the slates, &c. on the road without the leave or licence of the owners of the soil,—it seems to me that that was wholly unnecessary. If the declaration had contained such an averment, and the defendant had traversed it, the issue would have been an immaterial one. If the act was an improper one, it would be no answer to say that it was done with permission. Then, as to the plea,—it is neither more nor less than an expanded plea of not guilty: and I think the jury were quite right in the view they took of it. In the very nature of the thing, the permission given to the defendant was a qualified one,—so to place the slates as to provide against the possibility of danger arising therefrom to persons lawfully passing along the way. Again, I think the evidence failed to support the latter allegation in the plea, that the alleged damage was not sustained by any breach of duty of the defendant. The defendant clearly was guilty of a breach of duty in so placing and leaving the slates as to expose persons using the road to danger.

Willes, J. I am of the same opinion. In substance the case is this:—There was a road leading to a certain building, along which road persons having occasion to go to the building were accustomed to pass by leave of the owners of the soil, and were likely to pass; and the defendant, being engaged in some work upon the adjoining land, obtained leave to place slates and other materials there, either absolutely or modified in the way found by the jury, so as not to endanger persons using the road. Under that leave, the defendant placed certain slates across the road in such a way as to be likely to occasion injury to persons using the [567] road. It is not suggested that the defendant did not know that the road was likely to be used in the way I have mentioned, or that he gave any notice or warning to the persons, including the plaintiff, who were accustomed and likely to use the road. The question is, whether there is any legal remedy for a person lawfully using the road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it. The form of declaration which I should have drawn upon such a state of facts, would have been something like this, – that there was a certain road over which the plaintiff and others having occasion to go to a certain building by licence of the owners were accustomed and were likely to pass, and that the defendant, knowing that, wrongfully and negligently placed certain slates and materials across the road in such a manner as to be likely to prove dangerous to persons driving along the road, and that the plaintiff, being lawfully on the road on his way to the building, ran against the obstruction and was injured. The objections urged by Mr. Huddleston assume that the present declaration does in substance state all these facts. As to the fourth plea, it seems to me that the defendant failed to prove that he had the leave and licence of the owners of the soil to place the slates across the road in the way he did. I also think there is no ground for arresting the judgment. The declaration, as I read it, discloses a perfectly good [568] cause of action, and is not open to any of the objections urged against it. It is true it does not allege that the defendant had knowledge of the way in which the road was used. But it is perfectly clear that he did know it, and therefore the declaration would at once be amended if it were

necessary. But, after the remarks of my Brother Williams, the absence of that allegation would not I think make the declaration bad.

Byles, J. This case presents this singular aspect, that, though there was evidence on both sides, there was no contradiction. At the trial, it seemed to me to be a very clear case. If this way had been a public highway, and the defendant had placed an obstruction upon it, no action would have lain for that unless some individual had sustained an injury therefrom. It seems to me that the rule of law is precisely the same in respect of a private way, whether by prescription or by licence. If the exercise of that right be obstructed, the party injured thereby has a right of action, just the same as if the way had been a public one. The qualification of the licence set up by the defendant was introduced by the jury: I did not put it to them; for, I did not consider it any part of the case. If the obstruction was placed upon the road with the unqualified leave of the owners of the soil, all persons contributory to the injury sustained by the plaintiff therefrom would be jointly and severally responsible to him for it. As to the declaration, I have nothing to add to what has fallen from the rest of the court.

Rule refused.

[569] Hirsch and Others *v.* John Conrad im Thurn and Another. June 3rd, 1858.

[S. C. 27 L. J. C. P. 254; 4 Jur. N. S. 587; 6 W. R. 605. See *Minifie* v. *Railway Passengers Assurance Company*, 1881, 44 L. T. 555.]

By a contract for the sale of a parcel of white Bombay sessame seed (paid for on receipt of the shipping documents), "warranted when shipped of fair merchantable quality, and equal to the fair average," it was provided that any dispute arising out of the contract should be settled in London by the usual mode of arbitration, but that the contract should not be void on that account. An action having been brought by the buyers to recover damages for the breach of warranty, the declaration in which alleged that the plaintiffs had sustained damage by having resold and converted a great part of the seed into oil before they discovered or could reasonably discover the breach of warranty,—the court stayed the proceedings, under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, there being nothing on the record to shew that any question of fraud could arise, and nothing in the affidavits to shew such an alteration of circumstances as to induce the court to withdraw the matter from the mode of investigation which the parties themselves had selected.

On the 20th of March, 1857, the defendants, through Messrs. Laing & Campbell, colonial brokers, entered into a contract for the sale to the plaintiffs of a parcel of sessame seed. The sold-note was as follows:—

"London, March 20th, 1857.

"Sold for account of Messrs. J. C. im Thurn & Co., to our principals, S. W. B. 4906 bags of sessame seed, shipped at Bombay per the 'Bombay,' Capt. Flamank, and warranted when shipped of fair merchantable quality and equal to the fair average of white Bombay sessame seed, at 62s. 6d. per qr. the cost free on board, the freight, insurance, and bags to London included. The quantity to be computed at the invoice weight, taking the bushel at 49 lbs., unless it should be found to weigh more, and then the real weight to be taken. Twenty sound bushels to be weighed on arrival, to ascertain the weight; and the amount of invoice to be paid in fourteen days from the ship's reporting, by cash, less 2½ per cent. discount, in exchange for shipping documents and freight release. Buyers to have craft alongside for the seed as soon as it is come-at-able, or it is to remain at their risk and expense. Any dispute arising out of this contract to be settled in London by the usual mode of arbitration; but this contract not to be void on that account. This contract to be void for any portion that may be lost at sea or not arrive. **[570]** Any damage arising on the passage at buyer's risk. Brokerage and guarantee 1 per cent. "Laing & Campbell."

The sessame seed the subject of the above contract having arrived in London, the plaintiffs made a claim upon the defendants for 1513*l.* for a breach of the contract by

reason of the alleged inferiority of the quality of the seed. The defendants disputed the claim, and proposed to refer the matter to arbitration under the clause for that purpose contained in the contract.

On the 30th of October last, this action was commenced. The declaration (which was delivered on the 28th of May) stated that the defendants, by warranting that certain goods, to wit, 4906 bags of sessame seed, shipped at Bombay, per the "Bombay," Captain Flamank, were, when shipped, of fair merchantable quality, and equal to the fair average of white Bombay sessame seed, sold the same goods to the plaintiffs on the terms, amongst others, that the contract should be void as to any portion that might be lost at sea or not arrive; and, although the said goods were not lost at sea, and did arrive, yet the said goods were not when shipped of fair merchantable quality or equal to the fair average of white Bombay sessame seed, and the shippers of the said goods had fraudulently shipped white Bombay sessame seed mixed with other and inferior seed, and with an unusual quantity of dirt and rubbish, and the goods so shipped were the goods so sold and warranted to the plaintiffs, and were, by reason of such fraudulent conduct, not so sold and warranted; by means of which premises the plaintiffs, who paid for, re-sold, re-shipped, and caused to be manufactured into oil a great part of the said goods before they discovered or could reasonably discover the said breach of warranty, sustained a great loss on the said goods, **[571]** to wit, &c., the said goods having been bought by the plaintiffs for such purposes, as the defendants always well knew.

Honyman, on behalf of the defendants, who had appeared to the action, but had not pleaded, moved to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (*a*). The affidavit upon which the motion was founded stated that the action was brought in respect of matters which were by the contract agreed to be referred to arbitration, and the only matters in question in this cause were, the quality of the seed, and the **[572]** amount of the allowance (if any) to be made to the plaintiffs for the alleged inferiority of the said seed; that no sufficient reason existed why such matters could not or ought not to be referred to arbitration in the manner provided for by the contract; that the defendants before and at the time of the commencement of the action were and always had been desirous and ready and willing to refer all disputes arising out of the said contract to arbitration in the manner provided for in the contract, and to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration; and that the well-known and usual mode of arbitration was, for each party to name a colonial broker or other competent referee, and for the two referees thus named to appoint another colonial broker or other competent person as third referee, or umpire. [Cockburn, C. J. There being a suggestion of fraud, ought not the matter to be submitted to a jury?] If there had been a bonâ fide suggestion of fraud as between the parties to the contract, the court would not interfere: see *Wallis* v. *Hirsch*, ante, vol. i., p. 316. But no fraud is charged here; merely a breach of contract. Fraud is imputed only to the shippers of the seed.

(*a*) Which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which [such] action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit; Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

H. James, at the call of the court, shewed cause, upon an affidavit which stated, that, about four or five weeks before the arrival of the seed in this country, Mr. Page, of the firm of Laing & Campbell, through whom the contract was made, told the plaintiffs that he (Page) had been informed by one of the defendants that they were afraid that the sessame seed would not be white, but mixed, but requested them not to take any notice of such information until its arrival; that, in June, 1857, the defendants offered to deliver to the plaintiffs shipping documents of 4906 bags of sessame **[573]** seed ex "Bombay," which the defendants represented to consist of white Bombay sessame seed of the quality described in the said contract, whereupon the plaintiffs paid the defendants the sum of 5365*l.* 10*s.*, being the amount of the invoice delivered by the defendants in respect of the goods comprised in the said shipping documents; that, upon examination of the said seed, the plaintiffs found that it was not white Bombay sessame seed, but was mixed in so large a proportion with black and brown sessame seed and dirt as to be quite a different article, and useless to the plaintiffs for the purposes for which they bought it; and that the plaintiffs verily believed, that, at the time the defendants so as aforesaid invoiced the said goods to them, and represented the same to be in accordance with the contract, they, the defendants, knew that the same was not white Bombay sessame seed. James submitted that this would be a very inconvenient case to refer. [Cockburn, C. J. Why, then, did you so agree?] The court has a discretion: and, from the frame of the declaration, it is manifest that difficult questions may arise as to the plaintiff's claim for damages, involving the principle in *Hadley* v. *Baxendale*, 9 Exch. 341. [Cockburn C. J. Is there anything in the affidavits to shew that the defective quality of the seed was not discernible whilst it existed in specie and before it was converted into a new substance?] There is not; but the declaration so avers. Colonial brokers may be very proper persons to judge of the quality of seed; but may not be very fit to refer a question such as is likely to arise here to. [Cockburn, C. J. If it were clear that the inferiority of the quality of the seed was not discovered by the plaintiffs until after it had been converted into oil, there would be much weight in your argument, because a party might well be content to refer a dispute as to the quality of an article in its **[574]** natural state, to one with whose judgment of the thing in its manufactured state, he would not be satisfied. But here you state that the objection was brought to your notice while the subject-matter of the contract still remained in specie. I cannot see that any injustice will be done by carrying out the agreement which the parties have entered into.] At all events, the court will not in the exercise of its discretion enforce a reference, where the inquiry involves a charge of fraud. It was upon that ground the court discharged the rule in *Wallis* v. *Hirsch*, ante, vol. i., 316. [Cockburn, C. J. There it was distinctly brought to the notice of the court that the plaintiffs meant to charge fraud. Byles, J. In that case there was a count for money had and received, under which the plaintiffs sought to recover back the money which they had paid, on the ground of fraud.]

Cockburn, C. J. I am of opinion that the rule should be absolute. The contract upon which the action is brought contains a clause whereby it is provided that any dispute arising thereout shall be settled in London by the usual mode of arbitration,—that is, by colonial brokers. The contract relates to a parcel of sessame seed: and the ground upon which it is suggested that the court ought not to act upon the power conferred upon it by the 11th section of the Common Law Procedure Act, 1854, is, that, before the vendees ascertained the defective quality of the seed, they had converted a considerable portion of it into oil, and therefore it is contended, that, although the parties to whom it had been agreed to refer any dispute that might arise out of the contract, might be perfectly conversant with the quality and value of the article in the state in which it was contracted to be sold, they might not be so well acquainted with the quality and **[575]** value of the article into which it has been converted. It may be, that, if the whole of the seed in question had been converted into oil, there might have been great weight and cogency in the argument founded upon that suggestion. But Mr. James has been constrained to admit that there still remains a portion of the cargo which has not been so converted into oil, but which is still in the form of seed: and there is nothing upon the affidavits to satisfy us that the brokers would not be perfectly capable of judging of the whole parcel by that which remains. The parties having, therefore, by their contract expressly agreed to withdraw all disputes and differences arising out of the contract from the ordinary tribunals, and

to refer them to a tribunal specially selected by themselves, we ought to give effect to that agreement unless we are satisfied that the circumstances are so altered that justice cannot be done by carrying out the original intention of the parties. So far from thinking that such is the case here, I see no reason whatever for supposing that the brokers would not be perfectly capable of arriving at a correct decision, so that justice may be done in the manner agreed upon by the contracting parties. The only other point for consideration, is, whether a question of fraud is raised here, so as to make the matter more fit to be determined by a jury. But it does not appear upon the declaration that any question of fraud can arise directly or indirectly. And that distinguishes this case from *Wallis* v. *Hirsch*, ante, vol. i., p. 316. I think the rule should be absolute, but without costs.

The rest of the court concurring,

Rule absolute, without costs.

[576] FREND AND ANOTHER *v.* DENNETT. June 9th, 1858.

[S. C. 27 L. J. C. P. 314; 4 Jur. N. S. 897: in Equity, 5 L. T. 73. See *Hunt* v. *Wimbledon Local Board*, 1878, 3 C. P. D. 215; 4 C. P. D. 48. Approved, *Young* v. *Leamington Corporation*, 1882-83, 8 Q. B. D. 585; 8 App. Cas. 517. See *Hoare* v. *Kingsbury Urban Council*, [1912] 2 Ch. 466.]

By the 85th section of the Public Health Act, 11 & 12 Vict. c. 63, it is, amongst other things, enacted that "the local board of health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract, whereof the value or amount shall exceed 10l., shall be in writing, and sealed with the seal of the local board," &c.:—Held, that a contract which did not comply with this condition is not capable of being enforced.

This was an action brought by the plaintiffs, Messrs. Frend & Hamill, contractors, against the defendant as clerk to the local board of health of the town of Worthing,—a non-corporate district,—to recover the price of certain works done by them for the board.

The first count of the declaration stated, that, by certain articles of agreement duly made and entered into by and between the plaintiffs of the one part and the said local board of health of the other part, the plaintiffs did covenant and agree with the said local board to build, erect, construct, and complete for the said local board a water-tower, engine and boiler-house, chimney, coal-store, fitting-shop, and all other works that should be required by the said local board, and expressed in a certain specification, and as shewn in certain drawings, and according to the same and certain plans and sections, at and for the respective sums of 1761l. and 955l., and also to execute and perform all such additional works thereto as might be required by the said local board; and the said local board did thereby covenant and agree with the plaintiffs, that they the said local board would pay or cause to be paid unto the plaintiffs the said several sums of 1761l. and 955l. for the building, erecting, constructing, and completing the said water-tower, engine and boiler-house, chimney, coal-store, fitting house, and other works as expressed in the said specification, and shewn in the said drawings, plans, and sections, and would also pay or cause to be paid to the plaintiffs all such further sums (if any) as should become justly due or payable to the plaintiffs for or in respect of additional works, in accordance with the said specification, at certain times, [577] and according to a certain scale, and in manner then agreed upon between the said local board and the plaintiffs: Averment, that the plaintiffs did build, erect, construct, and complete the said water-tower, engine and boiler-house, coal store, and fitting shop, and all such other works as were required by the said local board, and expressed and shewn in the said specification and drawings, and according to the same and the said plans and sections, and did also execute divers additional works thereto which were required by the said local board; that, at the time of the commencement of this suit, a large sum of money, to wit, 300l., had become and was justly due and payable to the plaintiffs from the said local board for and in respect of such additional works, and in accordance with the said specification and the said covenant and agreement of the said local board; and that, although the said local board did pay to the plaintiffs the said sums of 1761l. and 955l. for and in respect of

the building, erecting, constructing, and completing the said water tower, engine and boiler house, chimney, coal-store, fitting-shop, and such other works as were expressed in the said specification, and shewn in the said drawings, plans, and sections, and although the plaintiffs had done all things, and all things had happened and occurred, and all conditions precedent had been performed and fulfilled, and all necessary times had elapsed, to entitle the plaintiffs to be paid by and to receive from the said local board the said sum of money for or in respect of such additional works as aforesaid, yet the said local board had not at any time paid the same, or any part thereof.

The second count stated, that the said local board retained and employed the plaintiffs to do, execute, and perform for them the said local board certain sewerage and drainage works as mentioned and expressed [578] in a certain specification; that the said local board did thereupon contract and agree to and with the plaintiffs to pay them for the same at and after certain rates thereupon agreed upon between them the plaintiffs and the said local board; that the said local board did also then contract and agree with the plaintiffs to pay them in cash for the first 500l. worth of such work, subject to a certain deduction, and also that, in case they the said board did not pay in cash for the work executed in excess of the said 500l., they would give to the plaintiffs at the end of each month a bond or negotiable security for the amount of work executed during the month, for periods expiring five years from the date of such document, bearing interest at 5l. per cent.; and that the said local board did also then contract and agree with the plaintiffs, that certain then-existing sewers should be kept clear of water by the board: Averment, that the plaintiffs did execute and perform such sewerage and drainage works for the said local board, and that the price and value of the same much exceeded the sum of 500l., and that, although the said local board did pay to the plaintiffs in cash for the first 500l. worth of such work, yet, at the time of the commencement of this suit, there was, and still remained, justly due and owing from the said local board to the plaintiffs, beyond and in excess of the said sum of 500l., a large sum of money, to wit, 800l., for and on account of such works; and that, although the plaintiffs had done all things, and all things had happened and occurred, and all conditions precedent had been performed and fulfilled, and all necessary times had elapsed, to entitle the plaintiffs to be paid the said last-mentioned sum of money, either in cash or by such bonds or securities as aforesaid, yet the said local board had not paid the same in manner aforesaid or otherwise howsoever; and, further, that the said [579] local board did not nor would keep the said existing sewers clear of water according to their said contract and agreement, but wholly omitted so to do, by means whereof the plaintiffs were not only greatly hindered and impeded in performing and executing the said sewerage and drainage works, but also thereby the same were rendered much more difficult of execution, and the plaintiffs were put to and incurred much additional expense, labour, and trouble in executing the same than they would otherwise have incurred, and were forced and compelled to and did necessarily leave on the said works so executed by them divers large quantities of timber and other materials of great value, and which would not have been necessary if the said existing sewers had been kept clear of water by the said board according to their said contract and agreement.

There was also a count for money payable by the board to the plaintiffs for work done and materials provided by the plaintiffs for the said local board, and at their request.

The defendants pleaded a great number of pleas to each count, and amongst them a plea that they did not covenant and agree as alleged.

The cause was tried before Willes, J., at the sittings in London after Hilary Term last, when a verdict was found for the plaintiffs, subject to leave reserved to the defendants to move to enter the verdict for them upon certain points of law, one of which was, that the contract, being for a sum exceeding 10l., and not being under seal, was void by the 85th section of the Public Health Act, 11 & 12 Vict. c. 63.

That section enacts "that the local board of health may enter into all such contracts as may be necessary for carrying this act into execution; and every such contract, whereof the value or amount shall exceed 10l., [580] shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal; and shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and

the time or times within which the contract is to be performed; and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into, and duly executed by the other parties thereto, shall be binding on the local board by whom the same is executed, and their successors, and upon all other parties thereto, and their executors, administrators, successors, or assigns, to all intents and purposes: Provided always, that the said local board may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty be mentioned in any such contract or in any bond or otherwise, for such sums of money or other recompense as to such local board may seem proper: Provided also, that, before contracting for the execution of any works under the provisions of this act, the said local board shall obtain from the surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise: Provided also, that, before any contract of the value or amount of 100l. or upwards is entered into by the said local board, ten days' public notice at [581] the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and the said local board shall require and take sufficient security for the due performance of the same."

Hawkins, in Easter Term last, obtained a rule nisi accordingly.

Lush, Q. C., and Hance, now shewed cause. The 85th section is directory only: as to some of its provisions it has already been so held in *Nowell* v. *The Mayor, &c., of Worcester*, 9 Exch. 457, and *Cunningham* v. *The Local Board of Health of Wolverhampton*, 7 Ellis & B. 107. The section requires, amongst other things, that the contract shall specify "the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed." It may not be possible in many cases to ascertain all these particulars beforehand: and, is it to be said that any failure in this respect renders the contract void? It may be, that, as between the members of the board and their constituents, the rate-payers, these are conditions which the former are bound to comply with; but they cannot be conditions-precedent to the right of a party who has done work for them to sue for the price. There are no negative words: all is affirmative and directory. There are many cases of corporations and joint stock companies where matters which quoad the corporation itself are requisite to the validity of the contract, and do not disqualify the party contracting with them to enforce its performance by action. Such are the cases of *The Copper-Miners' Company* v. *Fox*, 16 Q. B. 229, *Henderson* v. *The Australian Royal Mail Steam Navigation Company*, 5 Ellis & B. 409, *Reuter* v. *The Electric Telegraph Company*, 6 [582] Ellis & B. 341, and *Bill* v. *The Darenth Valley Railway Company*, 1 Hurlst. & N. 305. [Williams, J. All these cases proceed upon the ground stated in *Church* v. *The Imperial Gas-Light Company*, 6 Ad. & E. 841, 3 N. & P. 35, viz. that they are corporations established for trading purposes.] It is submitted that this being a contract relating to matters within the scope of the duty of the local board, and there being no prohibitory words in the 85th section of the statute, the absence of the formality of the seal will not vitiate the contract.

Field (with whom was Hawkins), in support of the rule. The plaintiffs seek by this action to charge the local board of health of the Worthing district in their quasi corporate capacity. It is necessary to see what are the powers with which the body is clothed, in order to arrive at the proper construction of the 85th section. They are trustees appointed for sanitary purposes, with limited powers to execute certain works. [Cockburn, C. J., in strong terms expressed his reprehension of the turpitude of the defence.] The objection is one which the board are bound to take. They can only pledge the credit of the rates in respect of contracts entered into by them in the manner and under the conditions prescribed by the act. The 85th section enacts in plain and unambiguous terms, that "every such contract," that is, every contract which they are thereby impowered to enter into, "shall be in writing, and sealed with the seal of the local board by whom the same is entered into." It is impossible to get over that. [The learned counsel was stopped by the court.]

Cockburn, C. J. This rule must be made absolute. I very much regret that

we are compelled to come to that conclusion; but I see no alternative. It is sought to make the rates for the district liable upon this **[583]** contract, by means of an action against the clerk to the local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the act of parliament; and that, by the very same clause which gives the board power to enter into contracts, amongst other things, expressly enacts that "every such contract, whereof the value or amount shall exceed 10l., shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal." I think the local board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute.

WILLIAMS, J. I am of the same opinion. I do not see how we can, consistently with the ordinary rules by which statutes are construed, hold this part of the 85th section to be directory. It is not like the case of a thing which is to be done by the board, where those dealing with them have no means of knowing whether or not it has been done in the manner required by the act. Here, however, is a public act which requires that all contracts to be entered into by the local board shall be entered into in a particular way, viz. "in writing, and sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof." The plaintiff, therefore, must have been well aware that the board had no power to contract so as to bind the rates, except in the manner pointed out by the act.

WILLES, J. I am of the same opinion. This case has been argued as if the 85th section of the act had been a controlling section, and as if all the terms in **[584]** which matters therein mentioned are required to be done were directory only. But it is that section which alone confers upon the local board the power of entering into contracts; and they must exercise that power in the terms in which it is by the act conferred upon them. I regret to be obliged to come to this conclusion; the more especially as this is not the first instance of fraud and oppression occasioned by this state of the law, within my own observation.

Rule absolute.

WHEELER *v.* GRAY. May 24th, 1858.

[Affirmed in Exchequer Chamber, 6 C. B. N. S. 606.]

A landlord is justified, under the 83rd section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall, between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3: and it is no objection that he has neglected to give the notice to the district surveyor, required by s. 38.—Semble, that the landlord would (if necessary), under such circumstances, be a "person" entitled to notice of action under s. 108.

This was an action for a trespass in breaking and entering certain premises in the occupation of the plaintiff, a coffee-house keeper, in Gray's Place, King's Road.

The defendant pleaded not guilty "by statute," the statute referred to in the margin of the plea being the Metropolitan Building Act, 18 & 19 Vict. c. 122, ss. 3, 82, 83, 85, and 108; and also leave and licence.

The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Michaelmas Term. The facts which appeared in evidence were as follows: The defendant was the owner of the house in Gray's Place, which was in the occupation of the plaintiff as tenant from year to year under him. The defendant was also the owner of the adjoining house. The party-wall between the two houses being in a state of dilapidation, the defendant, without the permission of the **[585]** tenant, and without giving any notice to the district surveyor under the 38th section of the act (*a*), or to the tenant, by one Lemon, a builder employed by him for that

(*a*) Which enacts, that "two days before any building or any work to, in, or upon any building, is commenced," &c., "it shall be the duty of the builder engaged in

purpose, entered the house in the plaintiff's occupation, and pulled down and re-built the wall. There was conflicting evidence as to the state of the wall, the plaintiff's witnesses stating, on the one hand, that a slight repair would have sufficed, the defendant's witnesses, on the other hand, stating that the wall was in such a ruinous state as to render it necessary entirely to re-build it.

On the part of the defendant it was submitted, that, inasmuch as he was acting or intending to act, under the provisions of the statute, he was entitled to a notice of action under s. 108 (*b*); and, further, that he [586] was justified in what he did, by the 83rd section (*a*)[1] and his lordship was asked to non suit the plaintiff.

For the plaintiff it was insisted that the defendant was not entitled to a notice of action, because he had not given the requisite notices (*b*)[2] to bring himself within the protection of the 108th section.

His lordship left it to the jury to say, —first, whether the wall in question was so far defective or out of repair as to make it necessary or desirable to pull it down,— [587] secondly, whether the defendant entered by the licence of the plaintiff,—thirdly, what damages they thought the plaintiff entitled to for the inconvenience he had been put to.

The jury answered the first question in the affirmative and the second in the negative: and they assessed the damages at 5l.

The plaintiff's counsel thereupon asked his lordship to certify for costs, but he declined to decide as to the application then: and he reserved leave to the defendant to move to enter a non-suit or a verdict for him, if the court should be of opinion that he was entitled to a notice of action, or justified in what he did.

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building or re-building such building, or in executing such work, &c., to give to the district surveyor notice in writing stating the situation, area, and height, and intended use of the building or buildings about to be commenced, or to, in, or upon which any work is to be done, and the number of such buildings if more than one, and also the particulars of any such proposed work, and stating also his own name and address," &c.

In this case, the premises were situate in two districts and notice had been given to the surveyor of one of them only.

(*b*)[1] Which enacts that "no writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of this act, until the expiration of one month next after notice in writing has been delivered to him, or left at his office or usual place of abode, stating the cause of action and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and, upon the trial of any such action, the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in such last-mentioned notice; and, unless such notice is proved the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere; and the defendant shall be at liberty to plead the general issue, and give this act and all special matter in evidence thereunder."

(*a*) Which enacts that "the building owner shall have the following rights in relation to party structures, that is to say," amongst others, "(1) A right to make good or repair any party structure that is defective or out of repair. (2) A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same."

(*b*)[2] Under the 38th and 85th sections, —the latter of which enacts that "the following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights:" amongst others, "(1) No building owner shall, except with the consent of the adjoining owner, or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure, unless he has given at the least three months' previous notice to the adjoining owner, by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode. (2) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced."

Parry, Serjt., in Hilary Term last, moved pursuant to the leave. [Cockburn, C. J. The doubt I felt at the trial was, whether a landlord who had leased premises could justify entering and pulling down a party-wall without the assent of the tenant.] The plaintiff was not in under any lease [Cockburn, C. J. The defendant had parted with the possession and the right to the possession for a year or for six months, whichever it was. I doubted, and still doubt, whether he could enter in the way he did, unless he could justify himself under the building-act.] The defendant was clearly justified by the 83rd section in entering to pull down and re-build the party-wall; and the plaintiff was not a person entitled to notice under s. 85, inasmuch as he does not come within the definition of "owner," given in the interpretation clause, s. 3, which is, that "owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." [Williams, J. Was the party-wall proved to be in a **[588]** dangerous state?] Not in terms: but that would seem to be involved in the finding that it was so far defective or out of repair as to make it necessary to pull it down.

A rule nisi having been granted,

Gibbons now shewed cause. The first question is, whether a landlord has a right at common law to enter upon his tenant for the purpose of doing repairs; the second, whether the defendant had any justification in this case under the Metropolitan Building Act, 18 & 19 Vict. c. 122, or whether he was entitled to a notice of action under the 108th section of that act. [Parry, Serjt., conceded, that, unless justified under the statute, the defendant was not justified at all, and intimated that he should rely upon the 83rd section, which defines the rights of the building owner.] It is clear that the landlord would be guilty of a tresspass in entering to repair, without the permission of the tenant: *Barker* v. *Barker*, 3 Car. & P. 557; *Neale* v. *Wyllie*, 3 B. & C. 533, 5 D. & R. 442. The 82nd section enacts, that, "in the construction of the following provisions relating to party structures, such one of the owners of the premises separated by or adjoining to any part structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the other premises shall be called the adjoining owner." The 83rd section gives the building owner "a right to pull down and re-build any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." But the 85th section expressly enacts that "no building owner shall, except with the consent of the adjoining owner, or, in cases where any party structure is dangerous, exercise any right thereby given in respect of any party structure, unless he has **[589]** given at the least three months' previous notice to the adjoining owner," &c. And s. 111 enacts that "nothing herein contained shall vary or affect the rights or liabilities as between landlord and tenant under any contract between them." The 38th requires two days' notice to be given by the builder to the district surveyor; the 39th imposes upon the district surveyor the duty of seeing that the provisions of the act are complied with; and the 41st section imposes upon the builder a penalty of 20*l.* for neglecting to give such notice. As building owner, therefore, the defendant could at the most only have a qualified right, to enter and repair or re-build, provided he gave the notices required by the 38th and 85th sections. Then, was he entitled to a notice of action under s. 108? The words of that section are, "No writ or process shall be sued out against any district surveyor or other person, for anything done or intended to be done under the provisions of this act, until," &c. Now, the rule laid down in *Sandiman* v. *Breach*, 7 B. & C. 96, 100, 9 D. & R. 796, is, that, where general words in an act of parliament follow particular words, they are to be construed to apply to persons or things ejusdem generis. Applying that rule here, the words "or other person" must be held to mean persons acting under the district surveyor. Here, the evidence shewed, that, so far from acting under the district surveyor, the defendant was proceeding altogether without his sanction. [Byles, J. The defendant evidently intended to do what he did under the provisions of the act. He was building owner, and he was owner of the adjoining premises. Was he not justified in entering the adjoining premises for the purpose of which he entered?] Possibly he might have been if he proceeded under the act, by giving notice to the district surveyor. [Williams, J. Is he the less entitled to notice of action because he pro-**[590]**-ceeds wrongfully? If all were regular, the notice would not be needed.] A man cannot be said to be acting under the act, when he is found to be expressly

evading the act. The statute applies only to works done under the inspection and superintendence of the district surveyor.

Parry, Serjt., in support of the rule. The defendant was a mere tenant from year to year, and therefore clearly not such an owner as is entitled to notice under s. 85. The person who is required by s. 38 to give notice to the district surveyor is the builder, not the owner: and by the interpretation clause (s. 3), it is provided that "builder shall apply to and include the master builder or other person employed to execute or who actually executes any work upon any building." Assuming, however, that the defendant was the person who ought to have given notice to the district surveyor, he may be liable to a penalty for the omission, but that cannot affect his rights as against the plaintiff. Then, as to the necessity for a notice of action, it is said that the 108th section applies only to persons acting under or by the authority of district surveyors. It is manifest that that cannot be the true interpretation of the section: the words "or other person" are clearly referable to "owners" and "builders" as defined by s. 3. The act was not intended merely to put district surveyors in motion. The cases of *Collins* v. *Povey*, 9 East, 322, and *Pratt* v. *Hillman*, 4 B. & C. 269, 3 D. & R. 360, which were decided upon the 100th section of the old building act, 14 G. 3, c. 78, shew that this 108th section cannot have the limited meaning contended for on the other side. The defendant clearly intended to act within the statute (*a*): and the jury have virtually [591] found that he did so. It would be putting far too narrow a construction upon the 108th section to hold it to be limited to district surveyors. [Williams, J. Who are the "other persons" who are supposed to be ejusdem generis with district surveyors? Gibbons. Any persons who are acting under their sanction or direction. Cockburn, C. J., referred to s. 73, which speaks of "commissioners" who act in the performance of analogous duties with reference to dangerous structures.]

Cockburn, C. J. I am of opinion that the rule must be made absolute to enter a nonsuit in this case, on the ground that it falls within the 108th section of the building act, 18 & 19 Vict. c. 122, and consequently that the defendant was entitled to a notice of action, and further that the action should have been brought within the time prescribed by that section for the commencement of actions for anything done or intended to be done in pursuance of the act. Independently also of that section, I am of opinion that the defendant was perfectly justified in what he did. The facts were these:—The plaintiff was tenant of certain premises of which the defendant was the owner, and which premises were separated by a party wall from other premises adjoining, also belonging to the defendant. The condition of the party wall becoming such as to render it necessary that it should be re-built, the defendant, against the will of the plaintiff, entered upon his premises for that purpose; and the question is whether he was justified in so doing. Now, the defendant was the owner of both the premises, and therefore, as my Brother Parry says, he was "owner" of the premises occupied by the plaintiff, and "building owner" with reference to the premises not occupied by the plaintiff. He therefore was entitled, when the [592] party wall became decayed, upon giving notice, if notice was necessary, to go upon the premises and do the repairs. The 85th section requires notice to be given to the owner of the adjoining premises. If, therefore, the adjoining premises had been the property of any other than the defendant himself, it would have been necessary for the defendant to give him notice: and, if he had done so, then, as the interpretation clause of the act provides that "owner" shall mean "every person in possession or receipt of the whole or any part of the rent or profits of any lands or tenements, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will," it is clear that such notice would have satisfied the exigency of the 83rd section. But it happened here that there was no adjoining owner other than the defendant himself. Now, it was not necessary that the defendant should give notice to himself; therefore, the necessity for such notice could not arise here. Notice being only required to be given to the "owner" described in the interpretation clause, and there being no person other than the defendant who filled that character, it follows that the defendant was entitled as owner to enter the adjoining house for the purpose of pulling down and re-building the party wall, the estate of which was such, as the jury have found, as to render it desirable and necessary so to do. In such a view of

(*a*) See *Read* v. *Coker*, 13 C. B. 850.

the case, there is no necessity to resort to the 108th section of the act, and therefore it is perhaps better not to pronounce any decided opinion as to whether or not a "building owner" is included within the words of that section. The matter is open to much argument on both sides. It has been contended, on the one hand, that a large and liberal view of the statute should be taken in favour of persons who are acting for the benefit of the public; and that, **[593]** I must own, is the inclination of my opinion: but it is unnecessary to decide it, inasmuch as the defendant is clearly protected under s. 83.

WILLIAMS, J. I also am of opinion that it is unnecessary to consider whether the defendant is a "person" within the meaning of the 108th section, inasmuch as he need not have recourse to that section, because I think he was justified in entering for the purpose of pulling down and re-building the party-wall under s. 83. If, as I at first thought, the defendant relied upon being the "building owner" of the premises occupied by the plaintiff, I should have felt some difficulty in saying that he was justified in what he did. But it appears that he was the "building owner" of the adjoining house, of which as well as of that in the occupation of the plaintiff he was landlord: and he relies upon the 2nd article of s. 83, by which a right is given to the building owner,—who by s. 82 is defined to be "such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure,"—to "pull down and re-build any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." The jury in this case have found that it was necessary and desirable that the party-wall in question should be pulled down and re-built; therefore, the defendant had a clear right to resort to the powers given him by that section. But it is said that there are two sections which require something to be done by the party before he can proceed to exercise the right given to him by s. 83, viz. the 38th, which requires a two days' notice to be given to the district surveyor, and the 85th section, which requires a three months' notice to be given to the "adjoining owner." Now, as to the latter, it **[594]** appears that the occupier of the adjoining premises was only a tenant from year to year. He, therefore, is not owner within the definition of owner given in s. 3, and consequently was not entitled to notice. The defendant was himself the owner, and the person entitled to the rents and profits of the premises. The objection, therefore, of the want of a notice under s. 85 falls to the ground: and the only remaining question is, whether it was necessary that the defendant should have given notice to the district surveyor. There is much in the argument that the duty of giving notice to the district surveyor is cast upon the builder only. But, assuming that the defendant is to be considered as a builder within the act, it seems to me that the omission to give that notice does not affect his rights as against the adjoining owner or occupier, though it may render him liable to a penalty for neglecting to conform to the requisition of the act. It therefore seems to me that this objection also fails. As to the observations which have been made as to the supposed hardship on the tenant, that he should be compelled to go on paying rent whilst by reason of the act of his landlord he derives no benefit from his occupation of the premises,—it is unnecessary to go into that. It may be, that, notwithstanding the tenant has no right to complain in this form of action, the exercise of the landlord's right under the statute might amount to an eviction, and so disentitle him to recover rent during the period occupied by the repairs.

WILLES, J. I also am of opinion that the rule must be absolute to enter a nonsuit. I say nothing as to the construction of the 108th section, because the first part of it applies only to the case of a thing done which was not lawful, but where the party doing it was acting bonâ fide under an impression that he was **[595]** pursuing the provisions of the act, and therefore he is protected sub modo,—unless a certain notice be given and the action be brought within a given time. Before coming to any conclusion upon that point, I should think it necessary to consider the decisions upon the 159th section of the Bankrupt Act, 12 & 13 Vict. c. 106, the words of which are much more general, and which have been held to apply only to officers who are bound to act in the performance of some duty, and not to assignees or persons who take upon themselves to act (*a*). Contenting myself with merely intimating that, I found my opinion in the present case upon the defendant's being justified in doing what he did, under the 83rd section of the act. Now, if the premises adjoining had belonged to any other

(*a*) See *Carruthers* v. *Payne*, 2 M. & P. 420, 5 Bingh. 270.

person than the defendant, the defendant would have been a building owner within s. 82, for that section says that "such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure, shall be called the building owner." A "party structure" is by the interpretation clause (s. 3), defined thus,—"Party structure shall include party-walls, and also partitions, arches, floors, and other structures separating buildings, stories, or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances." That is a remarkable definition. If, then, the ownership of the adjoining premises had been in another person, the defendant clearly would have been entitled, as building owner, under s. 83, the party structure being out of repair (as the jury have found this party-wall to have been), to enter for the purpose of repairing it. The 83rd and subsequent sections define the rights of the building owner: and s. 86 enacts that, "when-[596]-ever any building owner has become entitled, in pursuance of this act, to execute any work, it shall be lawful for him, his servants, agents, or workmen, at all usual times of working, to enter on any premises for the purpose of executing, and to execute such work, removing any furniture or doing any other thing that may be necessary, and, if such premises are closed, he or they may, accompanied by a constable or other officer of the peace, break open any doors in order to such entry: and any owner or other person that hinders or obstructs any workman employed for any of the purposes aforesaid, or wilfully damages or injures the said work, shall incur for every such offence a penalty not exceeding 10l., to be recovered before a justice of the peace." Turning again to the interpretation clause, I find "owner" means "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." Such being the meaning of "owner," the words "other persons" must mean other persons generally, and within that category comes the present plaintiff. That being so, the question is, whether the fact of ownership makes any difference, or whether the defendant does not fill the two characters of building owner and adjoining owner. The notice required by the 85th section is to be given, not to the occupier, but to the adjoining owner. There is nothing in the act which requires any notice to be given to the tenant. There being, therefore, no adjoining owner here to whom a notice could be given, no notice was or could be necessary, according to the well-known rule of construction, that, where an act of parliament enacts that something shall be done in a certain way, and subject to a condition, giving the matter in detail, and the condition cannot in the [597] particular case be performed, it need not be. One familiar illustration of that is, the case of an appeal being given subject to certain recognizances being entered into by the appellant, which has been held to apply to corporations, though, as they cannot enter into recognizances, they cannot perform the condition. They are bound only to do what by their peculiar constitution they can do. In such case the particular intent must give way to the general intent of the statute. So, here, the statute deals with party structures between different properties. The expressions it uses must clearly be construed so as to apply to party structures notwithstanding the premises on both sides belong to the same owner, just as if they belonged to different owners. I therefore think there is nothing absurd in holding that the defendant may fill both characters; and it seems to me that he had a perfect justification under the 83rd section for what he did. The rule must be made absolute.

BYLES, J. I am of the same opinion. The reasons upon which the judgment of the court is founded having been so fully given by my Lord and my learned Brothers, I do not think it necessary to add anything.

Rule absolute for a nonsuit.

[598] BROWNE AND ANOTHER *v.* SIR ROBERT PRICE, Baronet. June 25th, 1858.

[S. C. 27 L. J. C. P. 290; 4 Jur. N. S. 882; 6 W. R. 721.]

The defendant by deed of mortgage, reciting a loan of 12,500l. by the plaintiffs to the defendant upon the security of a demise of the defendant's life interest in certain property and a conveyance of a reversion in fee, and also by a policy for 15,000l. in the Norwich Union Life-Assurance Office, payable within three months after the

death of the defendant "in case he should leave issue male by his then present wife living at his death,"—the defendant covenanted that he would "from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, should remain due and owing on the said security, continue and keep on foot the benefit of the said recited policy of assurance, and pay or cause to be paid the yearly and other premiums, &c., and would not permit or suffer or do any act whereby the said policy might be forfeited or vacated," &c. The deed also contained a proviso, that, in case the defendant should neglect to pay the premiums, it should be lawful for the plaintiffs to pay the same, and to charge the payments so made upon the hereditaments thereby charged. The deed contained no covenant by the defendant to re-pay the plaintiffs the sums they might pay to keep the policy alive.—The defendant paid the interest and premiums regularly down to the year 1848, but since that time (there being then no possibility of his having any issue by his then wife) he had discontinued to pay the premiums. The annual premiums accruing up to the present time were placed to the credit of the office in an account kept by them, called their "Policy Premium Account," and regularly debited year by year by the office in the mortgage-account of the defendant, according to the practice of the office,—but the defendant had no notice of this course of dealing.—The plaintiffs having brought an action against the defendant upon his covenant for payment of the premiums, the defendant pleaded payment of 1*s.* into court.—Upon a special case stating these facts,—Held, that, assuming the plaintiffs to have paid the premiums, they were not entitled to more than nominal damages. —But, semble, that the course of dealing stated did not amount to evidence that they had paid them.

This action came on for trial at the sittings at Westminster after last Hilary Term, when a verdict was entered for the plaintiffs, by consent, subject to the opinion of the court upon the following case:—

The first count of the declaration stated that the defendant by deed of mortgage, —reciting that the plaintiffs and Edmond Wodehouse and Edward Wenman Martin (now respectively deceased) had, upon his application and request, agreed to advance and lend him the sum of 12,500*l.* upon the terms that the re-payment thereof, with interest for the same at the rate of 5*l.* per cent. per annum, but reducible as thereinafter mentioned, should be secured to them by a demise of the messuages, farms, lands, and hereditaments therein described for the term of ninety-nine years, if the defendant should so long live, and by a grant and conveyance of the remainder or reversion in fee of and in **[599]** the same hereditaments limited to him by a certain indenture of settlement therein mentioned, and also by the policy of assurance hereinafter mentioned, and also by the trusts, powers, provisoes, covenants, and agreements thereinafter contained; and also reciting, that, by a policy or instrument of assurance, under the hands and seals of three of the directors of the Norwich Union Life-Assurance Society, and numbered 22,109, and bearing date the 31st of May, 1841, the sum of 13,000*l.* had been assured to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, payable within three months after satisfactory proof of the death of the defendant, in case he should leave issue male by his then present wife living at his death, if the annual premium or sum of 260*l.* therein mentioned should be duly paid at or within the time therein appointed, and upon other the terms and conditions in the said policy expressed,—the defendant covenanted with the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, that he would from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, should remain due and owing on the said security, continue and keep on foot the benefit of the recited policy of assurance, and pay or cause to be paid the yearly and other premiums, or any extra premium or sum which ought to be paid, for the purpose of continuing and keeping on foot the benefit thereof, two days at least in every year before the same should become due, and would deliver the receipt or receipts for the same respectively, within five days after payment thereof, to them the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, and would not permit or suffer or do any act whereby the said policy might be forfeited or vacated by reason or means of his neglect, omission, commission, or default, nor do **[600]** or suffer or cause to be done any act, deed, matter, or thing whatsoever, whereby or in consequence of which any increased rate of premium should

become payable upon or in respect of the said policy, or whereby or in consequence whereof the same should be released or discharged, or the benefit thereof cease, determine, or be lessened, or the right of the said plaintiffs and Edmond Wodehouse and Edward Martin to receive the said sum of 13,000l. thereby secured be in any way affected, impeached, interrupted, or incumbered; And also that, by another deed of mortgage,—reciting that the defendant had occasion for, and, upon his application and request, the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin had agreed to advance and lend him, the further sum of 7500l., upon the terms that the re-payment thereof, with interest for the same at the rate of 5l. per cent. per annum, but reducible as thereinafter mentioned, should be secured to them by a further charge upon the hereditaments comprised in the deed in the first count mentioned, and also by the policy of assurance hereinafter mentioned; and reciting, that, by a policy or instrument of assurance, under the hands and seals of three of the directors of the Norwich Union Life-Assurance Society, No. 22,401, bearing date the 7th of February, 1842, the sum of 8000l. had been assured to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, payable within three months after satisfactory proof of the death of the defendant, in case he should leave issue male by his then present wife living at his death, if the annual premium or sum of 160l. therein mentioned should be duly paid at or within the time therein appointed, and upon other the terms and conditions in the said policy expressed,—the defendant covenanted with the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin that [601] he would from time to time during his natural life, and so long as the said sum of 7500l., or any part thereof, or any interest for the same, should remain due and owing upon the now reciting security, continue and keep on foot the benefit of the last-mentioned policy of assurance, and pay or cause to be paid the yearly and other premiums or any extra premium or sum which ought to be paid for the purpose of continuing and keeping on foot the benefit thereof, two days at least in every year before the same should become due, and should and would deliver the receipt or receipts for the same respectively, within five days after payment thereof, to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, and would not permit or suffer the said policy to be forfeited or vacated by reason or means of his neglect, omission, commission, or default, nor do or suffer, or cause to be done, any act, deed, matter, or thing whatsoever whereby or in consequence of which any increased rate of premium should become payable upon or in respect of the said policy, or whereby or in consequence whereof the same should be released or discharged, or the benefit thereof cease or determine or be lessened, or the right of the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin to receive the said sum of 8000l. thereby secured be in any way affected, impeached, interrupted, or incumbered: Averment, that the said principal sums of 12,500l. and 7500l. were still due and owing upon and by virtue of the said several deeds, and that the defendant did not continue and keep on foot the benefit of the said several policies, or either of them, or pay or cause to be paid the yearly premiums which ought to be paid for the purpose of continuing and keeping on foot the benefit thereof, but, on the contrary, neglected and refused to pay the said premiums, for divers, to wit, eight years next before this [602] suit, contrary to his covenant in that behalf; and that, by reason thereof, the same had severally been kept on foot by the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin in their life-time, and by the plaintiffs since their decease: and the plaintiffs claimed, by way of damages for the amount of the said annual premiums, and interest thereon, 30,000l.

The defendant, by J. L. T., his attorney, brought into court the sum of 1s., and said the same was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to.

The plaintiffs said that the sum was not enough to satisfy the claim of the plaintiffs in respect of the matter pleaded to by the defendant. Issue thereon.

The plaintiffs are, and were at the respective dates of the mortgages and policies in the declaration mentioned, trustees of the Norwich Union Life Assurance Society, and, as such, were parties to the said deeds and policies, although not so described in either. The full premiums payable in respect of the said two policies were paid by the defendant up to and inclusive of the year 1845. In that year, the directors of the said society consented, upon the application of the defendant, to reduce the future premiums by one half. The annual premiums on the policies so reduced were paid

by the defendant, either to the London agent of the society or to the secretary at Norwich, up to and inclusive of the year 1848. Since that time, no payment has been made on account thereof by the defendant, but the annual premiums accruing up to the date of this action have been placed to the credit of the said society in an account kept by them, called their policy premium account, and regularly debited year by year by the said society to the mortgage account of the defendant, according to the practice in their office. When a policy has become lapsed, or has been surrendered or **[603]** cancelled, the practice of the said society is, to make a note to that effect in the margin of the policy register-book; and, from that time, no entry or debit is made of the annual premiums. There is no evidence, save as appears herein, that the defendant had any notice or knowledge of the above-mentioned practice, or of the fact of its being acted upon. No such note has been made with reference to either of the policies in question: but, on the contrary, the annual premiums have been regularly credited and debited in manner hereinbefore mentioned; and, in the declaration of a bonus for the years 1851 and 1856, the said policies were treated in the books of the company as existing contracts, and proportionate additions made to each policy in the same manner as for the years 1841 and 1846. There is no evidence that the defendant knew that the policies were so treated.

The material provisions in the mortgage-deed (a copy of which accompanied and was to form part of the case) were as follows:—

"And the said Sir Robert Price doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said Horatio, Lord Walpole, Edmund Wodehouse, Edward Wenman Martin, and William John Utten Browne, their executors, administrators, and assigns, that he the said Sir Robert Price, his executors, administrators, or assigns, some or one of them, shall and will well and truly pay or cause to be paid unto the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, the said principal sum of 12,500*l.* and interest for the same at the rate of 5*l.* for 100*l.* for a year, on," &c.

"And further, that the said recited policy of assurance is a good, valid, and subsisting policy for the full **[604]** amount of the said sum of 13,000*l.* thereby secured, and that the said Dame Mary Ann Elizabeth Price, his wife, is now in the forty-fourth year of her age, and that she is not now enceinte; and that he the said Sir Robert Price shall and will from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, shall remain due and owing on this security, continue and keep on foot the benefit of the said recited policy of assurance, and pay or cause to be paid the yearly and other premiums, or any extra premium or sum which are or ought to be paid for the purpose of continuing and keeping on foot the benefit thereof, two days at least in every year before the same shall become due, and shall and will deliver the receipt or receipts for the same respectively within five days after payment thereof to them the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, their executors, administrators, or assigns, and shall not nor will permit or suffer or do any act whereby the said policy may be forfeited or vacated by reason or means of his neglect, omission, commission, or default, nor do or suffer, or cause to be done, any act, deed, matter, or thing whatsoever whereby or in consequence of which any increased rate of premium shall become payable upon or in respect of the said policy, or whereby or in consequence of which the same policy shall or may be released or discharged, or the benefit thereof cease, determine, or be lessened, or the right of the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, their executors, administrators, or assigns, to receive the said sum of 13,000*l.* thereby secured, be in any way affected, impeached, interrupted, or incumbered," &c.

"And also that, in case the said Sir Robert Price shall neglect or refuse to pay any such premiums as **[605]** aforesaid on the said recited policy, or to deliver the receipt or receipts for the same as aforesaid, or shall cause or suffer the said policy to be forfeited or vacated contrary to his covenant hereinbefore contained, it shall be lawful for the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, and the survivors and survivor of them, their or his executors, administrators, or assigns, to pay such premium as aforesaid, or, as the case may require, to effect any other policy or policies on the life of the said Sir Robert Price for any sum or sums of money not exceeding the said sum of 13,000*l.*, and to continue and keep on foot the

benefit of the said policy or policies respectively: and that all and every the sum and sums of money which shall be so paid by the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, for or in respect of the said recited policy, or of any such renewed policy or policies, or for or on account of such extra or additional premium or premiums as aforesaid, with interest for the same at the rate aforesaid, shall be and the same are hereby charged upon the said hereditaments hereby respectively demised and granted and conveyed, or intended so to be, and upon every such policy as aforesaid, and shall be raisable and payable and paid out of any moneys to arise or be received under or by virtue of these presents, or any of the powers or trusts hereinafter contained; and that the said hereditaments and premises, or the said policy or policies, shall not be redeemed or redeemable at law or in equity until payment to the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, not only of the said sum of 12,500l. and the interest thereof, but also of all such [606] sum or sums of money as they or he shall pay in respect of any such assurance or premiums as aforesaid, with lawful interest for the same."

The whole of the mortgage money, and a larger arrear of interest still remain due.

The following applications were made for interest and premiums, and the following answers returned:—

Sir Samuel Bignold to Sir Robert Price.

"Norwich, January 26th, 1850.

"My dear Sir Robert,—I am afraid you must be ill, or you would not have passed the time of payment of your interest without a word of remark. There is now, or in a few days there will be, a year due, besides an arrear of the insurance on the commuted scale. The directors remarked the other day on this state of things, and said some steps must be taken. I do not think there is any time to be lost, if you wish to prevent any interference of a receiver. Pray let me hear from you.—Yours faithfully, "Samuel Bignold."

Sir Samuel Bignold to Sir Robert Price.

"Norwich, May 17th, 1850.

"Dear Sir Robert,—The state of your account is so greatly out of order, the interest due in February last being still unpaid, that the directors will be certain to take some decisive steps, which I fear may be annoying to you: but I am altogether unable to stop it, except by the announcement that I have received 406l. 11s. The insurance premium on the reduced scale is long over due. -Yours truly,

"Samuel Bignold."

Sir Robert Price to Sir Samuel Bignold.

"May 25. Saturday evening.

"My dear Sir,—I am much obliged by the friendly [607] warning you have given me. It is too true that my difficulties are not yet over; for, the depression in that unfortunate iron trade is greater than ever, which makes it next to an impossibility for me to meet my engagements with that punctuality which I am well aware ought to prevail. I trust, however, I shall be able to make a remittance early in the next month: and, in the mean time, I hope for the continuance of that indulgence which I have before received from the directors. I write too late for the post: but I shall put it into the office, that it may go by the early mail on Monday. I should have written sooner, in reply to your obliging letter, but I was in hopes by this time to have been able to have sent accompanying draft.—Yours very truly,

"Robert Price."

Sir Robert Price to Sir Samuel Bignold.

"August 1, 1850.

"My dear Sir,—I send you 300l. on account: and I trust in the course of the week to forward the 106l. 11s. I am aware that even then I shall be indebted to the indulgence of your board: but indeed I believe, as it is the kindest, so it is the best course for them to pursue at the present time.—Yours very truly,

"Robert Price."

Lady Price has never had any issue, and has never been enceinte. She is now in the sixty-first year of her age.

In the year 1849, the defendant stated to the directors of the Norwich Union Office, that, in his opinion, there was no possibility of his wife, who was then in the fifty-third year of her age, having any issue, and requested them to forego the payment of any further premiums; but the directors refused so to do, and also **[608]** refused to make any further reduction in the rate, and insisted on the policies being maintained at the rate settled in 1845. The defendant died on the 5th of November, 1857; but this fact is not to prejudice the proceedings in the action.

The question for the opinion of the court is, whether the plaintiffs are, under the circumstances, entitled to recover in this action more than nominal damages: if not, the verdict to be entered for the defendant; if they are, the verdict for the plaintiffs is to stand, for such sum as the court shall think fit. The court is to have the same power of drawing inferences as a jury.

Lush, Q. C. (with whom was Cleasby), for the plaintiffs (*a*). The true measure of damages in this case is, the amount of the premiums stipulated for by the policy. The position of the plaintiffs is this, they have kept alive the policy against themselves, so that, if the event insured against happened, they would have been called upon to pay the 13,000*l*. The only measure of damages must be what the parties themselves have agreed for. If the policy had been effected in any other office, and the plaintiffs had paid the premiums, the measure of damages clearly would have been the amount they had paid. [Williams, J. Suppose there were two covenants,—one to pay the premiums,—the other that the covenantees might pay them on the default of the covenantor, and recover the amount from him: if the covenantees entitled themselves to claim upon the second covenant, could they recover more than nominal damages upon the first?] That would be like the case of *Warburg* v. *Tucker*, 5 Ellis & B. 384, where the court **[609]** of Queen's Bench held that the plaintiff was entitled to recover in respect of both covenants. [Williams, J. The ground of the decision there was, that the bankruptcy and certificate of the covenantor did not discharge him from the plaintiff's claim for a breach of either covenant,—the sum not being a debt payable upon a contingency within the 177th section of the bankrupt act, 12 & 13 Vict. c. 106, nor a liability to pay money upon a contingency within s. 178. In *Young* v. *Winter*, 16 C. B. 401, where the covenants were similar, this court held that the defendant was discharged, by virtue of ss. 178, 200, from liability for the breach of the first covenant, but not as to the second. In the course of the argument in the latter case, Maule, J., observes,—"Suppose the second covenant had not been there at all, the non-payment of the premiums by the bankrupts would have been a breach of the first covenant. What damages would the plaintiff have been entitled to in that case?" According to the report in 16 C. B. 417, the answer given by the learned counsel was, "Nominal damages would be all he could recover on the first breach." In the report in the 24 Law Journ., C. P. 217, the answer is thus stated,—"Only the sum actually paid by the plaintiff to keep the policies on foot."] As reported in the last-mentioned book, the counsel is made to say precisely what the contention here is, viz. that there was a fixed and ascertained amount of damages. In *Warburg* v. *Tucker*, the court of Queen's Bench held that neither claim was provable. The Exchequer Chamber gave no judgment as to the second covenant, and the record now stands with a judgment on the first (which is like the covenant here), with damages to the full amount of the premiums.* [Crowder, J. The amount of damages was not before the court of error. Williams, J. They were assessed by consent.] All we know of the case is, that **[610]** the plaintiff's claim was not confined to nominal damages. [Williams, J. If it is to be taken that the defendant was liable for the amount of the premiums paid, the decision that it was not a contingent liability to pay money was wrong. The case, however, is no authority at all. We do not know, neither did the Exchequer Chamber, what the circumstances were.] The plaintiffs, it is submitted, are entitled to a full indemnity for having kept the policy alive. [Crowder, J. How do they keep the policy alive?]

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—"That the proper measure of damages is the amount of the premiums in arrear, and interest thereon at 5*l*. per cent. per annum."

* See *Warburg* v. *Tucker*, 28 Law J., Q. B. 56.

By doing that which is equivalent to payment of the premiums. They credit the premium account and debit themselves. It is the same as if they had lent the money to Sir Robert Price with one hand, and received it from him with the other. The damages, therefore, which they have sustained are, the aggregate of the premiums which he had agreed to pay for the risk which they have undertaken. [Crowder, J. What difficulty was there in inserting a covenant to re pay?] This, it is submitted, is a covenant to re-pay. Sir Robert Price covenants to pay the annual premiums; and the plaintiffs have a remedy, in case of default, by charging the payments to the land. If the policy takes effect, the land is of no value.

Manisty, Q. C. (with whom was Russell), contrà (*a*). The covenant is, to continue and keep on foot the benefit of the policies, and pay or cause to be paid the yearly or other premiums for that purpose; and the breach assigned is that the defendant did not continue and keep on foot the benefit of the policies, or pay or [611] cause to be paid the premiums, by reason whereof they had been kept on foot by the plaintiffs. Now, what damages have the plaintiffs sustained by keeping the policies on foot? They have paid nothing; they have merely made certain entries in a ledger. What is the value of the risk which the plaintiffs have incurred in consequence of the defendant's failure to keep the policies on foot? Absolutely none. By the terms of the policy, the company were to pay 13,000*l.* in the event of Sir Robert Price dying and leaving a son by his then wife, whose age, as stated in the case, was fifty three. If Lady Price had been eighty-three, it would have been all the same: the damages never would have been diminished by the diminution of the risk. The case which approaches nearest to this is, *The National Assurance and Investment Association* v. *Best*, 2 Hurlst. & N. 605. There, the plaintiffs lent the defendant 600*l.* on the security of an indenture whereby two policies of insurance were charged with the payment of the principal money and interest. The indenture contained a covenant by the defendant to pay the premiums of the policies. By their terms, the policies only remained in force provided the premiums were paid every year. The defendant paid the first year's premium only, and the plaintiffs sued him on his covenant for non-payment of the three subsequent years' premiums: and the court held, that, as it did not appear that the plaintiffs had sustained any loss by the defendant's neglect to keep up the policies, the measure of damage was not the amount of the three years' premiums, but that the plaintiffs were entitled to nominal damages only. Pollock, C. B., in giving judgment, there says: "It is clear that the amount of the premiums is not the criterion of damage. The premiums not having been paid by the covenantors, if the covenantees had paid them in order to keep up the [612] policy, or, for their own security, had effected another policy, there might have been ground for substantial damages; but here there was nothing but the loss of the security; and it does not appear that any actual injury was sustained by the plaintiffs in consequence of that. The plaintiffs have not put us, nor did they put the jury, in a situation to estimate what damages they are entitled to, if the amount of the premiums does not furnish the criterion. As the court cannot substitute any other measure of damages, we think that on the first count the plaintiffs are entitled to nominal damages only." [Williams, J. The difficulty I feel is, that the plaintiffs have done nothing under the authority of the defendant: but, what they have done is pursuant to the provisions of the mortgage deed. I think their only remedy is that which is pointed out by the deed. We must hear what Mr. Lush has to say upon this point.]

Lush. The defendant covenants absolutely to keep alive the policies, and to pay the yearly premiums. It is as if he had covenanted to pay the plaintiffs a given sum every year so long as the mortgage debt should remain unpaid, in which case it is clear that the plaintiffs would be entitled to recover what the defendant had agreed to pay. [Willes, J. The covenant is, for payment of the premiums to the Norwich Union Life-Assurance Society, not to the plaintiffs.] The plaintiffs are the representatives of the Norwich Union Life-Assurance Society. The case so finds. Although technically called damages, the sum the plaintiffs are entitled to recover in the action would be the amount of the premiums. [Williams, J. According to your argument,

(*a*) The point marked for argument on the part of the defendant, was, "That the plaintiffs are only entitled to nominal damages, and that, having paid 1*s* into court, judgment ought to be given in his favour."

the plaintiffs might recover the amount of the premiums in this action, even though the mortgage might be an ample security.] That no doubt is so. But the stipulation **[613]** that the plaintiffs should be at liberty to add to the mortgage-debt the amount of any premiums they might pay for the purpose of keeping the policies on foot, cannot affect the construction of the defendant's absolute covenant to pay the premiums himself for that purpose. The same argument would equally apply to the covenant for payment of the interest on the sums advanced. [Crowder, J. All difficulty would have been avoided if the deed had contained a covenant on the part of the defendant to re-pay any premiums which the plaintiffs might be called upon to pay.] The question is, whether such a covenant was necessary. The covenant of the defendant to pay the premiums gives the plaintiffs, without more, authority to keep up the policies if the defendant omits to do so. In the case of a mortgage of a leasehold house, with an assignment of a fire-policy, and a covenant by the mortgagor to keep up the policy, the mortgagee would be entitled to pay the premium if the mortgagor failed to do so (*a*), and the amount paid by him for that purpose would be the measure of damages in an action for the breach of that covenant. What distinction is there between that case and this? In *Hey* v. *Wyche*, 2 Gale & D. 569, the plaintiff, a lessee under covenant to insure against fire in his own name and that of the lessor jointly, assigned to the defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire-policy which had been effected, the plaintiff effected a fresh one, but in his own name only. No fire happened. The plaintiff brought covenant against the defendant for neglecting to insure; and the defendant pleaded payment of one farthing into court. The court of Queen's Bench held, that, though the plaintiff **[614]** had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to which he had been exposed by the defendant's default. [Williams, J. That is a very odd case. What materials has the court for estimating the damages between nominal and the amount of the premiums?] Suppose, in the case put, the premises were destroyed by fire, and neither party had kept up the policy,—might not the jury, in an action against the mortgagor upon his covenant, reasonably say that the mortgagee was not entitled to recover the full value because he had omitted to avail himself of the alternative of keeping up the policy himself? The circumstance of the deed in this case providing a cumulative remedy cannot affect the construction of the other covenants. [Crowder, J. Then you would say that a covenant by the mortgagor to re-pay, would be mere surplusage?] It would be unnecessary, in a case like this; though *Warburg* v. *Tucker*, 5 Ellis & B. 384 shews that in some cases it might be useful.

Williams, J. I am of opinion that the defendant is entitled to judgment in this case, —that is to say, I am of opinion that no further damages are recoverable in this action than the nominal damages which have been paid into court. The case has been presented by Mr. Lush in two points of view. He has contended, in the first place, that the covenant for the breach of which the action is brought ought to be regarded as a covenant to pay the annual premiums to the plaintiffs, and that the measure of damages for a failure to pay such premiums would be the amount of the premiums themselves. I am clearly of opinion that this covenant cannot either directly or indirectly be looked upon as a covenant to pay the premiums to the plaintiffs, because **[615]** the plaintiffs themselves are the assured in the policy. There can be no substantial difference between the case as it now stands and what it would have been if the policy had been effected with a third party, and the defendant, having assigned the policy to the plaintiffs, had covenanted to keep it up. The plaintiffs, as it seems to me, stand precisely in the same position, as regards the question before us, as if they had been the assignees of a policy, with the usual covenant on the part of the assignor to keep the policy alive by payment of the premium. That being so, the question is what damages have the plaintiffs sustained by the breach of that covenant? Treating it as a covenant to pay the premiums to a third party, Mr. Lush's argument is this,—that the position of the plaintiffs is analogous to that of the mortgagee of a house, the mortgage being to secure a debt, and, being

(*a*) He might be bound to do so, as well as to repair the premises, pursuant to the covenants of the mortgagor's lease.

accompanied by an assignment of a policy of insurance, with a covenant on the part of the debtor to keep the policy on foot: and it is said, that, in that case, if the mortgagee, on the default of the mortgagor, were to pay the premiums, he might in an action upon the covenant recover the amount he had paid for that purpose. It is further urged, that, in substance, that which was done by the plaintiffs here amounts to payment of the premiums, and that the damages must be measured by the payments so made. It is unnecessary to decide whether, contrary to the wishes, or without the authority, of the debtor, the creditor has a right to pay the premiums and claim to recover the amount as damages, or whether the debtor has not a right to say that he elects to allow the security to drop, because here the deed has provided for the very thing which has happened. This is not like the case where the exact sum paid by the assignee for premiums would be recoverable, as, where the assignment contains, besides the cove-[616]-nant by the assignor to pay the premiums, a further covenant, that, on failure of the assignor to make the payments, the assignee may make them for him and be reimbursed. So far from its being a case of that sort, the silence of the deed in that respect, and the provision that a particular mode shall be adopted for securing to the plaintiffs the sums they may pay for keeping the policies alive, amount in effect to an agreement that those sums shall not be re-paid, but shall be tacked to the mortgage-debt. It seems to me that the parties having prescribed what shall be the consequences which are to result from a failure on the defendant's part to perform his covenant to pay the premiums, the plaintiffs' remedy must be confined to that, and that they cannot sue for the sums they have paid, but can only treat them as part of the mortgage-debt.

Crowder, J. I also am of opinion that our judgment must be for the defendant. I can see nothing to entitle the plaintiffs to recover any further damages in respect of the breach of covenant declared on than the sum which has been paid into court; and I rest my judgment entirely upon the language of the deed. In the first place, I think, we must look at the case as if the insurance had been effected with another office, and the plaintiffs, as assignees of the policy, had paid the premiums on the defendant's default. The omission of the defendant to keep the policy on foot, undoubtedly was a breach of his covenant, for which the plaintiffs would be entitled to maintain an action. But, when we are considering what damages the plaintiffs are to recover, we must not overlook the other provisions of the deed. It is commonly the case, that, in addition to the covenant on the part of the assignor to keep up the policy, a power is reserved to the assignee himself to pay the premiums on the assignor's default, and a [617] further covenant on the part of the latter to re-pay the sums which should be so paid by the former. If the deed now under consideration had contained such a covenant as that, the plaintiffs would have been entitled to recover all sums necessarily expended by them for the purpose of keeping the policy alive. But not only does this deed contain no such covenant, there is an express stipulation, that, in case the defendant shall neglect to pay the premiums, it shall be lawful for the plaintiffs to pay them, and that the sums so paid shall be charged upon the hereditaments conveyed, and be payable and paid out of any moneys to arise or be received under or by virtue of the mortgage-deed. It has been urged by Mr. Lush that this was merely intended as an additional security. But, looking at the deed, it appears to me that the intention of the parties evidently was, to provide that, if the defendant should make default in payment of the premiums, the plaintiffs might pay them, but not that they should have a right of action against him to recover back the sums so paid, but merely that they should be at liberty to add the amount of such payments to the mortgage security. I therefore think our judgment must proceed upon the apparent intention of the parties, and the absence of the covenant to re-pay, which is usually found, and the presence of the stipulation I have last adverted to.

Willes, J. I am entirely of the same opinion. It seems to me that the true construction of the deed puts an end to all dispute, even assuming that that which was done by the plaintiffs amounts in point of law to payment of the premiums. As to that, I desire to be understood as declining to express any opinion: and I believe that my learned Brothers do not intend that the judgment of the court should be taken as a de-[618]-cision that there has been a payment, but that, assuming there had been a payment, the plaintiffs were not entitled upon this covenant to recover back the amount.

Williams, J., and Crowder, J., intimated that they had not thought it necessary

to consider whether or not that which was done by the plaintiffs amounted to payment.

Judgment for the defendant.

SHERIDAN *v.* THE NEW QUAY COMPANY. July 5th, 1858.

[S. C. 28 L. J. C. P. 58; 5 Jur. N. S. 248. Applied, *Biddle* v. *Bond*, 1865, 6 B. & S. 232. See *Seagrave* v. *Union Marine Insurance Company*, 1866, L. R. 1 C. P. 320.]

A., who resided at Manchester, contracted to buy of B., at Dumfries, a quantity of oak-bark, to be shipped "for delivery at Liverpool." B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash; and B. sent a bill of lading, making it deliverable to "A. or his assigns," together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester were unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding they had received the bark to be carried for the plaintiff, to set up the title of B., in an action brought against them by the plaintiff.

The first count of the declaration stated, that the defendants were common carriers of goods for hire from Liverpool to Manchester, and that the plaintiff, by certain persons as his agents, caused certain goods to be delivered to the defendants as such carriers, to be carried from Liverpool to Manchester, and there delivered by the defendants according to the order of the agents [619] of the plaintiff; that the defendants received the goods, and that the agents of the plaintiff ordered the defendants to carry the goods to Manchester, and there deliver them to the plaintiff; and that, although a reasonable time had elapsed for the delivery of the goods, the defendants had not delivered them, and unjustly withheld them from the plaintiff.

The second count was in trover, for the conversion of oak-bark.

The defendants pleaded, to the first count,—first, a denial that the plaintiff delivered the goods to the defendants, or that the defendants received the goods, in manner and form as alleged,—secondly, a denial that the agents of the plaintiff ordered the defendants to carry and convey and deliver the goods as alleged,—thirdly, a denial that the plaintiff was ready and willing to accept the goods, or to pay the reward payable on the delivery of the goods,—fourthly, a denial of the breach,—fifthly, a special plea, that the goods, at the time of the delivery and receipt of them, were the proper goods of Messrs. George and James Donaldson, of Corsock, near Dumfries, in Scotland, timber-merchants: and that they were induced to part with the possession of them, and caused the same to be delivered to the defendants as alleged, for the plaintiff, under a colourable and fictitious sale and purchase thereof on the part of the plaintiff from the said Messrs. Donaldson, and by and through the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; and that, before any breach of the alleged contract in the first count mentioned, Messrs. Donaldson stopped the goods in the hands of the defendants, and gave notice to the defendants not to deliver them to the plaintiff, but to return them to Messrs. Donaldson, and that the defendants returned the goods to Messrs. Donaldson accordingly.

[620] The defendants pleaded to the second count,—first, not guilty,—secondly, that the goods were not the plaintiff's goods.

The plaintiff joined issue on these several pleas.

The cause came on to be tried at Liverpool, before Crompton, J., when a verdict was found for the plaintiff, subject to the following case:—

The plaintiff is a commission agent an Manchester. The defendants are common carriers of goods for hire between Liverpool and Manchester: and the plaintiff seeks to recover from the defendants the value of a quantity of oak-bark, under the following circumstances:—

In May, 1856, a person named Isaac Cooper, who was then residing in Manchester, inserted an advertisement in the papers, for oak-bark; and, in consequence of that advertisement, the following correspondence took place between Messrs. Donaldson and Isaac Cooper.

"Mr. Isaac Cooper. "Corsock, by Dumfries, 30th May, 1856.

"Sir,—In reference to your advertisement for oak-bark, we beg to inform you that we can supply you with, say from 30 to 40 tons (of 20 cwt.) put free on board at Tongland, near Kirkcudbright, for 5l. 5s. per ton.

"For G. & J. DONALDSON,
"JAMES M'PHERSON."

"Messrs. G. & J. Donaldson. "Manchester, 2nd June, 1856.

"Gentlemen,—Your letter of the 30th ult. came duly to hand. If the oak-bark is strictly in accordance with the advertisement, I will take the quantity mentioned in your letter: but allow me to suggest I think your price is to the full extent. You may, therefore, put on board the quantity, to be shipped for delivery at Liverpool, and I will give instructions to my agent there to [621] receive the same. Waiting to hear from you as to the time you make the shipment, and I shall make arrangements respecting payment thereof,—Your obedient servant, "ISAAC COOPER."

"Mr. Isaac Cooper. "Corsock, by Dumfries.

"Sir,—We have received your letter of the 2nd instant. With regard to the quality of the bark, we may state that the wood is good and healthy, and from sixty to seventy years' growth. It is to be understood that the bark is to be taken delivery of when shipped; and the time of shipping to be 'twixt 20th July and not later than the middle of August.

"For G. & J. DONALDSON,
"JAMES M'PHERSON."

"P.S.—Will be shipped either at Tongland or Pancakie, the freight being the same from both."

"Mr. Isaac Cooper. "Corsock, by Dumfries, 12th June, 1856.

"Sir,—I expected to have had a reply to my letter of the 5th instant regarding the bark ere this time, and will feel obliged by your doing so in course of post, as other parties are applying. I may state that my usual terms of payment are cash on delivery: but, not having the pleasure of your acquaintance, I have no objection to make payment against bill of lading, by your sending me a reference.

"For JAMES DONALDSON,
"JAMES M'PHERSON."

"Mr. Donaldson. "Manchester, 14th June, 1856.

"Sir,—I duly received yours of the 12th instant. In reply beg to state that absence from home prevented me answering yours of the 5th earlier: but, however, [622] with respect to reference, beg to refer you to Mr. James Wrigley, merchant, Hulme, near Manchester, who will no doubt satisfy you as to my respectability. But I consider the best reference to be cash, which I shall remit you prompt on receipt of the bark. "ISAAC COOPER."

"Mr. Isaac Cooper. "Corsock, by Dumfries, 16th June, 1856.

"Sir,—I have received your letter of the 14th instant, but you do not state whether you are to engage a vessel yourself for shipping the bark, or whether you wish me to do so. You will notice, from ours of the 30th ult. and 12th inst., that

our offer is 5l. 5s. per ton of 20 cwt. put free on board either at Tongland or Pancakie. But, if you wish me to engage a vessel for you, I will do so as reasonable as I possibly can. Please to write as to this by return of post, as part might be shipped this month, if you wish.

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

"Mr. James Donaldson. "Manchester, 19th June, 1856.

"Sir,—Yours of the 16th inst. is duly to hand. In reply, I beg to say that you had better engage a vessel for me at as reasonable a rate as you possibly can: and, with respect to the shipping a part this month, I should prefer your doing so if convenient: and, as regards our former correspondence, which you mentioned in yours, I perfectly understand it, and that our agreement is 5l. 5s. per ton, shipped at either of the places you name,—at that which is most convenient for you.

"ISAAC COOPER."

"Mr. Isaac Cooper. "Corsock, by Dumfries, 5th July, 1856.

"Sir,—I have engaged a vessel, the 'Mart,' of Perth, [623] to load with oak-bark for you at 20l. freight. She carries 72 tons dead weight. I expect to have her loaded about the middle of the week. You will, therefore, please write me on receipt the name of the party the captain is to call upon, on arriving in Liverpool.

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

"Mr. James Donaldson. "Manchester, July 8, 1856.

"Sir,—In reply to yours of the 5th inst., beg to inform you that the captain is to deliver the oak-bark to the New Quay Company, carriers to Manchester, who will pay the captain his freight: and please to say when the vessel will be likely to arrive in Liverpool, as every attention shall be paid mean time. "ISAAC COOPER."

"Mr. Isaac Cooper. "Corsock, 9th July, 1856.

"Sir,—I have received yours of yesterday's date. Should the wind be northerly, the vessel will arrive at Liverpool with bark the beginning of next week.

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

Messrs. Donaldson engaged the "Mart" for Cooper, as stated in their letter of the 5th of July, to take a little less than twenty four tons of the bark to Liverpool; and, the bark having been loaded on board the "Mart," on the 12th of July procured the master to sign the following bill of lading,—

"Shipped by the grace of God, in good order and well conditioned, by G. & J. Donaldson, in and upon the good ship or vessel called the 'Mart,' of Perth, whereof is master for this present voyage John Amess, and now lying in the harbour of Pancakie, bound for Liverpool, [624] to say, cargo of oak bark, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Liverpool (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted) unto Isaac Cooper or to assigns, he or they paying freight for the said goods. Pay the master in full of freight 20l. sterling, with primage and average accustomed. In witness whereof, the master or purser of the said ship or vessel hath affirmed to one bill of lading, &c. Dated, &c.

"JOHN AMESS (quantity unknown)."

Cargo of oa bark, 23 tons, 18 cw 2 qrs., 7 lb

Three clea days to be allowed fo dischargin Demurrag at the rate of 30s. per day after.

Messrs. Donaldson afterwards drew a bill on Cooper for 125l. 12s., "value in oak-bark," payable on demand.

Messrs. Donaldson delivered the bill of lading and the draft to the Union Bank of Scotland, at Castle Douglas, to be transmitted to Manchester: and the Union Bank of Scotland, accordingly, on the 14th of July, 1856, transmitted the bill of lading and the draft to the Manchester and Salford Bank. Messrs. Donaldson also sent to Isaac Cooper the following invoice:—

"Corsock, by Dumfries,
"14th July, 1856.

"Mr. Isaac Cooper, Knot Mills, Great Bridgewater Street, Manchester,
"To G. & J. Donaldson.

"Shipped by the ship 'Mart,' of Perth, 23 tons, 18 cwt., 2 qrs., 7 lbs., at 105s. per ton, £125 12s. 11d."

Mr. Cooper sent the following letter to Mr. James Donaldson :—

"Knot Mill, Great Bridgewater Street,
"Mr. James Donaldson. "Manchester, 16th July, 1856.

"Sir, Yours is duly to hand this morning. Also [625] your letter of the 9th was received in due course. I am expecting to hear by an early post of the arrival of the vessel in Liverpool, although the wind has not been favourable since Sunday night, which accounts for the delay. "Isaac Cooper."

On the receipt of the draft, the Manchester and Salford Bank made every inquiry for Cooper, both in Great Bridgewater Street and in Knot Mill and the neighbourhood, in order to present the draft to him for payment; but the bank was unable to obtain any information whatever about Cooper; and thereupon the bank returned the draft along with the bill of lading to the Union Bank of Scotland, by whom it was delivered to Messrs. Donaldson.

On the 14th of July, 1856, Isaac Cooper sent to the defendants (the New Quay Company), at Liverpool, the following letter :—

"Knot Mill, Great Bridgewater Street,
"Manchester, 14 July, 1856.

"Gentlemen,—I have a cargo of bark from Dumfries shipped by the 'Mart,' of Perth, vessel, which I expect in daily, and have ordered to come into your hands. The captain's charge for freight is 20l., which I will remit you, or send, as soon as she comes to Liverpool, with further instructions. Be good enough to inform me of the arrival. "Isaac Cooper."

About the same 14th of July, one G. D. Thomas, as agent for Isaac Cooper, applied to the plaintiff, in Manchester, to advance the freight of some bark which was coming from Scotland to Liverpool. Thomas saw the plaintiff two or three times on the subject; and, ultimately, on Tuesday, the 15th of July, the plaintiff agreed with Thomas to advance 20l. through the plain-[626]-tiff's agents, Buchanan & Co., of Liverpool, to pay the freight of the bark, on having the bark transferred to his order. On the same day, Isaac Cooper was introduced to the plaintiff (who had no previous acquaintance with him) at Manchester; and the plaintiff informed him that he had agreed to advance (through his agents, Buchanan & Co., of Liverpool,) 20l. for the freight of the bark, on having the bark transferred to his order. Isaac Cooper then offered to sell the bark to the plaintiff. The plaintiff inquired the value of the bark, and Cooper informed him that he had purchased it at 5l. 5s. per ton; and he produced and delivered to the plaintiff Messrs. Donaldson's invoice of the bark, dated the 14th July, and left it with him. The plaintiff then offered to give Cooper 10s. per ton advance on the invoice price. Cooper said he would let the plaintiff know; but no agreement for the sale of the bark from Cooper to the plaintiff was concluded on that day.

On the 17th of July, the "Mart" arrived in Liverpool, with the bark on board; and the master reported his arrival to Mr. Matton, the agent of the defendants, in Liverpool. Mr. Matton the same day wrote a letter to Isaac Cooper in Manchester, informing him of the arrival of the vessel with the bark; and Cooper sent to Mr. Matton by post, the following letter :—

"Knot Hill, Great Bridgewater Street,
"Manchester, 17 July, 1856.

"Gentlemen, - Your note of to-day came duly to hand, of the arrival of the vessel laden with bark for me I have ordered Buchanan & Co. to call on you to pay freight, &c.; and you may act by their instructions. "Isaac Cooper."

The Buchanan & Co. mentioned in the above letter consisted of a Mr. John Buchanan, who carried on busi-[627]-ness as an agent in Liverpool, and who had been in the habit of acting as agent for the plaintiff in Liverpool, and who was acting as agent for the plaintiff on this occasion. The plaintiff had, previous to the arrival of the bark in Liverpool, informed Mr. John Buchanan that he had a cargo of bark coming from Scotland to Liverpool; and the plaintiff had also informed Isaac Cooper that Mr. John Buchanan was the person who would act as his agent at Liverpool, and who would pay the freight of the bark.

On Saturday the 19th of July, the plaintiff had an interview with Isaac Cooper at Manchester; and it was then agreed between them that the plaintiff should buy the bark of Cooper at an advance of 10s. a ton on the invoice price; and Isaac Cooper left Messrs. Donaldsons' invoice of the bark with the plaintiff. Isaac Cooper the same day sent the following telegram to the defendants, at Liverpool:—

"Please to transfer the bill of lading belonging to me to Buchanan & Co., 9 North John Street, Liverpool."

After Mr. Matton had received the telegram on the 19th of July, Mr. John Buchanan called upon him, and asked him whether he had got a communication from Cooper, to hold a quantity of bark at his disposal. Matton said he had got, first a letter authorising him to hold the bark at Buchanan's disposal, and that he had that day also received a telegraph message to hand over a bill of lading. Buchanan said that he did not know there was a bill of lading; but he should require something to shew the captain before he could get possession. Buchanan wished the bark to be taken to Manchester, and the freight to be paid there; but Matton said that the freight must be paid in Liverpool. Buchanan asked Matton to give an order on the cap-[628]-tain. Matton then, in Buchanan's presence, and at his request, wrote and delivered to Buchanan the following order:—

"Liverpool, July 19th, 1856.

"To captain and owners of the 'Mart,' of Perth.

"You will please deliver to the order of Messrs. Buchanan & Co. the cargo of bark per said vessel, from Dumfries, they paying all expenses of freight, &c.

"For THE NEW QUAY COMPANY,
"JOSEPH MATTON."

Mr. John Buchanan went to Manchester the same evening, and forwarded the order to the plaintiff's residence, with a note informing him that the bark could not be delivered unless the freight was paid, and afterwards returned to Liverpool. On Monday morning, the 21st of July, the plaintiff transmitted 20l. in notes to Mr. John Buchanan in a parcel to Liverpool, and also sent him back the order on the captain.

Mr. James Donaldson arrived at Liverpool on Saturday the 19th of July.

On Monday the 21st, after Mr. John Buchanan had received from the plaintiff the 20l. and the defendants' order, Mr. James Donaldson and Mr. John Amess (the master of the "Mart") called together on Mr. John Buchanan. The master asked Mr. John Buchanan to give him a little money on account of the freight. Mr. Buchanan said he was prepared to pay all the freight. Mr. Buchanan asked the master where the bill of lading was. The master said he did not know where it was, though he had signed one; but that here was the master of the bark, meaning Mr. Donaldson. Mr. Donaldson said that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. Mr. Buchanan said the thing was all right; he had the freight in his pocket. Mr. Buchanan then made an ap-[629]-pointment for them to meet him at the defendants' office at half-past two in the afternoon. The master accordingly met him at the defendants' office; but Mr. Donaldson did not accompany him. The master produced the following order:—

"The New Quay Company, carriers to Manchester, on behalf of Mr. Isaac Cooper.

"Corsock, 12th July, 1856.

"Gentlemen,—Please to pay Mr. John Amess the sum of 20l. sterling, in full of freight of bark per sloop 'Mart.'

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

Mr. Buchanan paid the master the 20l. for the freight; and the following receipt was written across the last-mentioned order, and signed by the master, and a receipt stamp affixed to it, –"Received from Messrs. Buchanan & Co. the sum of twenty pounds, as freight (on the bark) per sloop 'Mart,' of Perth.

"£20. "JOHN AMESS."

Mr. Buchanan then shewed Mr. Matton the last-mentioned order and receipt, and asked Mr. Matton if he could take the bark up for Mr. Sheridan to Manchester, and stow it for him there. Mr. Matton told him he could. Mr. Buchanan then wrote the following directions across the defendants' order of the 19th of July, –

"The New Quay Company will please to forward the cargo of bark per 'Mart,' of Perth, to Manchester, and there to warehouse it for Mr. John B. Sheridan, 34 Cannon Street, Manchester, or his order, and please to pay the charges thereon, the freight being paid here, on his account, by us, and oblige,

"BUCHANAN & Co.,
"9 North John Street."

[630] Mr. Buchanan left that order with Mr. Matton.

On the 22nd of July, the plaintiff, at Cooper's request, paid Cooper 21l., and took from him a receipt for 41l. as paid on account of freight and expenses of oak-bark.

The plaintiff had not heard there was any dispute about the bark at the time he paid the 41l.

On the 23rd of July, about two-thirds of the bark was removed from the "Mart" into one of the defendants' boats, to be taken to Manchester.

After this had been done, the master of the Mart, and some one else, called on Mr. Matton; and the master asked Mr. Matton if the bill of lading had come to hand. Mr. Matton said he was not aware there was one. The master then told Mr. Matton he could not have the bark, and what had been put into the boat must be taken out, and that he should take back what was in the boat unless Mr. Matton would produce the bill of lading. Mr. Matton said that would be a great trouble and annoyance; and asked if there was no other mode of arranging it. The master then went away and saw the ship-brokers, and subsequently returned to Mr. Matton with a letter, and said that Mr. Matton could take the remainder of the bark and all of it to Manchester, subject to his order. The master then delivered to Mr. Matton the following letter:—

"Mr. Joseph Matton, agent for the New Quay Company.

"Liverpool, 23rd July, 1856.

"Sir,—I request that you will not deliver the cargo of bark received by you this day from the sloop 'Mart,' Dalbealtie, until the bill of lading signed by me for the same is produced by the party applying for the said bark on its arrival at Manchester.

"JOHN AMESS, Master."

[631] Mr. Matton assented to the terms of the said letter. The residue of the bark was then unloaded into the defendants' boat; and the defendants' boat, with the bark on board, left for Manchester on the same 23rd of July.

In the boat's manifest, the bark was entered as consigned to the plaintiff, or his order. Mr. Matton, on the same 23rd of July, wrote and sent to Isaac Cooper, by the post, the following letter:—

"Mr. Isaac Cooper. "Liverpool, July 23rd, 1856.

"Sir,—We are sending forward the bark ex 'Mart' to the address of Mr. John B. Sheridan, Manchester, by order of Messrs. Buchanan & Co.; and I have to inform you that, no bill of lading having yet been presented, the captain has given us a letter requesting that we do not deliver the said bark until the bill of lading signed by him be produced.

"For THE NEW QUAY COMPANY,
"J. MATTON."

On the 24th of July Mr. Donaldson telegraphed from Castle Douglas to Messrs. Wilson & Co., his agents in Liverpool, to stop the bark; having previously, on the same day received the draft and bill of lading returned from Manchester.

The plaintiff first heard that the defendants refused to deliver the bark to him on

the 24th of July; and he then instructed Mr. Buchanan to call on Mr. Matton and ask the reason why they would not deliver the bark. Mr. Buchanan, accordingly, on the 25th of July, called on Mr. Matton, and asked him why the New Quay Company would not deliver the bark according to his orders; when Mr. Matton said there was some dispute about the ownership of the bark, and took Mr. Buchanan up stairs to see Mr. Hall, the Manchester [632] manager for the defendants. Mr. Buchanan told Mr. Hall that it was unreasonable detaining the goods after receiving them from the plaintiff. Mr. Hall said the goods were obtained by fraud, and advised Mr. Buchanan to have nothing to do with the matter. Mr. Buchanan told him that he had no interest in the matter further than acting as agent for the plaintiff. Mr. Hall then asked Mr. Matton to bring up the company's order with Mr. Buchanan's cross order upon it. Mr. Hall read the order over, and said it was all right as far as that was concerned. The plaintiff subsequently instructed his attorney to apply to the defendants on the subject; and Mr. Potter, his attorney, wrote and sent to Mr. Hall, the defendants' manager at Manchester, the following letter:—

"13 Cooper Street, Manchester,
"The New Company. "26th July, 1856.

"I have been instructed by Mr. Sheridan to state, that, unless you immediately deliver to him the bark forwarded by your company to his order by Messrs. Buchanan & Co., of North John Street, Liverpool (your charges upon which he is prepared to pay, as already intimated to you), he will hold you responsible for all damages he may sustain, and commence legal proceedings against you without further notice.

"MICHAEL POTTER."

To this, Mr. Hall, on the part of the defendants, returned the following answer:—

"New Quay Company,
"Water Street, Manchester,
"28th July, 1856.

"Sir,—In reply to yours of the 26th instant, I beg to inform you that I have prior instructions to hold the [633] bark to order of consignors until the production of the bill of lading.

"WILLIAM HALL."

The bark arrived in Manchester on the 24th of July, and was warehoused by the defendants in one of their warehouses at Manchester. On the 29th of July, 1857, Mr. James Donaldson agreed to sell the bark to Mr. Middleton, a tanner, in Manchester, at 6l. 9s. per ton, less 2½ per cent. discount. The defendants thereupon delivered to Mr. Middleton a debit note of their charges, amounting to 14l. 16s.

Jonas Greenwood, a workman in Mr. Middleton's employ, was shortly afterwards sent to the defendants' wharf by Mr. Middleton, to cart away the bark. After removing part of the bark, the company's servants interfered, and refused to allow him to cart away the remainder, until he had paid the 14l. 16s. for carriage hire. Greenwood subsequently produced the debit-note which had been delivered to Mr. Middleton, and paid the defendants the 14l. 16s.; and the defendants' agent wrote a receipt on the debit-note. The defendants' servants then delivered the remainder of the bark to Greenwood on account of Mr. Middleton, and he carted it away.

It is not unusual for there to be no bill of lading for goods carried by sea, in the coasting-trade.

The question for the opinion of the court is, can the plaintiff maintain this action against the defendants. If the court shall be of opinion that the plaintiff can maintain this action against the defendants, the verdict is to be entered for the plaintiff on such issues as the court may direct, and for such an amount of damages as the court may direct. If the court shall be of opinion that the plaintiff cannot maintain this action against the defendants, the verdict is to be entered for the defendants on such issues as the court may direct.

[634] The court is to be at liberty to draw any inference of fact which a jury might draw.

Mellish (with whom was Hill, Q. C.), for the plaintiff. The Messrs. Donaldson, the original owners of the bark, in question, contracted to sell it to Cooper, to be

paid for on receipt of the bill of lading, and Cooper contracted to sell it to the plaintiff, a bonâ fide purchaser for value, and without notice of any fraud. Messrs. Donaldson shipped the bark for Liverpool, sending to Manchester a bill of lading, to be handed to Cooper there on payment of the price of the bark. Cooper, however (who it was plain intended to get possession of the bark without paying for it), could not be found. The vessel with the bark on board having arrived at Liverpool, the master addressed himself to the defendants, by whom as carriers the bark was to be conveyed to Manchester for Cooper. The freight to Liverpool having been paid there, the bark is carried thence by the defendants to Manchester, and there warehoused by them for the plaintiff. The defendants, however, subsequently choose to attorn to the Messrs. Donaldson; and they sell the bark to one Middleton, to whom the defendants deliver it. Under these circumstances, two questions are presented for the opinion of the court,—first, whether, as between Messrs. Donaldson and the plaintiff, there was a delivery of the bark to the plaintiff,—secondly, whether there was or not, was there not such a contract for the carriage of the bark for the plaintiff as to preclude the defendants from questioning his title to it. The only answer which could be suggested to the first of these propositions is, either that there was stoppage in transitu, or that there was such fraud on the part of Cooper as to render the sale to him voidable. Now, ordinarily, the right of an unpaid vendor to stop goods in transitu is at an end when the goods **[635]** have either actually or constructively arrived at their destination, and reached the hands of the consignee: and, although, as between the vendor and vendee, the contract may be voidable on the ground of fraud, the former cannot declare his election to treat it as void after the goods have, as here, passed into the hands of a bonâ fide purchaser for value: that is clearly established by *White* v. *Garden*, 10 C. B. 919. As between Messrs. Donaldson and the plaintiff, there clearly was a delivery of the bark to him when it was delivered to the defendants, who were to carry it as his agents from Liverpool to Manchester. Even before the bark was delivered into the barges of the New Quay Company, there was a constructive delivery to the plaintiff. James Donaldson having assented to the payment of the freight at Liverpool by Buchanan, the plaintiff's agent, it was not competent to him afterwards to intercept the delivery of the bark to the plaintiff. The delivery of part of the bark would, as a general rule, enure as a delivery of the whole, so as to vest the property in the whole in the consignee: *Slubey* v. *Hayward*, 2 H. Blac. 504; *Hammond* v. *Anderson*, 1 N. R. 69. In *Bunney* v. *Poyntez*, 4 B. & Ad. 568, that rule was held not to apply where there was a manifest intention to separate the part delivered from the residue: and Pollock, C. B., observing upon that case in *Tanner* v. *Scovell*, 14 M. & W. 28, 36, says, "Lord Tenterden says in the case of *Bunney* v. *Poyntez*, that the delivery in *Slubey* v. *Hayward*, was 'the delivery of part of the cargo, made in the progress of and with a view to the delivery of the whole;' because you could not take the whole of the cargo at one time, but must take hogshead by hogshead, or sack by sack, as the case may be. If there was no intention to separate the particular part delivered from the remainder, that incipient delivery, so to speak, that inchoate delivery will amount to a **[636]** determination of the right to stop in transitu." Here, the delivery of the twenty tons was made in the progress of and with a view to the delivery of the whole. [Crowder, J., referred to *Crawshay* v. *Eades*, 1 B. & C. 181, 2 D. & R. 288, where Bayley, J., says: "There can be no doubt, that, wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder." Willes, J. Was not the acceptance of the bill of lading a condition precedent to the vesting the property in the bark in the buyer?] It is by no means usual to have bills of lading in the coasting trade. At all events, it is not competent to the defendants, after they have once assented to the plaintiff's title, by receiving, carrying, and warehousing the goods for him, to repudiate it, and set up the right of a third person: *Gosling* v. *Birnie*, 7 Bingh. 339, 5 M. & P. 760.

Manisty, Q. C. (with whom was Knowles, Q. C.), for the defendants. Having regard to all the circumstances disclosed in the special case, the property in the bark, as between Messrs. Donaldson and Cooper, never passed to the latter. If, upon the whole, the court can see that there was no intention on the part of the vendors that the property should pass until the bill of lading had been accepted and paid for, and that the vendee was cognizant of that, the property did not pass. All the cases establish that. And if no property passed to Cooper, the plaintiff cannot stand in

a better position in that respect: *Wait* v. *Baker*, 2 Exch. 1. In the course of the argument of that case, Parke, B., says: "Property never passes, unless there be some agreement to the effect that the property shall pass." And, afterwards, in giving judgment, the same learned judge says: "It would depend upon circumstances whether the property passes, or whether merely the [637] original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage,—which in the Roman law was called obligatio certi corporis, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery: although the property, after the contract, remained at the risk of the vendee, and, if lost without any fault in the vendor, the vendee, and not the vendor, was the sufferer. The law of England is different: here, property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it." [Willes, J., referred to *Van Casteel* v. *Brooker*, 2 Exch. 691.] This doctrine was acted upon in *Brandt* v. *Bowlby*, 2 B. & Ad. 932, and as strongly expressed as in any case in the books. There, B., a merchant in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs in Russia, desiring them to draw upon H. & Co. in London for the amount, and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July, B. wrote a letter, cancelling the orders he had given. Upon the 8th August, 1830, the plaintiffs informed B. that they had purchased a cargo for the ship, and should dispatch it as soon as possible, addressed to H. & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an indorsed bill of lading to H. & Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they in-[638]-closed an unindorsed bill of lading to B., and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange inclosed in this letter were dishonoured, whereupon the plaintiffs' agent in London delivered the indorsed bill of lading to H. & Co. On the 2nd of October, B. confirmed the revocation of his order, and on the 24th of November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped delivered it to B.'s orders, and not to H. & Co. pursuant to the bill of lading. In an action brought against the shipowners for not delivering pursuant to the plaintiffs' orders, it was contended that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B by the shipment But the court held that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted; and that, in default of acceptance, it never did vest in him; and, consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to B.'s order. Bayley, J., there says: "I agree to the law laid down in argument, that a contract cannot be rescinded by one only of two contracting parties; but the question in this case is, whether the property in the goods shipped ever vested in B. at all. That depends entirely on the intention of the consignors. The fact of their transmitting the unindorsed bill of lading to B., and an indorsed one to H. & Co., shews clearly that they did not intend that the property in the wheat should vest absolutely in B, but should be subject to a condition that the bills were accepted." *Turner* v. *The Trustees of the Liverpool Docks*, [639] 6 Exch. 543, and many other cases, are to the same effect. In the present case there is abundant evidence that the bark was never intended to vest in Cooper until he had accepted the bill of lading and paid the price. The important point of time is, when the bark had arrived at Liverpool and the parties met. All of them knew that there was a bill of lading, without which neither Cooper nor any person claiming through him could get the bark. [Crowder, J. Did not the defendants undertake to carry for and deliver to the plaintiff?] The question is, was there any delivery? It is submitted that there was not: the bark was put on board the company's boats upon the faith of Buchanan's assertion that all was right. [Willes, J. Can you set up the jus tertii?] It was allowed in *Core* v. *Harden*, 4 East, 211, 1 J. P. Smith, 20. A

delivery under a mistake, or procured by fraud, is no delivery: *Bishop* v. *Shillito*, 2 B. & Ald. 329, n.; *Godts* v. *Rose*, 17 C. B. 229. [Willes, J. The sending a bill for acceptance through an agent, to whom the bill of lading is also sent, is evidence that the delivery is conditional on the acceptance of the bill: *Wilmshurst* v. *Bowker*, 7 M. & G. 882, 8 Scott, N. R. 571; *Key* v. *Cotesworth*, 7 Exch. 595.] The question is whether the goods were still in transitu, and whether Messrs. Donaldson had a right to stop them. In the notes to *Lickbarrow* v. *Mason* (2 T. R. 63, 1 H. Bl. 357, 6 East, 21), in 1 Smith's Leading Cases (4th edit.) 646, it is said: "The rule to be collected from all the cases is, that goods are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that, if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, **[640]** and rent be paid to him for them, that puts an end to the right to stop in transitu." If that be the true rule, it is clear that the bark in question was in course of transmission until it reached Manchester, the place of its ultimate destination. [Williams, J. If Messrs. Donaldson had demanded the bark, the defendants would have had no answer. That shews that they ought to have the right to set up the jus tertii; otherwise, they might be liable to two actions.] The right to stop in transitu subsists until the goods have come to the actual possession of the buyer as owner: *James* v. *Griffin*, 1 M. & W. 20.

Mellish, in reply, referred to 1 Smith's Leading Cases, 646, where it is said: "The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the transitus, although the place be not that of their ultimate destination: *Wentworth* v. *Outhwaite*, 10 M. & W. 436; *Dodson* v. *Wentworth*, 5 Scott, N. R. 821, 4 M. & G. 1080; because in such a case the goods have got into the hands of agents for the buyer, not concerned merely in the carriage of the goods. And the same, as it seems, where the goods have got into the hands of a person employed by the buyer to receive them from the first carrier, or out of the warehouse where they were when sold, and give them a new destination, as in *Valpy* v. *Gibson*, 4 C. B. 837."

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This was an action brought to recover the value of a quantity of oak-bark alleged to belong to the plaintiff.

The first count was against the defendants as common carriers for not delivering the oak-bark at Manchester, pursuant to a delivery to them by the plaintiff for that purpose at Liverpool. The second count was in trover.

[641] The material pleas to the first count are, one which denies the bailment, and another which states that the goods, before their bailment to the defendants, had been fraudulently obtained by the plaintiff from Messrs. Donaldson, to whom they belonged, and that, after such bailment, and before any breach of duty on the defendants' part, Donaldson demanded the goods, and the defendants delivered them up to them, which is the cause of action complained of.

It appears that a person named Cooper, who resided at Manchester, ordered the goods of Donaldsons, who were in business at Dumfries, in Scotland. They were shipped at Dumfries free on board the "Mart" (Amess), a vessel provided by Donaldsons at the request of Cooper, but of which Donaldsons were not the owners, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to Cooper at Manchester.

The bill of lading was obtained by Donaldsons on the 12th of July, and it was made out deliverable to Cooper or his assigns. On the same day, Donaldsons signed an authority to the master in the following terms, addressed to "The New Quay Company, carriers to Manchester, on behalf of Mr. Isaac Cooper":—

"Corsock, by Dumfries, 12 July, 1856.

"Gentlemen,—Please to pay Mr. John Amess the sum of 20*l.*, in full of freight of bark per sloop 'Mart.'"

Some obscurity has arisen from this document having been introduced into the special case out of the order of time: but it is clear, from the date, that it was given to the master at the time the bill of lading was signed.

The goods were to be paid for in cash against the bill of lading. Accordingly, Donaldsons, on the 14th of July, drew upon Cooper for the price at "on demand," and forwarded the bill of lading and the bill of exchange through their bankers to the Manchester and **[642]** Salford Bank, with instructions to present the bill for acceptance. The effect of this course was, that Donaldsons did not part with the bill of lading; and their evident intention was, not to do so until Cooper accepted the bill for the price of the goods. Such acceptance was a condition precedent to the acquisition of any right by Cooper to the bill of lading or the possession of the goods: and, indeed, the transaction being for cash, the bank at Manchester would doubtless not have parted with the bill of lading until the bill of exchange was not only accepted, but paid. The bank, upon receipt of the documents, sought Cooper in vain at the address which he had given. He was not to be found: and indeed, it is obvious that he could not, or did not intend to, pay for the goods, and wanted to obtain them or their value without payment. After many fruitless inquiries for him, the Manchester and Salford Bank at length returned the documents to Donaldsons at Dumfries, who received them back here on the 24th of July.

On the 14th of July, Cooper wrote, in appearance from the address where he was not to be found by the bank, the following letter to the defendants:—

"Gentlemen,—I have a cargo of bark from Dumfries, by the 'Mart,' of Perth, which I expect in daily, and have ordered to come into your hands. The captain's charge for freight is 20l., which I will remit you or send as soon as she comes to Liverpool, with further instructions. Be good enough to inform me of the arrival."

Cooper never in fact paid even the freight; and that was afterwards paid by Buchanan & Co, of Liverpool, the agents of the plaintiff, under the following circumstances:—

The plaintiff was, on the 14th of July, applied to by Thomas, as agent for Cooper, to advance the freight. **[643]** On the 15th of July, he agreed to do so, upon having the bark transferred to his order. He on the same occasion offered to buy it of Cooper at an advance of 10s. per ton on the invoice price; and Cooper asked time to consider the offer.

On the 17th of July, the vessel arrived in Liverpool; and, on the same day, Cooper was informed by the defendants of her arrival, and wrote them the following letter:—

"Gentlemen,—Your note of to-day came duly to hand, of the arrival of the vessel laden with bark for me. I have ordered Buchanan & Co., of North John Street, Liverpool, to call on you to pay freight, &c.; and you may act by their instructions."

On the 19th of July, the plaintiff bought the bark of Cooper, upon the terms of his offer of the 15th; and the invoice was left with him by Cooper, who thereupon sent the defendants a telegraphic message, in the following terms, —"Please to transfer the bill of lading belonging to me, to Buchanan & Co."

On the same evening, John Buchanan, who throughout was the plaintiff's agent, was informed by Matton, the agent of the defendants, that he had received Cooper's letter, and his telegraphic message that the "bill of lading" should be transferred to his, Buchanan's, firm. Buchanan, therefore, then learned that there was a bill of lading. He requested that the bark should be sent to Manchester, and the freight paid there: but Matton insisted that it should be paid in Liverpool. Matton then, at Buchanan's request, gave him an order addressed to the captain, as follows:—

"Liverpool, July 19th, 1856.

"To the captain and owners of the 'Mart,' of Perth.

"You will please deliver to the order of Messrs. Buchanan & Co. the cargo of bark per said vessel from Dumfries, they paying all expenses of freight, &c."

[644] This order was sent the same evening to the plaintiff, with a letter from Buchanan informing him that the bark would not be delivered without payment of the freight in Liverpool.

On the same day, James Donaldson, one of the vendors, arrived in Liverpool,—for what purpose, does not appear.

On Monday, the 21st of July, the plaintiff sent 20l. to Buchanan & Co, to pay the freight. On the same day, an interview took place between James Donaldson, Amess (the master of the 'Mart'), and Buchanan, to which and the subsequent payments and

delivery of the cargo so much importance is alleged by the plaintiff to belong, that we recite them in the terms of the special case,—premising that Donaldson does not appear to have uttered a word from beginning to end of that interview, that nothing said thereat in his presence was untrue, and that nothing was concluded thereat. This statement in the case is as follows:—

"On Monday, the 21st, after Mr. John Buchanan had received from the plaintiff the 20*l.* and the defendants' order, Mr. James Donaldson and Mr. Amess, the master of the 'Mart', called together on Mr. John Buchanan. The master asked Mr. John Buchanan to give him a little money on account of the freight. Mr. Buchanan said he was prepared to pay all the freight. Mr. Buchanan asked the master where the bill of lading was. The master said he did not know where it was, though he had signed one; but that here was the master of the bark, meaning Mr. Donaldson, said that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. Mr. Buchanan said the thing was all right; he had the freight in his pocket. Mr. Buchanan then made an appointment for them to meet him at the defendants' office at half past two in the afternoon. The master accord-**[645]**-ingly met him at the defendants' office; but Mr. Donaldson did not accompany him. The master produced the following order:—

"'Corsock, 12th July, 1856.

"'The New Quay Company, carriers to Manchester,
on behalf of Mr. Isaac Cooper.

"'Gentlemen,—Please to pay Mr. John Amess the sum of 20*l.* sterling in full of freight of bark per ship "Mart." "'Per pro JAMES DONALDSON,
"'JAMES M'PHERSON.'

"Mr. Buchanan paid the master the 20*l.* for the freight, and the following receipt was written across the last-mentioned order, and signed by the master, and a receipt-stamp affixed to it,—'Received from Messrs. Buchanan & Co. the sum of 20*l.* as freight (on the bark) per sloop "Mart" of Perth.' Mr. Buchanan then shewed Mr. Matton, the last-mentioned order and receipt, and asked Mr. Matton if he could take the bark up for Mr. Sheridan to Manchester, and stow it for him there. Mr. Matton told him he could. Mr. Buchanan then wrote the following directions across the defendants' order of the 19th of July,—'The New Quay Company will please to forward the cargo of bark per "Mart," of Perth, to Manchester, and there to warehouse it for Mr. John B. Sheridan, 34 Cannon St., Manchester, or his order; and please to pay the charges thereon, the freight being paid here, on his account, by us, and oblige Buchanan & Co.' And Mr. Buchanan left that order with Mr. Matton. On the 22nd of July, the plaintiff, at Cooper's request, paid Cooper 21*l.*, and took from him a receipt for 41*l.* as paid on account of freight and expenses of oak bark. The plaintiff had not heard that there was any dispute about the bark at the time he paid the 41*l.* On the 23rd of July, about two thirds of the bark was removed from the 'Mart' into one of the defendants' boats to be taken to Manchester."

[646] Afterwards, upon the same day, the master appears to have taken alarm and finding, upon inquiry of Matton, that the bill of lading had not come to hand he demanded a return of the bark, and at first refused to deliver the residue. Matton however, induced him to deliver the residue of the bark, and permit them to carry the whole to Manchester, subject to his order. This arrangement was expressed in the following letter, to which Matton assented:—

"Liverpool, 23rd July, 1856.

"Mr. Joseph Matton, agent for the New Quay Company.

"Sir,—I request that you will not deliver the cargo of bark received by you this day from the sloop 'Mart,' until the bill of lading signed by me for the same is produced by the party applying for the said bark on its arrival at Manchester."

(Signed) "JOHN AMESS."

On the same day, Matton informed Cooper of that arrangement.

On the 24th of July, upon receiving back the unaccepted draft and the bill of lading, Messrs. Donaldson telegraphed to Liverpool to stop the bark; and on that day the plaintiff learned that it had been stopped, and that the defendants would not deliver it, on the ground of the ownership being disputed.

A correspondence took place, the result of which was, that the defendants refused

to deliver the bark to the plaintiff; and, on the 29th of July, by Donaldsons' directions, they delivered it to Middleton, a purchaser from Donaldsons. They at the same time delivered to Middleton a debit note, made out to the plaintiff as debtor, for the carriage of the bark from Liverpool to Manchester, 14l. 16s. Middleton was required to pay that sum before he removed the goods, and got a receipt upon the debit note.

[647] The above statement contains all the material facts. We have thought it necessary to preface our judgment with that statement, because, when the facts are stated clearly, it will be clear what the judgment ought to be.

The first question arising upon the facts is, whose were the goods when the defendants refused to deliver them to the plaintiff? They were Donaldsons' when they were shipped, and they were to become Cooper's upon his paying for them and obtaining the bill of lading. This he never did; nor did he in any way acquire a right to the possession of the goods: consequently, Sheridan acquired no right by the purchase from Cooper. But it was argued that he did acquire such a right by the conduct of James Donaldson on the 21st of July, at the interview in Liverpool, and by the subsequent payments made by the plaintiff in consequence of such conduct. An attentive consideration of the facts will, however, negative this.

Upon the 19th of July, Buchanan knew that there was a bill of lading. Donaldson does not appear to have known anything of the plaintiff, or that there was a purchaser from Cooper. The plaintiff's name had not previously been mentioned. Donaldson said nothing at the interview; and all that the master, who, by the bye, was not Donaldson's agent, said that Donaldson had said, was true, namely, that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. This was a statement of the master made in answer to Buchanan's question where the bill of lading was, and it was doubtless made to induce Buchanan to pay upon the supposition that the bill of lading was in Cooper's hands; but every word of it was true. Buchanan's answer, that "the thing was all right; he had the freight in his pocket,"—if sincere, shews that both parties were honestly mistaken in supposing that **[648]** Cooper probably had the bill of lading, and further shews that Buchanan was inclined to act upon his belief of the fact. He clearly did not act upon what then passed, or say he would; for, if he did, he would then and there have paid the captain the freight. If he had done so, it would, in our opinion, have made no difference: but he did not. In fact, no arrangement was then come to, but Buchanan made an appointment for Donaldson and the master to meet him at the defendants' office at half past two in the afternoon. Donaldson did not attend that appointment, and appears to have taken no further part. The master and Buchanan did attend; and the master produced the order already observed upon, of the 12th of July (given when the bill of lading was signed), and Buchanan thereupon paid him the freight, without any further inquiry or communication from Donaldson. The production of this document and the payment made upon it, were strongly insisted upon by Mr. Mellish, in his very able argument, as, taken in connection with the interview already spoken of, constituting a distinct and independent authority from Donaldson to the plaintiff to take possession of the goods as buyer. The case seems ingeniously framed to make this view plausible. The date of that document, however, its address, and the fact that it was not referred to at the interview of the 21st, shew that it had acquired no new force when it was used. It was simply an authority given to the master, when he signed the bill of lading, requesting the defendants to do what is common among carriers on distinct parts of a route, namely, to pay the master his freight, upon receiving the goods: and it was of course given in the expectation that the defendants would be furnished by the buyer with the bill of lading, and that he would pay them the entire freight, including what they had paid the master of the vessel, **[649]** upon the delivery of the goods at Manchester. We cannot, therefore, think that Donaldson's silence whilst the master told the truth at the interview where nothing was concluded, coupled with his not attending a further appointment, and with the master (who was not his agent) using a document made nine days before, and not alluded to at the interview, for the purpose of obtaining payment, from a person to whom it was not directed, of freight which the defendant had requested another, and not the plaintiff, to pay, can give such person, or his principal, a right, by any known mode of transfer, to the possession of the goods in respect of which the freight was due. It is, therefore, clear to demonstration that the goods remained Donaldson's, and never did belong to the plaintiff.

The only remaining question is, whether the defendants, being employed by the plaintiff as common carriers, are thereby precluded from disputing his title to the goods. We rather doubt whether this question arises upon the first count, because there was no delivery by the plaintiff to the defendants of the whole of the bark, and no contract for the carriage of less; and upon this ground, as at present advised, we should decide that the verdict ought to be for the defendants upon the first plea to the first count.

The count in trover remains to be considered; and, as the third plea to the first count, striking out as surplusage the part imputing fraud to the plaintiff, or with a slight amendment, also raises the same question, it is necessary to discuss it.

Assuming it to arise, we are of opinion that there is no estoppel. The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question: it was raised by the demand of the real owner, before the defendants **[650]** had parted with the goods. The law would have protected them against the real owner, if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding: and we do not assent to the altered statement of the law in the later editions of Story on Bailments, §§ 266 and 582,—the earlier editions of that valuable work having laid it down in accordance with our view (*a*).

For these reasons, we give judgment for the defendants.

Judgment for the defendants.

(*a*) In the 2nd edition of Story on Bailments (published in 1839), the learned author, speaking of excuses of carriers for the non-delivery of goods, says, § 582,—"Another excuse is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. It is generally true that the carrier cannot dispute the title of the person who delivers the goods to him, or set up an adverse title, to defeat his right of action growing out of the contract (*Anonymous*, cited 3 Esp. N. P. C. 115). But this is true only when that adverse claim is not asserted by the superior claimant himself, but merely by the carrier, of his own motion. Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and, if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods (*Taylor* v. *Plumer*, 3 M. & Selw. 562; *Wilson* v. *Anderton*, 1 B. & Ad. 450)."

In the corresponding section of the edition of 1856 (which was referred to by the learned judge in his judgment), the law is thus stated,—"Another excuse which may be asserted, under certain circumstances is, when the goods are demanded or taken from the possession of **[651]** the carrier by some person having a superior title to the property. In general the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action growing out of his contract (citing 3 Esp. N. P. C. 115, but giving the name of the principal case, which has nothing to do with the question; and also referring to *Kieran* v. *Sanders*, 6 Ad. & E. 515, *Nicholson* v. *Knowles*, 5 Madd. 47, Story on Agency, § 217, Story on Eq. Jur. §§ 814-817, and Story on Bailments, §§ 264, 450). And this is emphatically the rule when the adverse claim is not asserted by the superior claimant himself, but is merely asserted by the carrier of his own mere motion (Story on Agency, § 217; 2 Story on Eq. Jur. §§ 816, 817; Story on Bailments, § 450). *Formerly it seems to have been thought, that, if the adverse title was asserted by the superior claimant, and the carrier had due notice of it, and was forbidden to deliver it to the bailor, he might protect himself from responsibility, and set up such title against the bailor* (*Ogle* v. *Atkinson*, 5 Taunt. 759, 1 Marsh. 323; Story on Bailments, § 450). *But this doctrine, although perhaps maintainable in some cases under special circumstances, is now deemed to be generally untenable* (Story on Bailments, § 266); *and therefore the carrier may be placed in a position in which he cannot safely deliver the goods to either party.* For, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and, if the adverse title is well founded, and he resists it, he is liable to an action for the

[653] WHILEY AND ANOTHER *v.* WHILEY. June 8th, 1858.

Where judgment has been signed (for default of appearance) upon a writ specially indorsed under the 25th section of the Common Law Procedure Act, 1852,—the affidavit in support of an application by the defendant to be let in to defend, under the proviso in s. 27, must not merely state that he has "a defence upon the merits," but must disclose or make known the nature of such defence, in order that the judge may see that it really amounts to a defence.

The 25th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, authorizes a special indorsement of the particulars of the plaintiff's claim, where it is for a debt or liquidated demand in money, to be indorsed on the writ of summons; and the 27th section enacts, that, "in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filling an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act [s. 22], and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule (A.) to this act annexed, marked No. 5 (on which

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recovery of the goods by the person setting up such adverse title (*Taylor* v. *Plummer*, 3 M. & Selw. 562; *Wilson* v. *Anderton*, 1 B. & Ad. 450; 2 Story on Eq. Jur. §§ 816, 817; Story on Bailments, §§ 266, 450; Story on Agency, § 217),"—a result which is plainly unjust.

The 266th section, which is above referred to as the authority for the supposed change in the law, is as follows:—"Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him; for, the lender has, by his contract, a right to be reinstated in his possession (Pothier, Prêt á Usage, n. 18, 46; Story on Bailments, § 230). However, if, in the meantime, a recovery has been had against the borrower without his default (*Edson* v. *Weston*, 7 Cowen, R. 278; *Wilson* v. *Anderton*, 1 B. & Ad. 450; Story on Bailments, **[652]** § 120), or if the thing has been attached in his hand in an adverse suit, that will constitute a sufficient excuse (Pothier, Prêt á Usage, n. 46; Story on Bailments, § 120). If the borrower actually restores the thing to the true and real owner, without any injury or injustice to the lender, he will no longer be liable to any action (*Whittier* v. *Smith*, 11 Mass. R. 210). In like manner, if the thing is taken out of the possession of the borrower by the real owner (*Shelbury* v. *Scotford*, Yelv. 22), or if, upon a threat by such owner to sue him, he has delivered up the thing, he will be discharged (*Wilson* v. *Anderton*, 1 B. & Ad. 450, per Littledale, J.)."

The passage printed above in italics appears to have been written by the learned author himself; for, it is to be found in the 3rd edition, which was published at Boston in 1843,—two years before Dr. Story's decease, which took place on the 10th of September, 1845: see his Life and Letters, edited by his son, vol. 2, p. 548,—and which edition purports to have been revised and corrected by himself. The passage is repeated in the edition of 1846, by the son of the learned judge, and also in Mr. Summer's edition of 1851, and in Mr. Bennett's edition of 1856.

The law as thus stated in the later editions of Story, is adopted by Mr. Angell in his treatise on the Law of Carriers, § 335. But that learned author adds something which, if the law were as he states it, would be equally erroneous. He says: "But the situation of the bailee is not one without remedy. He is not bound to ascertain who has the right, and he may file a bill of interpleader in a court of equity. If the bailee forbears to adopt that mode of proceeding, and makes himself a party, by retaining the goods for the bailor, he must stand or fall by his title." This, if the previous statement were correct, would be opposed to the established doctrine in equity, that a party cannot file a bill of interpleader in contradiction to the contract which he has entered into: *Crawshay* v. *Thornton*, 7 Sim. 391, 2 Mylne & Cr. 1.

Cheesman v. *Exall*, 6 Exch. 341, is somewhat analogous to the principal case, with reference to a pledge. And the general question was argued in a still more recent case of *Thorne* v. *Tilbury*, 3 Hurlst. & N. 534, but the court thought that the plea did not raise the point so as to render it necessary to decide upon the conflict of authority which had been referred to. In *Dixon* v. *Yates*, 5 B. & Ad. 340, Lord Wensleydale said,—"The defendant is a warehouseman, and therefore may set up the jus tertii."

judgment no proceeding in error, shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, &c.; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before: provided always that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits."

The defendant was served with a writ of summons specially indorsed as follows:—"September, 1857. To amount received by the defendant for the use of the plaintiffs on account of the price and value of the brig 'Isabella,' the property of the plaintiffs, 936l. 18s. 4d."

[654] On the 18th of April last final judgment was signed against the defendant for non-appearance, and application was made to Crowder, J., at Chambers, to set aside that judgment and to let the defendant in to defend under the proviso at the end of the 27th section. The affidavit (of the defendant) upon which that application was founded was as follows:—"This action is brought against me to recover the sum alleged to be due to the plaintiffs as mortgagees of the ship 'Isabella.' I was not a party to the said mortgage, nor derived any benefit therefrom, and the debt was contracted and the money borrowed by my co-owner on the same ship before I became an owner or interested therein. I instructed my solicitor, Mr. J. S. of M., to defend this action and to protect my interest; but he has neglected to do so, owing, I believe, to pecuniary embarrassments, and he has since, as I believe, left the town of M. where he was practising as an attorney and solicitor. In consequence of the neglect of the said J. S., judgment was signed against me on the 18th of April last. I have a good defence to this action on the merits, and I am desirous of being allowed to defend the same, as I am not indebted to the plaintiffs, either legally or morally, in one penny."

Upon this affidavit, and upon the authority of a case of *Warrington* v. *Leake*, 11 Exch. 304, the learned judge made the order as prayed.

Field, on a former day in this term, obtained a rule nisi to rescind that order. He submitted that the affidavit did not within the meaning of the proviso in s. 27 "disclose" any defence upon the merits.

H. James now shewed cause. This matter was very fully discussed in the court of Exchequer in the recent case of *Warrington* v. *Leake*, 11 Exch. 304, where **[655]** that court decided (Martin, B., dissenting) that an affidavit stating the precise nature of the defence is not requisite, but that the ordinary affidavit of merits is sufficient: and that is manifestly the convenient course, for no affidavit can be received in answer: *Blewitt* v. *Gordon*, 1 Dowl. N. S. 815: and any other decision would have the effect of introducing a new sort of affidavit of merits. In *Warrington* v. *Leake*, Pollock, C. B., says: "The 27th section enables a plaintiff to sign judgment in case of the non-appearance of the defendant, although personal service of the writ of summons has not been effected,—the effect of which may be that persons, through some mistake on their part, may find themselves suddenly incumbered with a judgment signed against them, of which they know absolutely nothing, or at least of which they have not received such notice as used formerly to be required, under the old practice, before a plaintiff was entitled to sign judgment. This proviso was intended for the purpose of guarding against such mischief. Now, the word 'disclosing,' if the proper sources are sought to obtain its true definition, apparently points to something more than 'adverting to,' or 'stating,' or simply 'telling,' which are some of its definitions. It was probably intended that something more was meant, but of that I am by no means certain. The legislature has made use of a word which does not necessarily convey more than the sense of 'telling'; and, as this uncertainty exists, I think we ought to take care how we permit a defendant to be bound by a judgment signed against him in a case such as the present, in a mode of procedure which, but for this enactment, would not be permitted by the law of the land." Parke, B., with less hesitation, says: "I think the proviso only requires an affidavit satisfactorily accounting for the non appearance, and the ordinary affidavit of merits. **[656]** I think the sentence is not perfectly complete as it stands, but that it was so framed for the sake of brevity and simplicity. When the matter was before me, I could not see why more should be required than the ordinary affidavit of merits under the old

practice, where the defendant had appeared and had taken several steps in the action, and judgment had been snapped against him. I therefore think the mere affidavit of merits is sufficient, without stating the ground of defence, as used to be the case under the old practice of letting in a defendant to defend, upon a simple affidavit." And Platt, B., adds: "In my opinion the 27th section has not altered the practice with respect to the affidavit, by requiring more from a defendant than used to be required. I have had this question frequently before me at Chambers, and I have come to the conclusion, that, by 'disclosing' is meant averring a good defence on the merits. This is the only condition to which a defendant is subjected on an application to set aside a judgment, for, the act does not proceed to state that such affidavit may be answered by an affidavit made on the part of the plaintiff." [Williams, J. The affidavit here assigns a bad reason for the defendant's alleged non-liability.] Independently of that, the affidavit, it is submitted, sufficiently discloses that the defendant has a defence upon the merits. Is the defendant to go fully into his defence upon affidavit? That surely never could have been intended. [Cockburn, C. J. The legislature must certainly have meant, when it used the word "disclosing," something more than a mere statement of the fact that the defendant has a defence upon the merits.] There can be no more reason for the affidavit entering into a detail of the nature of the defence now than there was under the old practice where it was sought to set aside a judgment signed for want of a plea.

[657] Field, in support of his rule. Before the passing of the Common Law Procedure Act, 1852, the practice undoubtedly was, to let in a defendant against whom judgment had been signed for want of a plea, to defend, upon a simple affidavit stating that he had a good defence to the action upon the merits. But at that time there could be no indorsement shewing the nature of the claim, as now. [Williams, J. That would appear from the declaration.] By the special indorsement on the writ of summons, the plaintiff gives the defendant notice of what it is that he is suing him for; and for so doing he obtains a statutory benefit from which he can only be removed by the defendant's compliance with the requirements of the proviso at the end of s. 27, viz. by producing an affidavit satisfactorily accounting for the non-appearance, and disclosing a defence upon the merits. The affidavit produced upon the present occasion clearly does not disclose a defence upon the merits. Stating merely "I have a good defence to this action on the merits" certainly discloses nothing. It is submitted that the interpretation put upon this proviso by Martin, B., in *Warrington* v. *Leake*, is the more reasonable one, and ought to prevail. He says,—"The word 'disclosing' is not uselessly employed by the legislature, but is a very apt and appropriate term, and ought to have that force attributed to it which it properly bears. Knowing, as I do, what the nature of the affidavit was which went by the name of 'an affidavit of merits' under the old practice, and finding that the new law requires the affidavit of merits to 'disclose the defence,' I come to the conclusion that something more is now required than the ordinary affidavit of merits." Some assistance in construing this proviso may be derived from the 2nd section of the Bills of Exchange Act, 18 & 19 Vict. c. 67, which likewise uses the word "disclose." The 1st **[658]** section having provided for the service of the writ, the 2nd proceeds to enact that "a judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit." Under that statute, the affidavit invariably sets out the facts upon which the proposed defence rest. [Byles, J. The additional words used there shew plainly what the legislature meant by the word "disclose." There is an ambiguity in the proviso in s. 27 of the Common Law Procedure Act, 1852.] If the legislature had intended that the defendant should be let in to defend upon a dry affidavit of merits, they would have said so. [Cockburn, C. J. What "disclosure" does the defendant make when he says, "I have a defence to the action upon the merits: at some future time I will tell you what it is?"] The disclosure clearly should be such as to enable the judge to determine whether or not it is fit that the defendant should be let in to make the defence.

COCKBURN, C. J. I am of opinion that the rule to set aside the order of my

Brother Crowder should be made absolute. The language used by the legislature with reference to these liquidated demands to be indorsed on the writ of summons is, that, in case of non-appearance by the defendant, it shall be lawful for the plaintiff, on filing an affidavit of personal service of the writ, &c., at once to sign final judgment, upon which judg-[659]-ment execution may issue at the expiration of eight days from the last day for appearance, —with this proviso, that "it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits." It has been contended by Mr. James (who has urged all that could be said upon the subject) that this means no more than "stating that he has a defence upon the merits;" and that view is supported by the decision of the majority of the court of Exchequer in *Warrington* v. *Leake*, 11 Exch. 304. I feel bound, however, to say that I concur in the opinion expressed by Martin, B. I think it is impossible to say that disclosing a defence means no more than stating the fact of the existence of a defence. It clearly means something more: the defendant must shew upon his affidavit what the nature of the defence is. He need not set out the whole defence with minute particularity: but he must do something more than nakedly state that he has a defence to the action upon the merits. Much was said in *Warrington* v. *Leake*, and the argument has been again urged before us, as to the hardship which would be thus imposed upon defendants,—a hardship which the law does not impose upon them in other cases where judgment has been signed in consequence of a slip. These arguments, however, only tend to shew that possibly the legislature would have done more wisely if they had put these upon the same footing as other cases: but they afford no ground for calling upon us to put a different construction upon the language of the legislature from that which we should otherwise have done. Considerable light is thrown upon the meaning of the proviso in question by the 2nd section of the Bills of Exchange Act, 1855, where a similar expression is [660] used; and yet nobody has ever thought it sufficient for an affidavit to found an application for leave to defend merely to state that the defendant has a legal or equitable defence. "Disclosing" there manifestly points to something more than a mere statement of the existence of a defence. Independently of that statute, I should have felt no difficulty in coming to the conclusion I have stated: but, with it, all possibility of doubt is in my judgment removed. For these reasons, I am of opinion that the order must be set aside. At the same time, as it is not impossible that the defendant may have been misled by the decision of the court of Exchequer in *Warrington* v. *Leake*, it seems to me that it would be unjust that he should be precluded from setting up a defence upon the merits, if he has one. I therefore think he ought to be allowed to renew his application, upon an amended affidavit, within a reasonable time.

Williams, J. I am of the same opinion. It is our duty simply to construe the language of the statute, not to canvass the propriety of its enactments. It appears from the case of *Warrington* v. *Leake* that some persons for whose judgment and learning I entertain the most sincere respect, having considered that the proviso in question, if construed literally, would be productive of a harsh and inconvenient change in the practice of the law. It is said, that, as before the passing of the Common Law Procedure Act, where judgment had been signed for want of a plea, it was only necessary for the defendant on applying to set aside the judgment to produce an affidavit accounting for the slip and swearing generally to merits, so now there can be no good reason for imposing upon a defendant who seeks to be let in to defend after a judgment signed against him for non-appearance under [661] this act, any more strict terms. I do not think it necessary to give any opinion as to whether the legislature have been considerate or not in altering the law in this respect: that is not a legitimate mode of construing an act of parliament. Where the language of an act of parliament will admit of two constructions, if one of them would lead to harshness or injustice, we may fairly infer that the other will give effect to the intention of the legislature, and adopt it in preference. That is the only legitimate use we can make of such considerations. Here, however, assuming that the requisitions of the clause in question are somewhat harsh, it must be observed that it is confined to debts and liquidated demands in money,—will that justify the court in holding that "disclosing a defence upon the merits" means simply swearing that the defendant has a defence upon the merits? It seems to me that that would be doing the greatest violence to the words of the act, and that it is not enough for the defendant to swear

that he has merits, but that he must disclose to the judge by affidavit what that defence is. How can that be said to be a "satisfactory affidavit" which conveys no information whatever to the mind of the judge? The Bills of Exchange Act, which is in pari materiâ, affords us considerable light in arriving at this conclusion. Upon the whole, therefore, notwithstanding the decision of the court of Exchequer, and giving full consideration to the reasoning of the learned judges who pronounced it, I have no hesitation in saying that this affidavit is not such as the statute requires.

WILLES, J. I am of the same opinion; and I am not deterred from being so by the fact of the former practice upon this subject having been as represented, because the matter upon which we are now passing judgment is an entirely new one, and is the creature of the **[662]** Common Law Procedure Act, under which the suing party has great privileges given to him. The 25th and 27th sections have reference solely to debts and claims for a liquidated demand in money, cases in which there is more rarely a defence than in other forms of action. In those cases, therefore, the legislature has thought proper, looking to the comparatively small number of cases in which the defendant has any defence, to give the plaintiff a more speedy judgment than he had by the old course of practice. By the 25th section, the plaintiff in such cases is allowed to make upon the writ of summons a special indorsement of the particulars of his claim, which indorsement is to stand for particulars of demand. And by s. 27, in case the defendant fails to appear to a writ so specially indorsed, the plaintiff may, on filing an affidavit of personal service, or a judge's order for leave to proceed under another provision in the act, at once sign final judgment, without being put to the expense and delay of filing or delivering a declaration. The provision that no proceeding in error shall lie upon a judgment so signed, shews that it was intended to give the plaintiff an advantage which he did not possess before. The judgment is to be final, and not reversable in a court of error. Then comes a provision which is very peculiar, and which really is for the benefit of the plaintiff: "and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before." As to that, the provision has been held to be so entirely the creature of the statute, that, although in the ordinary computation of time, where the last day is Sunday, the following day is given, in this particular instance the Sunday reckons as one of the eight days, though the last (*a*). **[663]** Then comes the proviso upon which this question turns, and which was manifestly introduced for the purpose of saving useless expense to both parties:—"Provided always that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits." The 33rd section introduces a further benefit for a plaintiff suing upon such a cause of action: where two or more defendants are sued, and one only appears, the plaintiff may sign judgment against the defendant who has not appeared, and issue execution at once. It appears to me, therefore, that, seeing that this is entirely a new proceeding, we must interpret the clause without reference to any former practice. So regarding it, it seems to me that "disclosing" must be construed to mean what the obvious and natural sense would seem to indicate,—opening out and letting the judge see whether there really is a defence upon the merits. I have no doubt whatever that it was the intention of the legislature that it should be so. I entirely agree also in the suggestion of my Lord, that, inasmuch as the defendant was in all probability misled by the case in the Exchequer, he ought to be allowed an opportunity of applying again upon an amended affidavit.

BYLES, J. I concur in the judgment pronounced by my Lord and my learned Brothers, though, I must confess, not without some little hesitation; for, I do not think that the decision of the court of Exchequer in *Warrington* v. *Leake* did any violence to the language of the 27th section. The proviso in that section does not say that there shall be an affidavit disclosing facts from which it may be seen that the defendant has a defence upon the merits, but merely an affidavit **[664]** "disclosing a defence upon the merits." At the time of the passing of the Common Law Procedure Act, 1852, an affidavit of merits was a thing that was very familiarly known. It is said that the consequence of a decision different from that come to by the court of Exchequer in *Warrington* v. *Leake* would be, the introduction of a new sort of

(*a*) See *Rowberry* v. *Morgan*, 9 Exch. 730.

affidavit of merits. Since that decision was pronounced, the Bills of Exchange Act, in the 2nd section of which the same word "disclose" is made use of, certainly does introduce a new description of affidavit merits. The words of the proviso which we are called upon to construe being in my judgment equivocal, we have to put the best construction upon them we are able: and it is important that there should be no doubt upon the subject. In order, therefore, that there may be no doubt, so far at least as this court is concerned, I concur in the decision that the present affidavit is insufficient.

Rule absolute.

[665] GARDNER, *Appellant*, WHITFORD, *Respondent*. June 24th, 1858.

The 63rd section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall without the permission of the harbour-master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein.—The assertion of such local or private rights does not exclude the jurisdiction of the justices under the act.—Upon appeals under the 19 & 20 Vict. c. 43, the appellant begins in this court, though it is otherwise in the Queen's Bench and Exchequer.

An information was laid on the 8th of February, 1858, by John Whitford, the harbour master at the Great Grimsby Docks, in the borough of Grimsby, before John Wintringham, Esq., one of Her Majesty's justices of the peace for the borough, for that, on the 1st of February, 1858, at the parish of Great Grimsby, in the said borough of Grimsby, the said John Gardner, then and there being the master of a certain vessel, to wit, the packet called the "Pelham," did place the said vessel in the entrance of the old dock there situate, the property of the Manchester, Sheffield, and Lincolnshire Railway Company, without the permission of the said John Whitford, the harbour-master of the said dock, and did not, on being required so to do by the said harbour-master, forthwith proceed to remove the said vessel, contrary to the provisions of the 63rd section of the Harbours, Docks, and Piers Clauses Act, 1847, which said Harbours, Docks, and Piers Clauses Act, 1847, is incorporated with the Manchester, Sheffield, and Lincolnshire Railway Act, 1849: that the said information and complaint was, on the 15th of February, 1858, heard at the Town Hall in Great Grimsby by and before the undersigned, J. Wintringham and C. B. Moody, Esquires, two of Her Majesty's justices of the peace acting in and for the said borough of Grimsby, and the said John Whitford, and J. G., the solicitor of the Manchester, Sheffield, and Lincolnshire Railway Company, appeared in support of the said information, and the said John Gardner, the appellant, and W. P., the solicitor for the said Packet Company, appeared for the defence; and the following evidence was offered and received in support of the said information, **[666]** viz. the Harbours, Docks and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 63, whereby it is enacted "that, as soon as the harbour or dock shall be so far completed as to admit vessels to enter therein, no vessel, except with the permission of the harbour-master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits; and, if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or dock, or within the prescribed limits, without such permission, and do not, on being required so to do by the harbour master, forthwith proceed to remove such vessel, he shall be liable to a penalty not exceeding 5*l*., and a further sum of 20*s*. for every hour that such vessel shall remain within the limits aforesaid after a reasonable time for removing the same has expired after such requisition: Also, the 9 & 10 Vict. c. cclxviii. (local and personal), by which the Grimsby Dock Company and certain railway companies therein named were incorporated, by the name of "The Manchester, Sheffield, and Lincolnshire Railway Company:" Also the 12 & 13 Vict. c. lxxxi. (local and personal), ss. 6, 10, and 241; which section 6 incorporates with that act the provisions of the Companies Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, and the said Harbours, Docks, and Piers Clauses Act, 1847; and section 10, the interpretation clause, defines the word "dock or docks" to mean and include "the Grimsby Docks, and the outfalls, entrances,

wharfs, &c., thereof;" and section 241 enacts, that with respect to Grimsby Docks, the prescribed limits within which no vessel except with the permission of the dock-master shall lie or be moored, and within which all the powers conferred upon the dock-master by the Harbours, Docks, and Piers Clauses Act, 1847, for the removal of such vessels or otherwise in relation to **[667]** vessels lying or being within the prescribed limits, shall be the distance of two hundred yards from the said docks: Also the 39 G. 3, c. lxx. (local and personal), s. 40, which enacted "that no ship, vessel, lighter, raft, boat, or other light or small craft, should at any time or times be permitted or suffered to lie or be moored within any part of the haven lying between the lock erected and fixed therein and the river Humber, without the express license and consent of the haven or harbour-master for the time being:" Also the 8 & 9 Vict. c. ccii. (local and personal), intituled "The Grimsby Docks Act, 1845," by which the above act of 39 G. 3, was repealed; and, by s. 84 of the said Grimsby Docks Act, 1845, it is enacted, "that no vessel, except with the permission of the dock-master, shall lie or be moored in any of the outfalls or entrances, or within two hundred yards from the centre of any entrance, of the said docks, or of any outfalls into the river Humber, unless for the purpose of coming in or going out of the said docks, so that at all times the entrances may be kept clear and without obstruction."

The appointment of the said John Whitford as harbour-master, under the seal of the said Manchester, Sheffield, and Lincolnshire Railway Company, was also produced and received in evidence; and a notice, of which the following is a copy was proved to have been personally served by the said John Whitford, on the 15th of January last, on the said John Gardner, the defendant and appellant, the master of the said vessel called the "Pelham" steam-packet.

"To John Gardner, the master of the steam-packet or vessel called the "Pelham."

"I, the undersigned John Whitford, of Great Grimsby, in the county of Lincoln, the harbour-master of and for the undertaking called the 'Grimsby Docks,' duly appointed by the Manchester, Sheffield, and Lincolnshire **[668]** Railway Company, do hereby give you notice, that, if, at any time after the 30th day of January, you shall moor or place, or suffer your vessel called the 'Pelham,' or any other vessel of which you are the master, to lie in the entrance of the said docks called the Grimsby Docks, or either of the said docks, or within the prescribed limits thereof, without my permission (and which permission I hereby refuse to give you), I shall for each and every time you shall so moor or place your said vessel in the said entrance of the said docks, or either of them, or within the prescribed limits thereof, proceed to recover from you the penalty or penalties imposed by the 'Harbours, Docks, and Piers Clauses Act, 1847, according to law. Given under my hand, this 15th day of January, 1858.

"JOHN WHITFORD,
"Harbour Master."

Evidence was also given, that, on Monday, the 1st of February, 1858, being after the expiration of the day named in the said notice, the said John Whitford, as such harbour master, personally required the said John Gardner, the said defendant and appellant, at or about ten o'clock in the morning of that day, to remove the said vessel called the "Pelham" packet; the said John Gardner, the defendant and appellant, being then on board the said vessel called the "Pelham" packet, which had been and was then moored at the old packet landing called the jetty, in Great Grimsby, in the said borough, in the channel or entrance from and to the river Humber to and from the said Grimsby Old Dock, about fifty or sixty yards from the said old dock gates, being within the prescribed limits, and through which channel or entrance every ship or vessel going into or coming out of the said Grimsby Old Dock would have to pass, there being at the time the said John **[669]** Whitford, the said harbour-master, required the said John Gardner, the said defendant and appellant, to remove the said vessel called the "Pelham" packet, sufficient water to enable the said John Gardner, the said defendant and appellant, to have removed the said vessel called the "Pelham" packet; but the said John Gardner, the said defendant and appellant, refused to comply with such order of the said John Whitford, the said harbour-master, but kept the said vessel called the "Pelham" packet moored in the same situation, varying only with the fall and rise of the tide, until four or five o'clock in the afternoon of the

same day: That no vessel wanted to pass in or from the said Grimsby Old Dock at the time the said John Whitford, the said harbour-master, required the said John Gardner, the said defendant and appellant, to remove the said vessel called the "Pelham" packet: That no evidence was produced on behalf of the said John Gardner, the said defendant and appellant: but the conviction of the said John Gardner, the said defendant and appellant, was opposed on the following grounds,—

1st, That the mayor, aldermen, and burgesses of the borough of Grimsby previously to the passing of the first Grimsby Haven Act, 36 G. 3, c. xcviii., (local and personal), had the right of passing from the port of Grimsby to the port of Hull with vessels and otherwise; and that, under the powers and provisions of the said Grimsby Haven Act, 39 G. 3, c. lxx., the mayor and burgesses of Grimsby conveyed by a certain indenture, bearing date the 4th of September, 1804, to the Grimsby Haven Company, in fee, land near the outfall or entrance channel from the river Humber to the Grimsby Old Dock; and that the Grimsby Haven Company, by and under an indenture of lease, dated the 23rd of May, 1805, demised a portion of the said land, with the rights and appurtenances thereto belonging, to John **[670]** Barkworth and Thomas Dawson for a term of ninety-nine years; and, by certain assignments and other assurances in the law, the same, together with a warehouse erected thereon, became vested in John Smith and others, the proprietors of the "Pelham" packet, who thus became possessed of all rights that the said mayor and burgesses of the said borough of Grimsby were entitled to in the said outfall, and of passing up and down the same, which constituted a right of property; and, such right of property being in dispute in this case, that the magistrates had no power or jurisdiction to decide on the said information, or on the offence with the commission of which the said John Gardner, the said defendant and appellant, was charged in the said information.

2ndly, That, under the provisions of the said Harbour Docks and Piers Clauses Act, 1847, by s. 33, coupled with the 10th section of the 12 & 13 Vict. c. lxxxi., intituled "The Manchester, Sheffield and Lincolnshire Railway Act, 1849," the 6th section of which incorporates therewith the said Harbours, Docks, and Piers Clauses Act, it is enacted, that, upon payment of the rates made payable by that and the special act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers; and that the said 10th section, in the interpretation clause of the Grimsby Dock Act, includes the Grimsby Docks and the haven, basins, outfalls, entrances, locks, quays, wharfs, piers, jetties, drains, improvements, and additions, and other works connected with the said dock; and that, consequently, the said "Pelham" packet was of right moored in the said outfall at the said old packet landing called the jetty, subject to the payment of the rates and dues payable to the said Manchester, Sheffield, and Lincolnshire Railway Company.

[671] 3rdly, That, the said John Whitford, the said harbour-master, exercised the powers vested in him without reasonable cause, or in an unreasonable and unfair manner, contrary to the provisions of the 54th section of the said act of 10 & 11 Vict. c. 27.

The magistrates, after receiving such evidence, and hearing the allegations of both parties, convicted the said John Gardner, the said defendant and appellant, of the offence of which he was charged in the said information, and adjudged that the said John Gardner, the said defendant and appellant, for his said offence, should forfeit and pay the sum of 20s. and, should also pay to the said John Whitford his costs in this behalf.

The said John Gardner, the said defendant and appellant, being dissatisfied with the said determination as being erroneous in point of law, applied in writing to the justices, within the time required by the 20 & 21 Vict. c. 43, to state and sign a case setting forth the grounds of such their determination, for the opinion thereon of the court of Common Pleas; and the said John Gardner, the said defendant and appellant, at the time of making such application, having entered into the required recognizance, the justices have hereinbefore set forth the facts, and also hereinafter set forth the grounds of such their determination, that is to say,—

"As to the first objection to the conviction of the said John Gardner, the defendant and appellant, we the undersigned justices decided that neither the said Grimsby Haven Acts, 36 G. 3, c. xcviii., and 39 G. 3, c. lxx., nor the said conveyance, lease, assignment, and assurance, vested any property, right, or privilege in the owners of

the said piece of land and warehouse in the said outfall of the said Grimsby Old Dock, or entrance passage from the river Humber to the Grimsby Old Dock, that is not possessed by other subjects of the **[672]** realm, or that controls, limits, or affects the operation of the 63rd section of the said Harbours, Docks, and Piers Clauses Act, 1847, so as aforesaid incorporated with the said Manchester, Sheffield, and Lincolnshire Railway Act, 1849; the said piece of land and the warehouse thereon being separated from the said outfall or entrance into the said Grimsby Old Dock by a carriage-road, and also by the said jetty or pier.

"As to the second objection, we, the undersigned justices, adjudged, that the enactment in the Harbours, Docks, and Piers Clauses Act, 1847, s. 33, that, upon payment of the rates made payable by that and the special act, and subject to the other provisions thereof, the harbour, dock, and pier should be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers, did not abridge or affect the operation of the said 63rd section of the same act.

"And, as to the third objection, we decided that no evidence was given before us, the said magistrates, that the said John Whitford, the said harbour-master, exercised the power vested in him by the said 63rd section of the said Harbours, Docks, and Piers Clauses Act, 1847, without reasonable cause, or in an unreasonable and unfair manner, as provided against by the 54th section of the same Harbour, Docks, and Piers Clauses Act, 1847.

Upon the case being called on, Boden, who appeared for the respondent, claimed to begin. He stated, that the court of Queen's Bench had decided, in accordance with the practice on cases from the sessions and cases of mandamus, that, in appeals under the 20 & 21 Vict. c. 43, the party who supported the decision of the justices should be first heard; and that the court of Exchequer had adopted the same course. But the court said they would adhere to the practice prevailing here in appeals from revising-barristers and from county courts, of allowing the appellant to begin.

[673] Hayes, Serjt. (with whom was Field), for the appellant (*a*). This is a conviction under the 63rd section of the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, which act is incorporated in the Manchester, Sheffield, and Lincolnshire Railway Act, 10 & 11 Vict. c. cclxviii., for placing a vessel in the entrance or outfall of the Old Grimsby Dock without the permission of the harbour-master, and refusing to remove the same when required by him so to do. The 33rd section of the general act enacts, that, "upon payment of the rates made payable by this and the special act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." And s. 54 enacts, that, "if any harbour-master, or any of his assistants, without reasonable cause, or in an unreasonable or unfair manner, exercise any of the powers or authorities vested in the harbour-master by this or the special act, the person so offending shall for every such offence be liable to a **[674]** penalty not exceeding 5*l*." Then comes the 63rd section, which enacts, "that, as soon as the harbour or dock shall be so far completed as to admit vessels to enter therein, no vessel, except with the permission of the harbour-master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits; and, if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or docks, or within the prescribed limits, without such permission, and do not, on being required to do so by the harbour-master, forthwith proceed to remove such vessel, he shall be

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(*a*) The points marked for argument on the part of the appellant, were,—

"1. That a bonâ fide claim of title and right having been raised, the justices had no jurisdiction to decide upon the information, or over the offence charged:

"2. That the justices have decided a question of title and claim of right, over which they have no jurisdiction:

"3. That, there being a claim of right and title, the appellant was not guilty of the offence charged:

"4. That the appellant had the right to moor the packet in the place in question, under the 33rd section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), the place in question being part of the dock therein mentioned:

"5. That the respondent's direction under the 63rd section of the said Harbours, Docks, and Piers Clauses Act, 1847, was in exercise of his power without reasonable cause, and in an unfair and unreasonable manner."

liable to a penalty not exceeding 5l., and a further sum of 20s. for every hour that such vessel shall remain within the limits aforesaid after a reasonable time for removing the same has expired after such requisition." The question is, whether the rights of the proprietors of the "Pelham" packet, who were the owners of the jetty at which the vessel was moored, are taken away by the 63rd section of the general act. [Crowder, J. The words of the 63rd section are very general; and it is an act passed for public purposes.] No doubt the words are very general; and the appellant's case falls literally within them: the only question is, whether the court will, taking the whole act together, so construe them as to deprive parties of their private rights.

Boden, for the respondent, was not called upon (*a*).

[675] WILLIAMS, J. I am of opinion that the conviction was right, and must be sustained. The public conduct of the harbour is regulated by the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27. The language of the 63rd section is quite general. The intention of that section evidently was, to make all private rights subservient to the general convenience and the regulation of the harbour. If the harbour-master has exercised the powers vested in him without reasonable cause, or in an unreasonable or unfair manner, the appellant's remedy is under the 54th section.

CROWDER, J. I am of the same opinion. The 63rd section of the Harbours, Docks, and Piers Clauses Act, 1847, overrides everything where there is a harbour and a harbour-master, no matter what rights of property may exist in private individuals. The words are as general as they can be; and there is nothing to exclude the owners of property from their operation. The appeal must be dismissed, with costs.

Appeal dismissed, with costs.

[676] MUNSTER *v.* THE SOUTH EASTERN RAILWAY COMPANY. May 27th, 1858.

[S. C. 27 L. J. C. P. 308; 4 Jur. N. S. 738. Referred to, *Talley* v. *Great Western Railway*, 1870, L. R. 6 C. P. 51; *Sutcliffe* v. *Great Western Railway*, [1910] 1 K. B. 503.]

By a railway act it was enacted, "that, without extra charge, it should be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight and four cubic feet in dimensions; and that the said company should in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid."—Pursuant to the powers conferred upon them by the act, the company made certain rules and regulations as to passengers' luggage; amongst others, one requiring it to be labelled, and declaring that they would not be responsible for the loss or detention of articles not labelled and properly addressed,—and another declaring that all unclaimed property found on their premises or in their carriages should be deposited in a place called the lost

(*a*) The points marked for argument on the part of the respondent, were,

"1. That, under the circumstances stated in the case, the conviction of the appellant was right, and the same is good and valid in law:

"2. That no real claim of right to property, as alleged, was in question before the convicting justices, so as to deprive them of jurisdiction; that the pretended claim set up by the appellant, even if the same had been well founded in fact (of which there was no legal evidence), was irrelevant to the matter of the complaint before the justices, and afforded no legal answer thereto; that such pretended claim, so far as the same had any application to the matter in question before the justices, was wholly inconsistent with and contrary to the express provisions of the statutes referred to in the case, and on which the conviction was founded:

"3. That the several objections to the conviction stated in the case, are respectively insufficient, and cannot be supported in law, for the reasons (amongst others) therein set forth."

property office, and restored to the owner on payment of a fee of 6d. for each article. In addition to these regulations, the company gave private instructions to their servants, to the effect that "no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed in the luggage-van: the passengers must take charge of such articles themselves, or send them as booked parcels." The plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and 6d. demanded for its restoration:—Held, that the company were not justified in refusing to carry the package at their own risk, and were responsible for its detention.—Semble, that, if the company had been justified in refusing to carry the parcel, they might have been justified in taking it to the lost property office.

This was an action against the South Eastern Railway Company for the alleged unlawful detention of a passenger's luggage.

The first count of the declaration stated, that, at the time of the grievances thereinafter mentioned, the defendants were the owners and proprietors of a railway from a station or terminus of the defendants in the borough of Southwark, in the county of Surrey, to a station or terminus called Tunbridge Wells Station, in the county of Kent, and of engines and carriages used by them for the carriage and conveyance of passengers and their luggage, and of goods and chattels, upon and along their said railway from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward to them the defendants in that behalf; and the defendants, during all the time aforesaid, were **[677]** common carriers for hire of passengers, together with their luggage, and of goods and chattels, on the railway aforesaid, and between the places aforesaid: that the plaintiff requested the defendants, to wit, on the 10th of December, 1856, to carry and convey the plaintiff as a passenger, and the luggage of the plaintiff, consisting of divers goods and chattels, from the said station in Southwark to the said Tunbridge Wells Station, and tendered himself to be so carried and conveyed as a passenger, together with his said luggage, to the defendants at the said station in Southwark, that being the place used by the defendants in their business as common carriers as aforesaid for receiving passengers, together with their luggage, to be carried and conveyed as aforesaid: and the plaintiff then became a passenger on the said railway of the defendants, and was carried by them in one of their said carriages along the said railway from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward: yet that, although the defendants then had ample convenience for carrying and conveying the whole of the said luggage of the plaintiff, together with the plaintiff, and the plaintiff then paid to the defendants such sum of money as the defendants were entitled to for the carriage and conveyance of the whole of the said luggage of the plaintiff together with the plaintiff: and although the defendants did on that occasion receive, carry, and convey other passengers, together with their luggage, from the said station in Southwark to the said Tunbridge Wells Station: and although all conditions precedent were performed, and all things were done and happened, to entitle the plaintiff to have the whole of his said luggage carried and conveyed, together with himself, on that occasion, from the said station in Southwark to the said Tunbridge Wells Station,—the defendants wholly refused to carry and convey a part of the said luggage of the **[678]** plaintiff, that is to say, one package of the plaintiff, from the said station in Southwark to the said Tunbridge Wells Station, together with the plaintiff, or at all; whereby the plaintiff was put to great inconvenience and expense, and was deprived of the said part of his luggage for a long space of time.

The second count stated, that, at the time of the grievances thereinafter mentioned, the defendants were the owners and proprietors of the said railway in the first count mentioned, and of engines and carriages used by them upon and along the said railway, as in the first count mentioned, and were such common carriers for hire as in the first count mentioned; and that, on the 12th of December, 1856, the plaintiff requested

the defendants to convey the plaintiff as a passenger, and the luggage of the plaintiff, &c., as in the first count.

The third count was similar, but laying the date on the 17th of December, 1856.

The fourth count was similar, but laying the date on the 7th of February, 1857.

The fifth count stated, that, at the time of the grievances in that count mentioned, the defendants were the owners and proprietors of the railway in the first count mentioned, and of engines and carriages used by them, as in the first count mentioned, and that the defendants, on the 10th of December, 1856, agreed with the plaintiff, under and subject to certain terms and conditions then agreed on between the plaintiff and the defendants, to carry and convey the plaintiff as a first-class passenger, together with certain luggage of the plaintiff, on a certain journey from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward to the defendants; and the plaintiff then became and was received by the defendants as a first class passenger, to be carried and conveyed, toge[679]ther with his said luggage, from the said station in Southwark to the said Tunbridge Wells Station, under and subject to the said terms and conditions: and that, although the plaintiff performed all things on his part to be performed, and all conditions precedent were fulfilled, and all things were done and happened, to entitle the plaintiff to the performance of the said agreement by the defendants, and to have the whole of his luggage carried and conveyed by the defendants on the said journey, from the said station in Southwark to the said Tunbridge Wells Station, together with the plaintiff, according to the said agreement; yet the defendants wholly refused to carry and convey a part of the said luggage of the plaintiff, that is to say, one package of the plaintiff, together with the plaintiff, or at all: and the plaintiff was thereby put to great inconvenience and expense, and was deprived of the said part of his said luggage for a long space of time.

The sixth, seventh, and eighth counts were the same as the fifth, but laying the dates respectively on the 12th and 17th of December, 1856, and 7th of February, 1857.

The ninth count alleged that the defendants converted to their own use, and wrongfully deprived the plaintiff of the use and possession of (*a*) the plaintiff's goods, that is to say, four packages of the plaintiff, containing articles of clothing.

[680] The tenth count alleged that the defendants detained from the plaintiff certain goods and chattels of the plaintiff, that is to say, four packages of the plaintiff, containing articles of clothing.

The eleventh count stated, that theretofore, and at the several times and occasions thereinafter mentioned, the defendants were common carriers, and the owners and proprietors of the said railway, engines, and carriages mentioned in the first count, and that, on several occasions before this suit the defendants contracted with him, the plaintiff, for reward to them in that behalf, to carry and convey the plaintiff, with certain luggage to him belonging, from the said station in Southwark to the said station at Tunbridge Wells, by their train of carriages, subject, amongst others, to the following terms and regulations, published by the defendants in the words and figures following, that is to say, "9. Passengers' luggage. First class passengers are allowed 100 lbs. of luggage free of charge, such luggage being of the description mentioned in the company's (thereby meaning the defendants') act of parliament. 10. Luggage to be claimed and labelled. Passengers are requested, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's (meaning the defendants') labels; and no luggage will be placed in the train until it is so marked.

(*a*) This redundancy of expression is persisted in by pleaders, notwithstanding its uselessness has been repeatedly pointed out and explained. The form of a count for a conversion, as originally given in Sched. (B.), No. 28, to the Common Law Procedure Bill, 1852, was as follows: "That the defendant converted to his own use the plaintiff's goods, that is to say, iron, hops, household furniture [or as the case may be."] When the bill was before the House of Lords, a noble and learned lord, conceiving that there might be cases to which that form would be inapplicable, proposed and succeeded in getting inserted an alternative,—"or wrongfully deprived the plaintiff of the use and possession of;" but those words were printed in the amended bill, and afterwards in the act, without the usual marks "[ ]" to denote that they were to be substituted, when necessary, for the preceding words. In applying the form as it stands, the pleader turns "or" into "and."

The company (meaning the defendants) will not be responsible for the loss of any [681] article of luggage that is not marked with their label, and properly addressed:" Averment, that, in making the said contract with the defendants on each of the said occasions, the plaintiff was a first-class passenger, and received from the defendants, and paid for, a first-class ticket accordingly; that, on each of the said occasions, the plaintiff had certain luggage with him, being luggage of the description mentioned in the company's act of parliament, which he contracted and required to be carried in the same train with him, subject to the said terms and regulations, and which, being under 100 lbs. in weight, the defendants were bound to convey for the plaintiff, as such first-class passenger as aforesaid, free of charge, and which luggage was also properly addressed, in accordance with the said regulations; and that, on each of the said occasions, after taking his said ticket, the plaintiff claimed his said luggage on the defendants' platform, and requested the defendants that it might be marked with their label or labels, in accordance with the said regulations; yet that the defendants, disregarding their said contract, and their duty, refused to carry and convey the said luggage for and with the plaintiff, subject to and in accordance with the said regulations, and also refused to mark the same with their label or labels, or to place the same in the said train, in accordance with the said regulations,—whereby the plaintiff was put to great expense and inconvenience, and was forced and obliged to go and be carried as such passenger as aforesaid from Southwark aforesaid to Tunbridge Wells aforesaid without his said luggage, and was afterwards obliged to pay divers sums of money to the defendants, in order to recover and obtain possession of his said luggage; and the plaintiff had in other respects, by reason of the said default of the defendants, been greatly damaged, &c.

[682] The defendants pleaded, - first, to the first four counts, not guilty.

Secondly, to the first four counts, that the defendants were not common carriers as in those counts respectively alleged.

Thirdly,—to the first four counts, that the plaintiff did not make the payments in those counts respectively alleged.

Fourthly, to the fifth, sixth, seventh, and eighth counts, that the defendants did not agree as in those counts alleged.

Fifthly, to the fifth, sixth, seventh, and eighth counts, the defendants denied the said alleged breaches of the said agreements, and said they were not guilty of the same.

Sixthly, to the ninth count, not guilty.

Seventhly, to the tenth count, that the defendants did not nor do detain the said goods as alleged.

Eighthly, to the ninth and tenth counts, that the said goods and chattels were not the goods or chattels of the plaintiff.

Ninthly, to the tenth count, that, before and at the times of the said detention of the said goods and chattels, the defendants were possessed of a certain railway and lands, and because on the occasion in that count mentioned the said goods were wrongfully in and upon the said railway and lands, incumbering the same and doing damage there to the defendants, the defendants on the said occasion seized and took in and upon the said railway and lands the said goods and chattels as a distress for the damage so by them done and doing, and impounded the same, and kept and detained and still kept and detained the same so impounded as such distress, in a proper and convenient place: which were the grievances in the said count complained of.

Tenthly, to the tenth count, the defendants further [683] said that the said goods and chattels were four bundles of goods, and each of the said bundles was, at different times before the alleged grievance, deposited and left by the plaintiff with the defendants, to be kept, taken care of, and warehoused by the defendants for the plaintiff for reward to the defendants, and upon the terms that the defendants should have a lien thereon for such reward; and that the defendants received each of the said bundles upon those terms, and did accordingly keep, take care of, and warehouse the same; and that, before the alleged grievances, such reward became and was, and still remained, due to the defendants from the plaintiff in respect of each of the said bundles, which reward remained due; and, the defendants being entitled to a lien upon each of the said bundles respectively for the reward due in respect thereof, they the defendants thereupon refused to deliver up and had not delivered them up to the plaintiff,—which were the alleged grievances in the said tenth count complained of.

Eleventhly, to the tenth count, that the defendants did what was complained of by the leave of the plaintiff.

Twelfthly, to the last count, that the defendants did not contract as alleged.

Thirteenthly, to the last count, that the said luggage was not luggage of the description mentioned in the company's acts of parliament.

Fourteenthly, to the last count, that the contracts in that count mentioned were also made subject to the following terms, that is to say, that such of the plaintiff's luggage as consisted of small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, or bundles of rugs, coats, or wrappers, strapped together, should not be labelled or placed in the luggage-van of the train by which the plaintiff was con-[684]-veyed, and that the plaintiff should take charge of such articles, or send the same as booked parcels; and that the said luggage which the defendants refused to carry and convey and to mark with their label or labels as aforesaid, on each of the said occasions, was and consisted of small articles of the description aforesaid, wherefore the defendants refused to mark the same with their label or labels or place the same in the luggage-van of the said train, which the plaintiff requested the defendants to do; and the defendants were willing that the plaintiff should take charge of the said luggage in the said train, and that the defendants should so carry and convey the same with him on and to the end of the said journey, or that the same should be sent as booked parcels, in accordance with the said terms and regulations; but the plaintiff refused to take charge thereof or to so send them, and insisted on the same being labelled and placed in the luggage-van of the said train, and would not otherwise suffer or permit the defendants to carry or convey the same for or with the plaintiff; wherefore the defendants did on the said occasions refuse to carry and convey the same.

Fifteenthly, as to the last count, the defendants further said that the said contracts in that count mentioned were also made subject to the following terms, that is to say, that such of the plaintiff's luggage as consisted of small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, or bundles of rugs, coats, or wrappers strapped together, should not be labelled or placed in the luggage van of the train by which the plaintiff was conveyed; and that the said luggage which the defendants refused to carry and convey and to mark with their label or labels as aforesaid, on each of the said occasions, was and consisted of small articles of the description mentioned; wherefore the defendants refused to mark the same with [685] their label or labels, or place the same in the luggage van of the said train, which the plaintiff requested the defendants to do; and that the defendants were ready and willing to carry and convey the same with the plaintiff on and to the end of the said journeys in one of the carriages by the train respectively by which the plaintiff with his luggage was to be so carried and conveyed as aforesaid, otherwise than the luggage-van, but the plaintiff refused to suffer or permit the defendants so to carry and convey the same, and insisted on the same being labelled and placed in the luggage van of the said train; wherefore the defendants did on the said occasions refuse to carry and convey the same.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, seventh, eighth, twelfth, and thirteenth pleas, and took issue on the ninth, tenth, eleventh, fourteenth, and fifteenth pleas. And, as to the ninth plea, he said, that, on each of the said occasions when the defendants seized and took the said goods and chattels as in that plea mentioned, the same were then respectively in and upon the said railway and lands, incumbering the same, and doing damage there as in that plea alleged, by the leave and license of the defendants, and in pursuance of contracts before then respectively entered into between the plaintiff and the defendants. Issue thereon.

The cause was tried before Erle, J., at the last Spring Assizes for Surrey. The facts as they appeared at the trial (the plaintiff himself being the only witness examined) were as follow:—The plaintiff is a barrister, having a residence at Tunbridge Wells, to which place the South Eastern Railway Company have a branch line from their main line at Tunbridge. On the respective days mentioned in the declaration, viz. the 10th, 12th, and 17th of December, 1856, and 7th of February, 1857, the plaintiff was a first-class passenger [686] by the railway from London to Tunbridge Wells. At the several times in question, the following, amongst others, were the regulations of the company for the carriage of passengers and their luggage

upon the railway,—which regulations were duly published in their time-tables, and of which the plaintiff had notice:—

"9. Passengers' luggage. First-class passengers are allowed 100 lbs. of luggage, second class 60 lbs., and third-class 56 lbs., free of charge; such luggage being of the description mentioned in the company's act of parliament. Children who pay half-price are allowed half the foregoing quantity. Overweight will be charged one farthing per lb. for any distance under forty miles, and one halfpenny per lb. for any distance exceeding forty miles. Commercial travellers passing to various parts of the line during the same day will be charged overweight at the above rates for the farthest point of destination only, if declared at the commencement of the day's journey, and the luggage-ticket given up at the termination.

"10. Luggage to be claimed and labelled. Passengers are required, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's labels: and no luggage will be placed in the train until it is so marked. The company will not be responsible for the loss or detention of any article of luggage that is not marked with their label and properly addressed: nor for luggage of any other description than that mentioned in their acts of parliament, except a declaration of its nature and value be made at the time, and it be booked and paid for accordingly. All passengers' luggage is conveyed subject to the conditions upon which goods are carried by the company.

"11. All unclaimed property found on the company's premises, or in their carriages, is deposited in the Lost Property Office at the London Bridge terminus. If [687] there be an address on the articles found, notice will be sent to that address, that the property is in the company's possession: and, if there be no address thereon, the packages will be opened at the expiration of one week, with a view to ascertain the address of the owner, when notice will be forwarded to him: and the property will in either case be restored to the owner, on payment of 6d. for each article, or forwarded, if desired, at the usual parcels rate. An additional charge of 6d. per week is made, after the expiration of the first week, on each article left for a longer period."

The facts detailed by the plaintiff, as to the first of the parcels were as follows:—The plaintiff, who resided at Tunbridge Wells, was in the habit of going backwards and forwards between that place and London by the South Eastern railway. On the 10th of December, 1856, he took a first-class ticket at London Bridge station by the 8.30 train for Tunbridge Wells. He had with him a small portmanteau, a cloak, a small morocco bag, a stick, an umbrella, and a bundle containing a book-slide of ornamental Tunbridge-ware and a silk coat, wrapped up in a plaid shawl fastened with a strap, but open at each end, and having two pots of cocoa placed under the strap. This bundle was not addressed. The whole would weigh about 50 lbs. The plaintiff asked a porter to label the portmanteau and the bundle. The porter labelled the former, but declined to label the latter, saying (after consulting the station-master) that it was contrary to his instructions to put a label upon such a package,—alluding to an unpublished regulation issued by the company on the 1st of August, 1853, for the guidance of their servants, and which was as follows: "In future, no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed [688] in the luggage-van. The passengers must take charge of such articles themselves, or send them as booked parcels." The porter then proposed to put the bundle into the carriage with the plaintiff, saying that the company could not be responsible for such a package, and that, if the plaintiff would not take it, he (the porter) must carry it to the lost luggage office. The plaintiff said he knew nothing about their regulations, that he would not have the bundle in the carriage with him, and that the company must take charge of it. The bundle was accordingly left upon the platform, and subsequently taken to the lost luggage office, where the defendant saw and demanded it on the following day, but the company's servants refused to restore it to him except upon payment of 6d.: and, as the plaintiff declined to pay the sum demanded, the bundle was retained.

On the 12th of December, the plaintiff went again by the same train with a bundle consisting of a shawl, wrapped round some articles of clothing, a number of the Law Journal, a volume of sermons, and some papers, fastened with two straps placed transversely, and sealed, and addressed to himself.

On the 17th of December, the plaintiff went again by the same train, with a

bundle consisting of articles of wearing apparel packed in a wrapper, sealed and addressed to himself.

On the 7th of February, 1857, the plaintiff went again by the same train, with a bundle consisting of wearing apparel with a shawl wrapped round, and cross-strapped.

Each of the parcels was worth 5l.; and on each of the last three occasions, the same altercation took place, and with the like result.

The plaintiff avowed that his intention in making up these parcels was to try his right to have them carried by the company: and that, in consequence of the **[689]** change of carriages at Tunbridge, he had on former occasions been put to considerable inconvenience in having to take charge of his own luggage on the platform there.

On the part of the plaintiff it was insisted, that the company were bound, as well by their common-law duty as carriers as by the 131st section of their act of incorporation, 6 & 7 W. 4, c. lxxv.(*a*), to carry passengers' luggage at their own risk, and could not relieve themselves from that responsibility by insisting upon the passenger taking any portion of his luggage in the carriage with him; that they could not make a regulation requiring packages to be labelled, and then by refusing to label exempt themselves from liability: and that they **[690]** had no right to insist upon the payment of a fee for the restoration of the articles.

For the defendants, it was submitted, that, though a duty might be imposed upon the company, by the 131st section of their act, to carry articles of the description, weight, and dimensions therein mentioned, they had a right to place them in any part of the train they pleased; that the 151st section gave them power to make regulations as to the conveyance of luggage; that no duty was imposed upon them either by the statute or by the common law to label any parcels, however packed, which might be brought to them; that they had a right to reject such as were improperly or insufficiently packed; that, the bundles in question having been left upon the platform in consequence of the refusal of the plaintiff to allow them to be placed in the carriage with him, the company's servants were justified in taking them to the lost luggage office; and that the charge of 6d. per package demanded for their restoration was not unreasonable.

The learned judge was of opinion that a duty was imposed upon the company by s. 131 to carry luggage, and that there had been no absolute refusal on the part of the company's servants to carry the packages in question; but only a refusal to accede to the plaintiff's demand that they should be labelled and placed in the luggage-van and carried at the company's responsibility; and that the parcels in question were not packed so as to be reasonably fit to be carried in the luggage-van. He thereupon directed a nonsuit,—reserving leave to the plaintiff to move to enter a verdict for the value of the parcels, if the court could infer from the facts that the plaintiff was entitled to recover,—the defendants to have leave, if necessary, to add a plea that they were ready and willing to perform the contract, but that the plaintiff altogether refused to permit them to do so.

[691] The learned judge appended to his report the following statement: –

"Four packages were offered,—on the 10th, 12th, and 17th of December, 1856, and 7th of February, 1857. The first was a shawl, open at each end, with two pots

(*a*) Which enacts, "that, without extra charge, it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight, and four cubic feet in dimensions; and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to, any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid: Provided always that nothing herein contained shall in any case extend or be deemed or construed to extend to charge or make liable the said company further or in any other case than where according to the laws of this realm for the time being stage-coach proprietors and common carriers would be liable; nor shall anything herein contained extend or be deemed or construed to extend in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage coach proprietors have or may have, but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

of cocoa under the strap, and a book-slide of ornamental inlaid Tunbridge-ware inside. On this parcel the contest was begun; and that which passed as to this parcel the jury must be taken to have found as to the three others. The plaintiff required it to be labelled and taken charge of as luggage, with the responsibility attaching in respect to luggage so received. The defendants refused to label it, and so to take charge of it; but offered to place it in any carriage in which the plaintiff might be or wish it to be, without a label, and without the responsibility attaching in respect of luggage so received. The plaintiff was going to Tunbridge Wells. At Tunbridge the carriage is changed: the labelled luggage is transferred by the porters of the company, who are responsible, not only for safe carriage but for correct delivery at the labelled destination: the packages not labelled, carried with the passenger, are to be transferred, either by himself or by porters acting under his direction, and on his responsibility as to the destination. The plaintiff refused to point out any carriage in which the package should be placed under his charge,—insisting that it should be labelled and taken by the company. This they refused to do. The parcel was therefore left on the platform, and was taken to the unclaimed parcel office, where it was offered to the plaintiff on payment of 6d. This being refused, the action was brought.

"The second parcel was a shawl wrapped round some articles of clothing and books, made into a square package, with two straps placed transversely, and addressed to the plaintiff.

[692] "The third was a parcel of clothing packed in a wrapper of blue calico,—merely a wrapper: this was carried and delivered as luggage (*a*).

"The fourth was the same calico parcel completely covered with a shawl, and strapped cross-ways, as before described. This was refused in the same manner and on the same grounds, and with the same offer, as the first.

"The first objection by the company to the counts on the duty to label and carry, was, that there was no duty to label created by statute or common law. This I held to be clear. The question turns on the statute 6 & 7 W. 4, c. lxxv., which enacts that it shall be lawful for the passenger to carry so much in size and weight of wearing apparel. This the defendants had been willing and offered to permit the plaintiff to do.

"The second objection was on the count (the eleventh) on a contract to label luggage, founded on regulations No. 9 and 10. I said I thought they created no contract to label, but created a responsibility for delivery at destination if a label were put on; that the regulation declaring that the company would not be responsible for luggage not labelled, did not exempt them from responsibility in respect of luggage not labelled, if it was damaged by any breach of duty on their part; and that the responsibility intended by regulation No. 10 was, the responsibility of delivering at the labelled destination alone. I further thought that luggage must be reasonably secured and fitted for transit without damage in the carriage appropriated to luggage: that the company were not bound to receive as luggage every article of wearing apparel which a passenger might offer, unless it was reasonably secured and fitted for transit without **[693]** damage: that the regulation for rejecting shawls as luggage was lawful, and on this principle I thought, that, when the plaintiff tendered a shawl uncovered and unprotected, he did not tender luggage which the company were bound to receive and label and carry to its destination at their risk for safe and correct delivery: and that the fact that the shawl contained some articles of clothing made no difference, if the shawl was the outside of the package. I further thought that the package was left by the plaintiff on the platform, and so became an unclaimed parcel, and so was lawfully warehoused by the company, and so was lawfully detained till a reasonable compensation for warehousing was paid: and I held 6d. to be a reasonable charge therefor."

Bovill, Q. C., in pursuance of the leave reserved, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 20*l*., if upon the facts the court should think it ought to be so entered.

Edwin James, Q. C., and Woollett, now shewed cause. It was perfectly competent to the company to make reasonable regulations as to the terms and mode of conveying packages like those in question, and to reject and refuse to carry or to

(*a*) There is some inaccuracy in this statement. This parcel was not one of those in question.

label things insecurely packed or not properly addressed. [Williams, J. Do you contend that the company can cast upon the passenger the burthen of taking personal charge of his luggage?] They were not bound to put it in any particular part of the train; and they were always willing to carry these packages provided the plaintiff would suffer them to be placed in the carriage in which he himself was,—which was a safe and a reasonable place. [Cockburn, C. J. I do not collect from the evidence that the plaintiff refused to allow the packages to be **[694]** placed in the carriage with him. All he objected to was,—and I think the objection a reasonable one,—that they should be placed under his personal charge, and be carried at his risk.] The circumstance of their not being labelled, and of their being placed in the carriage with the passenger, will not relieve the company from any responsibility which the law casts upon them: *Richards* v. *The London, Brighton, and South Coast Railway Company*, 7 C. B. 839; *Butcher* v. *The London and South Western Railway Company*, 16 C. B. 13. These packages appeared upon the face of them to be anything but "luggage." There is a material distinction between "luggage," properly so called, and the lighter articles which a traveller usually carries in his hand. The definition of luggage in Richardson's Dictionary is, "heavy, cumbrous baggage or package." [Cockburn, C. J. Surely you cannot insist that the company mean to confine themselves to Richardson's definition. Suppose a gentleman is going to spend a night at the house of a friend in the country,—would not the contents of a carpet-bag such as are ordinarily taken on such occasions be luggage?] They might come within the definition of "articles of clothing" in s. 131 of the 6 & 7 W. 4, c. lxxv. [Cockburn, C. J. The whole contention here seems to have been, not as to where the articles should be placed, but at whose risk they were to be carried. The plaintiff seems to have been under an impression that if he took them in the carriage with him the company would evade all responsibility in respect of them. And the porter and station-master evidently thought so too.] In *Robinson* v. *Dunmore*, 2 Bos. & P. 416, Chambre, J., says: "It has been determined, that, if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable **[695]** if the portmanteau be lost. In this case, the plaintiff, for greater caution, sends his servant with the goods, who pays for the watching them because he apprehends danger of their being stolen. So, the man who travels in a stage-coach has some care of his own property, since it is more for his interest that the property should not be lost, than that he should have an action against the carrier." It is clear, therefore, that the company would avoid no responsibility by the packages going in the carriage with the passenger. [Cockburn, C. J. They say they will not be responsible for luggage unless marked with their label, and they capriciously refuse to label things of this sort. Is the passenger, with notice that such a regulation exists, bound to submit to have his luggage placed in the carriage with him, with notice from the company that they will not be responsible for its safe conveyance?] The company had a right to carry the articles as and where they pleased: it was not a question of responsibility. [Byles, J. The report of the learned judge is conclusive on that point. He says, speaking of one package; and the same applies to all, -"The plaintiff required it to be labelled and taken charge of as luggage, with the responsibility attaching in respect to luggage so received. The defendants refused to label it, and so to take charge of it; but offered to place it in any carriage in which the plaintiff might be or wish it to be, without a label, and without the responsibility attaching in respect of luggage so received."] That is a fallacious view of the learned judge. Cockburn, C. J. It is the view of the facts upon which the nonsuit proceeds.] The court are to draw inferences for themselves from the facts. [Cockburn, C. J. The company's servants want to place a package under the seat of the carriage with the passenger. The latter says "I will not have it placed here, because that will cast upon **[696]** me the responsibility which ought by law to rest upon the company." It was evidently a mere struggle, not as to the place of carriage, but as to the liability of the carrier for its safety. What right had the company, under the circumstances, to treat this as lost luggage?] If they were justified in refusing to carry it, and it was in consequence of the plaintiff's declining to receive it in the carriage with him that it was taken to the lost luggage office, they clearly were entitled to treat it as lost or abandoned. The regulations in this respect were perfectly fair and reasonable. They could not leave the goods on the platform, and the porter could not rudely thrust them upon the

passenger against his will. [Cockburn, C. J. The company knew very well to whom the articles belonged: and it appears from the report that all the packages were directed but one.]

Bovill, Q. C., Garth, and H. Matthews, in support of the rule. By the 131st section of the 6 & 7 W. 4, c. lxxv., the company are bound to carry a certain amount of articles of clothing for every passenger free of charge. They make regulations, which perhaps they are warranted in doing, by one of which they require that all luggage shall be labelled, or they will not be responsible for any loss or detention; and then they make a private regulation by which they prohibit their servants from putting their labels upon certain articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, bundles of rugs, coats, and wrappers strapped together,—which are not to be placed in the luggage-van, but must be taken charge of by the passengers themselves or sent as booked parcels. They clearly are not justified in so limiting the responsibility which the law casts upon them. There is no plea here that the articles were not properly packed. [Cockburn, C. J. If the defendants were justified in refusing to [697] carry these packages, they would be justified in taking them to the lost luggage office: and, if they were justified in taking them there, there was no conversion; and the point arises upon not guilty.] The company clearly were bound to receive and to carry these packages. To make out a plea such as that which it was proposed at the trial to add, the company must shew that they were ready and willing and offered to carry the articles upon the terms mentioned in the act of parliament. This they clearly never did; for the only offer to carry was, upon the terms that the passenger should take the risk upon himself. This clearly was the only contention between them.

The court intimating that they thought the company were liable in respect of the two last parcels, which exclusively consisted of articles of clothing, but that they entertained some doubt as to the others, which besides clothing contained articles not coming within the description of personal luggage, Bovill consented to confine the verdict to 10l., the value of the last two.

Cockburn, C. J. I am of opinion that the rule must be made absolute to set aside the nonsuit and to enter a verdict for the plaintiff in respect of the last two parcels which were the subject of the action, and which contained articles of clothing only. The facts, as applicable to these, were as follows:—The plaintiff, having sufficiently packed or tied together the articles (consisting of wearing apparel), and being himself a passenger by the train, desired that the packages might be labelled and placed with the rest of the passengers' luggage. The railway porter to whom this request was addressed, after consultation with the station-master, declined to comply with it. It appears that the 131st section of the company's act of incorporation (6 & 7 [698] W. 4, c. lxxv.) compels the company to carry a certain quantity of articles of clothing for each passenger free of charge. The act also enables the company to make rules and regulations in respect of the conveyance of passengers and their luggage, one of which (the 10th) was as follows,—"Passengers are required, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's labels; and no luggage will be placed in the train until it is so marked. The company will not be responsible for the loss or detention of any article of luggage that is not marked with their label and properly addressed, nor for luggage of any other description than that mentioned in their acts of parliament, except a declaration of its nature and value be made at the time, and it be booked and paid for accordingly." The plaintiff, being aware of this regulation, and intending to compel the company to assume the responsibility of the safe carriage of the packages in question, calls upon the company's servant to label them. This he refuses to do. It is impossible to avoid seeing that the contention between the parties here was, whether the company, by refusing to label the packages, could divest themselves of their common-law liability as carriers for the safe conveyance of the articles. They appear to have sought to relieve themselves of such liability by requiring all luggage to be labelled, and then giving a direction for the guidance of their servants, that, "in future, no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed in the luggage-van: the passengers must take charge of such articles themselves, or send them as booked parcels." Acting upon that direction, the porter and station-master decline to label the packages in question and to place them in the

luggage-van; telling the [699] plaintiff, that, if they go at all, they must go in the same carriage with the plaintiff himself. To this the plaintiff objects, on the ground that the company were thereby endeavouring to relieve themselves from their ordinary liability as common carriers. This being the struggle between the parties, the porter threatens to take the package to the lost luggage office, unless the plaintiff will consent to have it placed in the carriage with him. The plaintiff says: "Put the package where you please: but you shall not impose upon me the responsibility of taking charge of it myself." The things are thereupon left upon the platform, and afterwards taken by the porter to the lost luggage office,—treating them as property of which the owner was unknown. I am of opinion that the porter was not justified in so doing, and that the company are responsible for his acts. The plaintiff did nothing to prevent the company's servants from putting the packages into the carriage in which he was, or in any other part of the train. All he said was, that, if the packages were placed in the carriage with him, the company were not to consider that as a recognition on his part that he had taken upon himself any obligation with respect to them which would not attach to him if they were placed elsewhere. I think there was nothing done to relieve the company of their responsibility as common carriers, and their duty under the special act, to carry these packages as luggage; and consequently that the taking them to the lost luggage office and detaining them there was a wrongful act for which they are liable. Whether, therefore, upon the special count or upon the count in trover, I think the plaintiff is entitled to recover in respect of those two packages. I was disposed during the argument to entertain some doubt as to whether, if the company were justified in refusing to carry the articles in question, they were [700] justified in taking them to the lost luggage office: but Mr. James has satisfied me that, if justified in refusing to carry them, the company were justified in treating them as lost luggage. My judgment rests upon this, that the articles in question consisted of wearing apparel which the company were bound to carry, and that nothing had been done by the plaintiff to absolve them from that responsibility, or to prevent them from placing them in any part of the train,—the plaintiff's conduct amounting to no more than a protest against having cast upon him a responsibility which the law casts upon the company.

WILLIAMS, J. I am of the same opinion. When the evidence is looked at closely, it is obvious that the real controversy between the plaintiff and the defendants was, whether the latter were bound to take charge of the packages in question with the ordinary responsibilities of carriers of passengers. It is plain that both parties treated packages being carried with the passenger in the carriage, and unlabelled, as being no longer at the risk or under the control of the company. The company, by their servants, refused to carry the packages, because the plaintiff declined to assent to these terms: and the question is, whether they were justified in that refusal. I see no ground of justification except that upon which my Brother Erle decided at nisi prius. He thought that the company were not bound to receive as passengers' luggage any article of wearing apparel, unless reasonably secured and fitted for carriage without damage. Now, as the plaintiff has agreed to abandon all claims except in respect of the two packages which consisted exclusively of wearing apparel and shawls, it is unnecessary for me to say whether or not I concur with my Brother Erle in this view. It may well be doubted whether the proposition [701] is not too largely stated. There may, no doubt, be cases where articles of this description may be so carelessly and improperly packed as reasonably to justify a refusal on the part of the company to accept them. But it does not follow that they would be justified in rejecting every package which may be imperfectly packed (*a*). I confess I feel a difficulty in assenting to a proposition so broadly laid down. It is, however, unnecessary to consider that; for, I think we cannot fail to infer from the evidence here, that, as to the two parcels of wearing apparel and shawls which are now in question, they were packed in a way to be reasonably fitted for carriage by the company: and I cannot see why they should have refused to carry them upon the usual terms.

WILLES, J. I am of the same opinion. It is not necessary to go further for the law than the 131st section of the company's act, 6 & 7 W. 4, c. lxxv., in order to decide the question with reference to the two parcels which alone are now the subject

(*a*) See *Simons* v. *The Great Western Railway Company*, 18 C. B. 805.

of consideration. That section obliges the company to carry for each passenger free of charge a certain quantity in weight and bulk of articles of wearing apparel. It appears that the plaintiff, being a passenger by a particular train, wanted some luggage consisting of wearing apparel wrapped round, in the one instance with a piece of calico, and in the other with a shawl, and sufficiently secured by means of straps, carried for him by the company, instead of taking charge of it himself. The question is, whether he was entitled to have that done. I am of opinion that he was. It seems that the plaintiff desired to have these packages labelled [702] and put into the luggage-van. I do not found my judgment upon any supposed right of his to have the packages labelled and placed in any particular part of the train. That is mere matter of detail. It might be reasonable to impose such a condition: but there is no legal right to have a label placed upon the goods. The upshot of the contest was, that the company's servants desired to put these packages in the carriage with the plaintiff, coupled with the understanding that he should take charge of them, and that they should be under his care and at his risk whilst the change of carriages was taking place at Tunbridge, —in short, that they should be at his risk during the whole of the transit. The plaintiff refused to allow the packages to be placed in the carriage with him,—not absolutely, but in a sense that would cast upon him that responsibility; and he ends by saying, in substance: "Put them where you like, provided they are to be carried at the risk and upon the responsibility of the company." In the result, the packages are left upon the platform. The servants of the company do not appear to have claimed a right to put the packages in that or in any other carriage unaccompanied by the condition before mentioned. The question is, whether the plaintiff was entitled to have these things carried by the company at their risk, or whether he was bound to take the responsibility of taking care of them himself. It appears to me that that question is disposed of by the 131st section of the company's act, which enacts, that, without extra charge, it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight, and four cubic feet in dimensions,—a size and weight not ordinarily capable of being conveniently carried by a passenger. In return for this, the company are in no case to be in any way liable or responsible [703] for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid. The packages in question did not exceed that weight or those dimensions; nor did they fall within the proviso at the end of the section saving the liability of the company as to matters of special exception. It appears to me, therefore, upon the mere reading of that section, that the company are liable. As to the two packages which the plaintiff has consented to give up, a different question might have arisen. If it had appeared that the company had been in the habit of carrying articles such as were contained in those packages for the fare paid by the passenger, I should have inclined to think that their responsibility would have extended to them also. But, as Mr. Bovill has consented to abandon his claim as to them, it is unnecessary to say anything about them. The rule will, therefore, be absolute to enter a verdict for the plaintiff for 10l., as the value of the two packages first adverted to.

Byles, J. I am of the same opinion. I agree with my Lord and my two learned Brothers in thinking, that, although the company have a right to put the luggage in any part of the train they please, they cannot absolve themselves from their common-law liability as carriers, nor from the liability imposed upon them by the 131st section of the 6 & 7 W. 4, c. lxxv., by placing it in the carriage with the passenger to whom it belongs. It is quite evident that the real contention between the plaintiff and the porter and station-master was, not [704] whether the packages should be placed in the carriage with him, but whether the ordinary liability of the company should be limited by their so doing. The company in effect say to the plaintiff, we will not carry your packages unless you consent to take the risk and responsibility of their safety. The plaintiff declines to accept the risk, and the company refuse to carry; and so the packages are left behind. The defendants are clearly liable on the special count for their refusal to carry the last two parcels, which were left behind through their default; and I think they are also liable upon the count in trover. The rule will, therefore, be

absolute to set aside the nonsuit, and to enter a verdict for the plaintiff for 10*l.* upon the issues applicable to the last two parcels, and for the defendants as to the rest.

Rule absolute accordingly (*a*).

INGATE AND ANOTHER *v.* LA COMMISSIONE DEL LLOYD AUSTRIACO, PRIMA SEZIONE. June 12th, 1858.

[S. C. 27 L. J. C. P. 323; 4 Jur. N. S. 975; 6 W. R. 659. Discussed, *Newby* v. *Von Oppen*, 1872, L. R. 7 Q. B. 294. Commented on but followed, *Armstrong* v. *Elbinger Actien-Gesellschaft*, 1874, 23 W. R. 94. Held practically overruled, *Westman* v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1876, 1 Ex. D. 240. See *Scott* v. *Royal Wax Candle Company*, 1876, 1 Q. B. D. 409. Commented on, *Royal Mail Steam Packet Company* v. *Braham*, 1877, 2 App. Cas. 381. Distinguished, *Haggin* v. *Comptoir D'Escompte de Paris*, 1889, 23 Q. B. D. 523.]

The 16th, 18th, and 19th sections of the Common Law Procedure Act, 1852, do not apply to the case of proceedings against a foreign corporation carrying on business abroad.

By the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A.) to the act **[705]** annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: provided always that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before one of the masters of the said superior courts in the manner hereinafter provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment."

And s. 19 enacts, that, "in any action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that, in lieu of **[706]** the form of writ of summons in the schedule (A.) to the act annexed marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule (A.) marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad; and by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

A writ of summons, dated the 3rd of May, 1858, was issued against the defendants, La Commissione del Lloyd Austriaco, Prima Sezione (Austrian Lloyd's Company), a corporation aggregate established according to the law of the empire of Austria, and trading and carrying on business under that name and title at Trieste; and, on the 15th of May, the following notice was served by the clerk of the British consul, by

(*a*) See Chitty and Temple on the Law of Carriers, pp. 282 et seq.

delivering it to the secretary of the company at their chief office in the Tergesteo, No. 587, in Trieste:—

"To La Commissione del Lloyd Austriaco, Prima Sezione, of Trieste, in Austria.

"Take notice that Charles Colville Ingate and Frederick Ingate, of Fenchurch Street, in the city of London, England, have commenced an action at law against you in Her Majesty's court of Common Pleas, by a writ of that court dated the 3rd day of May, 1858; and you are required within twenty-one days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said court to the said action: and, in default of your **[707]** so doing, the said Charles Colville Ingate and Frederick Ingate may by leave of the court or a judge proceed thereon to judgment and execution. The plaintiffs claim 1990l. 17s. 11d. for debt, and 7l. 7s. for costs; and, if the amount thereof be paid to the plaintiffs or their attorneys within twenty-one days from the service hereof, further proceedings will be stayed."

An application was made to Byles, J., at chambers for leave for the plaintiffs to proceed, upon affidavits stating the above facts, and also that the defendants at and before the commencement of the suit were, and still were, justly and truly indebted to the plaintiffs in the sum of 1990l. 17s. 11d. for money paid in England, within the jurisdiction of this court, by the plaintiffs for the defendants at their request, and for commission and reward due and payable by the defendants to the plaintiffs for work done in England, within the jurisdiction of this court, by the plaintiffs for the defendants at their request; that it takes five days to communicate between London and Trieste by post; and that no appearance has been entered by or on behalf of the defendants. The learned judge, doubting the applicability of the Common Law Procedure Act to the case of a foreign corporation carrying on business out of the jurisdiction, declined to make any order, but referred the plaintiffs to the court.

Honyman now moved accordingly. The plaintiffs are entitled to proceed under the statute, unless there be some rule of law which prevents its application to a foreign corporation. [Byles, J. I doubted, and I still doubt, whether the 16th section of the act, can apply to a foreign corporation trading abroad. We have no means of knowing the constitution and attributes of such a body. It may be altogether different from our incorporated companies. For anything we know, each **[708]** member may be personally liable. Besides, it does not appear that the secretary, upon whom the notice was served, is a member of the corporation.] The company have addressed to the officer of this court a protest against the proceedings: it is clear, therefore, that the notice has come to their hands. The 16th section of the Common Law Procedure Act, 1852, provides that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation." [Willes, J. The 17th and 18th sections were introduced as a substitute for the old proceeding to outlawry, which could only be against natural persons. The 19th section speaks of "persons residing out of the jurisdiction." The language of the 16th section is clearly applicable to domestic corporations.] By s. 227 (the interpretation clause) "persons and parties" include corporations. In *Boyd* v. *The Croydon Railway Company*, 4 N. C. 669, 6 Scott, 461, where a railway act provided that no action should be brought against any person for anything done in pursuance of the act, without twenty days' notice given to the intended defendant, it was held that the word *person* included the company. [Williams, J. The spirit of the thing is, that there must be personal service or something that is equivalent to it. You are driven back to the 16th section; and that does not apply to foreign corporations. Cockburn, C. J. Before we can give leave to proceed, we must be satisfied that this jurisdiction, which is a new creation, applies to foreign corporations. The object of these sections, as my Brother Willes observes, was, to give a substitute for outlawry. I do not think there exists abroad such thing as a corporation for trading purposes in the sense in which we understand it.] Foreign corporations have been allowed to sue in this country in their corporate **[709]** names: *The Dutch West India Company* v. *Van Moses*, 1 Stra. 612, 2 Lord Raym. 1532; *The National Bank of St. Charles* v. *De Bernales*, R. & M. 190, 1 C. & P. 569. [Williams, J. As plaintiffs, but not as defendants. Willes, J. The earliest reported case of an action by a foreign corporation probably is that of *The Dutch East India Company* v. *Henriques, Resp.*, Pr. C. P. (by Sir G. Coke), 44. Williams, J. Before the passing of

the Common Law Procedure Act, there clearly was no mode of suing in this country foreigners residing abroad. That power is now given, in a mode that is pointed out. We cannot, if that is inapplicable to the case, sanction any other mode. Willes, J. In the Irish statutes, 43 G. 3, c. 53, and 13 & 14 Vict. c. 18, there are express provisions for the service of process upon foreign corporations: see *Sheehy* v. *The Professional Life-Assurance Company*, 2 C. B. (N. S.) 211, 3 C. B. (N. S.) 597.]

Cockburn, C. J. I think there ought to be no rule in this case, simply upon the ground that the 18th and 19th sections of the Common Law Procedure Act, 1852, relating to the service of process upon persons residing out of the jurisdiction of the superior courts of this country, do not apply to the case of foreign corporations. The 16th section clearly applies only to corporate bodies in this country. All the preceding sections relate exclusively to persons resident within the jurisdiction. The 18th and 19th sections relate to British subjects and foreigners resident in foreign parts. Looking at what the law was before the passing of this act, it seems to me to be perfectly clear that these provisions refer only to individual defendants, and not to corporations. Assuming, therefore, that this company is sufficiently shewn to be a corporation aggregate, capable of suing and being sued in its corporate name, I think it is enough to say that the provisions in question do not apply to such a case.

[710] Williams, J. It is clear to my mind that the 18th and 19th sections do not apply to foreign corporations. Throughout the clauses, personal service, or something tantamount to it, is talked of: and this there are no means of effecting in the case of a foreign corporation.

The rest of the court concurring,

Rule refused.

Ferrand and Others *v.* Bischoffsheim and Others. June 4th, 1858.

[S. C. 27 L. J. C. P. 302.]

To a declaration for money paid, money received, &c., the defendants pleaded that they at the request and with the consent of the plaintiffs dealt with and treated one F. as the principal in the transaction in respect of which the moneys were received by the defendants, and as the party with whom alone they were dealing; that the plaintiffs further authorized and requested the defendants to receive any moneys resulting from the transaction on account of and as the moneys of F., and on the terms that the defendants might deal with such moneys as the moneys of F.: Averment, that the moneys, being the moneys resulting from the said transaction, were afterwards, in pursuance of the said request, authority, and consent of the plaintiffs, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of F.: that, upon the faith and in consequence of the said request, authority, and consent of the plaintiffs, the defendants afterwards gave credit to F. in respect of divers other transactions, and were induced to allow F. to incur debts to them which were still due; and that, before and at the time when the said moneys were so received by the defendants as aforesaid, on account of and as the moneys of F., he the said F. was, and still remained, indebted to the defendants for and in respect of the debts thereinbefore mentioned, in an amount equal to the plaintiffs' claim, —which amount the defendants were willing to set off:—Held, bad, on demurrer.

This was an action for money paid, money received, and money found due upon accounts stated.

The defendants pleaded, secondly, as to 12071. 18s. 2d., parcel of the moneys alleged to have been received by the defendants for the use of the plaintiffs, that they, the defendants, at the request and with the consent of the plaintiffs, dealt with and treated one Octave Foa as the principal in the transaction in respect of which the said moneys in the introductory part of that plea mentioned and therein pleaded to were received by the defendants, and as the party with whom alone they were dealing; and that the plaintiffs then and at **[711]** the time of making the said request further authorized and requested the defendants to receive any moneys resulting from the said transaction on account of and as the moneys of the said Octave Foa, and on the terms that the defendants might deal with such moneys as the moneys of the said Octave Foa: That the said moneys therein pleaded to, being the moneys resulting

from the said transaction, were afterwards, and before the commencement of this suit, and in pursuance of the said request, authority, and consent of the plaintiffs as aforesaid, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of the said Octave Foa, and on the terms aforesaid: That, upon the faith and in consequence of the said request, authority, and consent of the plaintiffs as aforesaid, and upon the faith that they the defendants should so receive on account of and as the moneys of the said Octave Foa the moneys resulting from the said transaction, according to and in pursuance of the said request, authority, and consent of the plaintiffs in that behalf, they, the defendants, afterwards, and before the commencement of this suit, trusted and gave credit to the said Octave Foa in respect of divers other transactions; and that they, the defendants, were afterwards and before the commencement of this suit, whilst the said request, authority, and consent of the plaintiffs continued in full force and effect, and before any revocation thereof by the plaintiffs, induced to and did allow and permit the said Octave Foa to incur divers debts to them, and to become liable to them in respect of such debts, and which debts from the said Octave Foa to the defendants were still due and owing and unpaid, upon the full faith and in consequence of the said request, authority, and consent of the plaintiffs, and upon the faith that the moneys resulting from the first-mentioned **[712]** transaction should be received by them the defendants on account of and as the moneys of the said Octave Foa as aforesaid, in pursuance of and according to the request, authority, and consent of the plaintiffs as aforesaid: And that, before and at the time when the said moneys were so received by the defendants as aforesaid on account of and as the moneys of the said Octave Foa, the said Octave Foa was, and thence hitherto had been, and still was, indebted to the defendants, for and in respect of the divers debts thereinbefore mentioned as incurred by the said Octave Foa, in an amount equal to the plaintiffs' claim therein pleaded to, for money payable by the said Octave Foa to the defendants, for money paid by the defendants to and for the use of the said Octave Foa at his request, and for money received by the said Octave Foa for the use of the defendants, and for money found to be due from the said Octave Foa to the defendants on accounts stated between them, which amount the defendants were willing to set off against the plaintiffs' claim therein pleaded to.

Archibald, in support of the demurrer. The plea is clearly bad. In the first place, it does not shew any consent on the part of the plaintiffs to the receipt of this money as money of Foa; neither does it shew any ground upon which the defendants are entitled to the set-off they claim. The plea states that the defendants at the request and with the consent of the plaintiffs dealt with Foa as principal in the transaction. It is clear that the defendants were throughout aware that there was a principal, who might at any time have intervened; and therefore there is nothing to bring the case within the principle of *George* v. *Clagett*, 7 T. R. 359, and *Rabone* v. *Williams*, 2 Stra. 1182. In the last mentioned case, Lord Mansfield says: "Where **[713]** a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." *Fish* v. *Kempton*, 7 C. B. 687, is precisely in point: it was there held that, where A. buys goods of B., knowing that B. is selling them as factor, he cannot, in an action by the principal for the price, set off a debt due to him from B., although it is found that A. made the purchase bonâ fide. [Byles, J. Would payment to Foa have been good?] Payment stands upon a totally different footing from set-off: *Warner* v. *M'Kay*, 1 M. & W. 591 (*a*). [Cockburn, C. J. Payment to the agent would be payment to the principal. Byles, J. You may perhaps say that "deal with him as principal" means no more that "pay him"] Exactly so. In *Fish* v. *Kempton*, Williams, J., says that "the doctrine of *George* v. *Clagett*, and that class of cases, has no application where the buyer knows that the factor sells as factor." And Wilde, C. J., says: "Where a factor sells, with notice to the vendee that he sells as factor, payment to him is good, even though made prematurely; but the vendee

(*a*) Cited in *Fish* v. *Kempton*, 7 C. B. 687, and observed upon in *Smart* v. *Sandars*, 3 C. B. 399.

cannot, under such circumstances, claim a right of set-off." In *Carr* v. *Hinchliff*, 4 B. & C. 547, 7 D. & R. 42, the plea stated, that the goods were sold and delivered to the defendant by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of A., and **[714]** that the defendant did not know that the goods were the property of A.; that, at the time of the sale and delivery, A. was and still is indebted to the defendant in more than the value of the goods; and that the defendant was ready and willing to set off and allow to the plaintiff the value of the goods, out of the moneys so due and owing from A. [Byles, J. The plea in this case is open to this further observation, that the new debts are not alleged to equal in amount the debts sued for, and the old debts were not incurred upon the faith of the alleged request.]

Holland, contra, was called upon to support the plea. If the present case can be brought within the principle of *George* v. *Clagett*, the defendants may set off any claim they have. [Cockburn, C. J. The plea is, to say the least of it, very ambiguous.] This is very like the case of *Stracey* v. *Deey*, note to *George* v. *Clagett*. That was assumpsit for goods sold: pleas, non assumpsit and a set-off. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker, and, being indebted for grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back and holding out Ross as the only person concerned in the trade. Lord Kenyon **[715]** was of opinion, that, as the defendant had a good defence by way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by Ross. [Byles, J. There, there was an absence of knowledge on the part of the defendant that he was dealing with any other than Ross.] The averment of a request is tantamount to an averment of want of knowledge. [Williams, J. Is there any case to shew that the defendants may rely upon a set off in respect of a debt existing at the time of the dealing with the agent as principal? Is it not confined to transactions between the time of so dealing with him and the time of suing?] The defendants are entitled to be placed in the same situation as if Foa were the party suing. In Smith's Mercantile Law, 5th edit. 163, it is said: "The principal's right to enforce contracts made by his agent is subject to this rule, viz. that, if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been a principal. Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This rule is to prevent the hardship under which a purchaser would labour, if, **[716]** after having been induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if, at any time in the course of the transaction, he have means of knowing that the person with whom he deals is not a principal, the above reason does not apply, and then cessante ratione cessat ipsa lex." Words and conduct are put upon the same footing, according to the well known doctrine of *Pickard* v. *Sears*, 6 Ad. & E. 469, 2 N. & P. 488, and *Freeman* v. *Cooke*, 2 Exch. 654. In *Heald* v. *Kenworthy*, 10 Exch. 739, 746, Parke, B., says: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any

representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so." Whether, therefore, by special request, or by mere standing by, the defendant has been induced to deal with the agent as principal, he is entitled to all the equities he would have been entitled to as against the agent. The plea is intended to state, that before the moneys were received from Foa, the defendants had, in consequence of the plaintiffs' request, permitted Foa to incur debts to them. It is at all events good as an argumentative plea of not guilty. [Willes, J. It must be an argument excluding every supposable case in which the plaintiffs would be entitled to recover.] Argumentativeness was the objection urged against the plea in *Carr* v. *Hinchliff*. [Cockburn, C. J. It is **[717]** clear that if the principal represents the agent as principal, he is bound by that representation. So, if he stands by and allows a third person innocently to treat with the agent as principal, he cannot afterwards turn round, and sue him in his own name. The present is a third case: the plaintiffs request the defendants to deal with Foa as principal: must not that mean, as principal in that transaction?] If the plaintiffs had intended so to limit it, they should have taken care to do so. If the court entertain any serious doubt, the defendants will crave leave to amend the plea by confining the set-off to debts incurred with them by Foa after the plaintiffs' request and consent to their treating him as principal.

Cockburn, C. J. As the plea stands, it is clearly bad. It is not enough to say that the defendants at the request and with the consent of the plaintiffs dealt with and treated Foa as principal in the transaction; it must go further, and aver that the plaintiffs authorized the defendants to treat the moneys as moneys of Foa.

Williams, J. I also think the plea bad: and I do not say that it will be good with the proposed amendment.

Leave to amend, the plaintiffs' costs to be costs in the cause.

[718] In the Matter of an Action or Suit pending in the County Court of Lancashire holden at Liverpool, between George Hoey and Others and John M'Farlane and Others. June 9th, 1858.

[S. C. 4 Jur. N. S. 785.]

The county-court has, by the 18 & 19 Vict c. 63, ss. 40, 41, 42, jurisdiction to determine a dispute between the committee of management of a friendly society and any of its members, as to the propriety of the mode of convening and the manner and place of holding special general meetings for the purpose of altering or amending the rules of the society.—A plaint was heard before a deputy-judge of a county-court, and he, after the death of the judge whose deputy he was, sent a written statement of his decision to the late judge's successor, who received and entered it as his judgment The court (without expressly deciding that the judgment so entered was void) granted a rule nisi for a prohibition against proceeding upon it, in order to give the parties an opportunity of applying to the new judge for a re-hearing.

At a meeting of a committee of members of a society called the Liverpool United Legal Friendly Burial Society, nominated at a general meeting of the society held on the 13th of June, 1856, certain rules were adopted, and were afterwards duly certified by the registrar of friendly societies.

In the month of January, 1857, certain alterations in and additions to the said rules were deemed advisable for the better and more effectual management of the society, and for enlarging the payments for the funerals of the deceased members; and the defendants, who were the committee of management, caused to be issued and duly advertized and placarded a notice convening a general meeting of the society in accordance with the 111th rule (*a*), which notice was as follows:—

(*a*) The 111th section provided "that notices of all meetings shall be conspicuously posted by placards through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat, and shall be deemed sufficient to convene any meeting of members."

[719] "To the members of the Liverpool United Legal Friendly Burial Society :—

"A special general meeting of the members of the society will be held in the Clarendon Rooms, South John Street, Liverpool, on Thursday, the 5th of March, 1857, at three o'clock in the afternoon, for the purpose of obtaining the consent of a majority of the members present at such meeting to rescinding some of the present rules of the society, and to the making and passing certain new rules, and also for making and passing certain amendments and alterations in the present rules.

"The following are the numbers of the present rules proposed to be altered and amended :—2, 5, 6, 10, 13, 14, 16, 21, 26, 34, 35, 36, 42, 47, 63, 74, 75, 77, 83, 84, 85, 90, 95, 101, 102, 106, 111, 113.

"The substance of the proposed alterations and amendments is as follows :—Place of meeting, how removed,—extending age for the admission of members, raising of the funeral money,—election of committee,—persons present at committee meetings, —persons eligible to hold office,—officers in case of death, removal, or resignation,—increase of collectors, and allowance,—half-yearly balance-sheets, instead of yearly,—notices of meetings, and how called,—with other minor alterations.

"Proposed rules to be expunged,—3, 15, 37, 61, 64, 69, 70, 79, 96, 109, 115.

"Substance of ten proposed new rules :—Members from 45 to 75 paying half-subscription to receive half benefit,—hours for paying funeral money,—persons eligible to be members,—members transferring from other societies,—officers under control of committee of management,—members of committee to be elected annually.

"By order of the committee of management,

"Feb. 24, 1857. "W. JENKINS, Sec."

[720] The meeting was held at the time and place mentioned in the notice ; and there was ample room for all the members who attended ; and a full opportunity was afforded to every member who came to the meeting of taking part in the proceedings. No member had occasion to complain of want of room, or of being unable to obtain admission. Resolutions were passed by a large majority of the members at the meeting, authorizing divers alterations in the subsisting rules, and additions thereto, but all of them within the scope of the notice, and fairly and bonâ fide indicated thereby.

The plaintiffs, without any previous complaint made to the committee, and without giving them any notice of their objections, on the 29th of June, 1857, issued a plaint or summons in the Liverpool County Court, to which were appended the following particulars of complaint :—

"This is a case under the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), and the following are the particulars of the complaint of the above-named plaintiffs :—

"1. That the defendants are the committee of management of 'The Liverpool United Legal Friendly Burial Society,' the rules whereof have been duly certified under 'An act to consolidate and amend the law relating to friendly societies, passed in the 18th and 19th years of the reign of Her present Majesty.'

"2. That the plaintiffs are members of the said society, and interested in the matters of this action.

"3. That the 116th section of the said rules provides 'that no new rule shall be made, nor any of the rules herein contained, or hereafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society specially called for that purpose.'

[721] "4. That the 105th of the said rules provides that 'all meetings of the members shall be held in some convenient place in the borough of Liverpool, subject to the rules in that behalf provided.'

"5. That the 111th of the said rules provides that 'notices of all meetings shall be conspicuously posted by placard through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting ; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat.'

"6. That the said society consists of 30,000 to 40,000 members, who are principally working men, their wives and children ; and the adults in benefit, and entitled to attend and vote at public meetings of members, number about 15,000.

"7. That the defendants, as such committee as aforesaid, recently called a special general meeting of members to appoint a committee to alter the existing rules of the

society, and to pass new ones, although no such committee could be appointed by virtue of the said rules of the society.

"8. That the defendants afterwards called a special meeting of the members to be held at the Clarendon Rooms in Liverpool aforesaid, although the place is capable of holding about one hundred persons only.

"9. That the plaintiffs protested against such meeting and the proposed alteration of the rules; but the defendants proceeded with the meeting, and submitted divers new rules and alterations, some whereof were contrary to law.

"10. That the defendants subsequently called another meeting at the same place, and certain alterations in the existing rules, and additions thereto, were passed **[722]** by the persons then assembled; but the registrar has not certified the same.

"11. The plaintiffs charge that the notices calling the said meetings do not, nor does any one of them, contain the substance of the proposals to be made at the said meetings, within the meaning of the said 111th rule; and that the place of meeting aforesaid was not a 'convenient place,' within the meaning of the said 105th rule.

"12. That the defendants have wilfully, corruptly, and improperly sought to alter the existing rules of the society, and have expended divers large sums of the society's money in and about the said meetings and amendments and alterations, for printing, advertizing, deputations to London, and other things, and certain moneys are still owing in respect thereof.

"The plaintiffs seek an order of this honorable court, that the said meetings may be declared void and of no effect; that the defendants may be restrained by the injunction of this honorable court from procuring the certificate of the registrar of friendly societies in England that the said proposed alterations and amendments are according to law, and from taking any steps or proceedings for procuring or obtaining such certificate, and from putting in force or acting upon the said alterations and amendments, until the said 111th rule has been duly complied with in regard thereto; that the defendants be ordered to re-pay the trustees of and for the use of the society all such moneys as have been expended by the defendants out of the funds of the said society as aforesaid; and, for this purpose, if necessary, that an account thereof may be taken; and that they may be restrained from paying out of the funds of the society the moneys still owing as aforesaid; and that the defendants may be also ordered personally to bear their costs of and incidental to the present **[723]** proceedings, and to pay the plaintiffs their costs of and incidental thereto.

"The plaintiffs also seek such further or other relief as the circumstances of the case may require, and the court may be pleased to grant."

The hearing was adjourned, and the cause was ultimately tried on the 25th of August, 1857, before J. S. T. Greene, Esq., a judge of one of the county-courts of Lancashire, in the place of Joseph Pollock, Esq., the then judge of the Liverpool county-court, but who resigned before judgment was delivered therein

On the 18th of November last, the said J. S. T. Greene sent the following written order,—and no other order or judgment in the cause had been made or given:—

"*In the Matter of the Liverpool United Legal Friendly Burial Society.*

"I find that the proposed alterations and alleged amendments in the rules of the said society whereof complaint is made in and by the plaint entered in this court, and bearing date the 20th of June, 1857, were not and have not been duly and regularly made and passed, and that they are and were from the alleged time of making and passing thereof altogether null and void; and I direct that the same shall be no further proceeded with nor in any way attempted to be acted upon by the said defendants: And I order and direct that the business and affairs of the said society shall be conducted by the said defendants in this suit, and all and every other the officers and members of the society, according to the existing rules certified by the registrar of friendly societies in England, and in force at the hearing of this suit, until such rules shall be lawfully altered or rescinded.

"And I further order the said defendants to deliver into the office of the registrar of the court, within **[724]** twenty-eight days from the date hereof, a full and true account of all moneys which have been paid and disbursed, or detained or retained by them for that purpose, out of the funds of the society, in or on account of their costs and expenses incurred in defending this suit: and I direct the said registrar to ascertain the amount: and I do order that such moneys shall be paid by the said

defendants into this court for the benefit of the said society, to be received by the officers thereof duly authorized in that behalf; and, in default of the said defendants delivering and bringing into the office of the registrar such accounts as aforesaid, then I order that the said defendants shall pay the sum of 50*l.* for the benefit of the said society, to be paid over as aforesaid.

"And I further order that the defendants shall pay to the said plaintiffs the costs which have been incurred by them in the prosecution of this suit, to be taxed," &c.

Upon an affidavit setting forth the above facts, and further stating that none of the managing committee had ever used or appropriated any of the funds of the said society for their own use, or had ever been indebted to the said society on any account whatever, but had in all things connected with their office acted fairly and bonâ fide to the best of their judgment and belief for the benefit of the said society, and believed the said alterations and amendments would have been conducive to the interests thereof; and that alterations and amendments for the extension of the funeral allowances on the decease of members were still essential to be made, to enable the society to compete with other societies of a similar character, who were paying higher rates, with no larger amount of subscription,—

Brett moved for a rule to shew cause why a writ of **[725]** prohibition should not issue to the county-court of Liverpool, to prohibit all further proceedings in the said court against the defendants upon the above judgment. This was a matter in which the county-court had no jurisdiction; and, if the county-court had jurisdiction, it has not been well exercised. The sections of the statute 18 & 19 Vict. c. 63, which give jurisdiction to the county-court in matters relating to friendly societies, are the 41st and 42nd. The 41st section enacts, that, in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the rules of the society, shall be made to the county-court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county-court upon and in relation to such application as aforesaid shall not be subject to any appeal." And the 42nd section enacts, that, "in all cases where the order of such county-court shall be for the payment of money, the **[726]** same may be enforced in the same manner as the ordinary judgments of such court are enforced; but, where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county-court in his said order to order the party to do such act, or that, in default of his doing it, he shall pay a certain sum of money; and, in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by certiorari or other writ or process to any superior court of record." The 25th section provides for the making of rules, which by s. 26 are to be certified by the registrar of friendly societies. The 27th section enacts, that, "after the rules of a friendly society shall have been certified by the registrar as aforesaid, it shall be lawful for such society, by resolution at a meeting specially called for that purpose, to alter, amend, or rescind the same or any of them, or to make new rules:" it then provides for the transmission of such amended rules to the registrar, and declares, that, "if the said registrar shall find that such alterations, amendments, or new rules are in conformity with law, he shall give to the society a certificate, &c.; and that all rules, alterations, and amendments, when so certified as aforesaid, shall be binding on the several members of the said society and all persons claiming on account of a member or under the said rules; but, unless and until the same shall be

so certified as aforesaid, such rules, alterations, and amendments shall have no force or validity whatsoever." The registrar under these sections is the proper person to determine whether the rules, or any alterations or amendments thereof, have been made in conformity with law. The **[727]** plaint asks that an order may be made that the meetings held pursuant to the notice of the 24th of February, 1857, might be declared void and of no effect, that the defendants (the committee of management of the society) might be restrained from procuring the certificate of the registrar that the proposed alterations and amendments were according to law, and from putting in force or acting upon such alterations and amendments until the 111th rule had been duly complied with in regard thereto; and that the defendants be ordered to repay to the trustees all such moneys as had been expended by them out of the funds of the society in reference to the proceedings. The judge finds that the proposed alterations and alleged amendments in the rules had not been duly and regularly made and passed, and that they were altogether null and void; and he directs "that the same shall be no further proceeded with, nor in any way attempted to be acted upon by the defendants;" and he further orders and directs "that the business and affairs of the said society shall be conducted by the defendants and all and every other the officers and members of the society according to the existing rules certified by the registrar of friendly societies in England and in force at the time of the hearing of this suit, until such rules shall be lawfully altered or rescinded." This clearly was assuming a jurisdiction which the statute does not confer upon the county-court. The judge had no power to dictate to the committee the mode in which they were to carry on the business of the society. [Williams, J. That part of the order is only a periphrastical way of saying that the former rules shall continue in force. Cockburn, C. J. Suppose the meeting at which the alterations were made had been improperly convened, and held at an inconvenient place, do you contend that the judge of **[728]** the county-court had no jurisdiction?] The county-court has only an equitable jurisdiction under ss. 41 and 42 to order the parties to do some act: it has no power to order an injunction or a prohibition to control the committee in their management of the affairs of the society. [Byles, J. The 41st section gives the most ample jurisdiction to the county-court to entertain "all applications for the removal of any trustee, or for any other relief, order, or direction," &c.] The 42nd section qualifies those general expressions. [Byles, J. The 42nd section is cumulative on the 41st: the two sections together give the county-court all the jurisdiction which the court of Chancery had, and some powers which that court had not. Williams, J. It can hardly be contended that the registrar of friendly societies has power to deal with matters of this sort: and, if the county-court has not, there is no power vested anywhere for the purpose.]

Assuming that the county-court had jurisdiction, such jurisdiction, it is submitted has not been properly exercised. The plaint was heard by Mr. Greene, who was acting as deputy for Mr. Pollock, the judge of the Liverpool County Court, on the 13th of July, 1857; and the order was not made until the 18th of November, after the resignation and death of Mr. Pollock, and the appointment of Mr. Blair as his successor. The power of the deputy-judge is regulated by the 20th section of the 9 & 10 Vict. c. 95, and the 11th section of the 19 & 20 Vict. c. 108. The former enacts, that, in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the court, it shall be lawful for the judge, or, in case of the inability of the judge to make such appointment, for the Lord Chancellor (or chancellor of the Duchy of Lancaster) to appoint some other (qualified) person to act for him for any time or times not exceeding in the **[729]** whole two calendar months in any consecutive period of twelve calendar months. And the latter provides that the appointment of a deputy of a judge of a county-court, whether such deputy shall have been appointed by the judge, or by the Lord Chancellor, or by the chancellor of the Duchy of Lancaster, shall not be vacated by the death of the judge; but his acts done after such death shall be as valid as if the judge had not died; and he shall continue to act in all the courts of the district of which the deceased was judge, "until the Lord Chancellor, or, where the whole of such district is within the Duchy of Lancaster, until the chancellor of the Duchy, shall otherwise order, or a successor to such judge shall be appointed," &c. Here, Mr. Greene, who heard the case, and therefore whose mind was to be applied to the decision, sent that which purports to be an order to Mr. Blair, who was appointed to succeed Mr. Pollock as judge of the

county-court, and who received and recorded it as the judgment of the court, after the death of that gentleman. [Cockburn, C. J. It is, in effect, a judgment of the court without a hearing. The question is whether it was not the duty of the defendants, under the circumstances, to apply for a re-hearing.] The judgment is a nullity.

Mellish, contrà. The 41st and 42nd sections of the 18 & 19 Vict. c. 63, confer upon the county-court all the powers of dealing with friendly societies which the court of Chancery possessed before, and something more. And it is clear that a court of equity might have granted an injunction in such a case as this: *Ward* v. *The Society of Attorneys*, 1 Collier, C. C. 370. [Cockburn, C. J. Upon the question of jurisdiction, the court entertain no doubt. The only difficulty we feel is, whether the judgment of the deputy can stand.] **[730]** The judgment is the judgment of the court,—of the new judge. The declaration of the reasons upon which it is founded forms no part of the judgment. Assuming, therefore, that Mr. Blair, the new judge, has entered the judgment, and will act upon it, the question is whether it is so contrary to natural justice to enter and to enforce a judgment upon a hearing before a deputy who was properly qualified at the time of the hearing, as to induce this court to interpose. This court will only prohibit the county-court from doing that which is clearly beyond its jurisdiction: *In re Walsh*, 1 Ellis & B. 383. Supposing, therefore, Mr. Blair is prohibited, it would only be to restrain him from enforcing Mr. Greene's judgment,—not to prohibit him from proceeding upon the plaint generally: and time might now be given to the parties to apply for a re-hearing.

Cockburn, C. J. As to the first point, I am clearly of opinion that the county-court has jurisdiction in the matter in question. The statute gives the county-court the largest powers in reference to disputes amongst members of these friendly societies. The 40th section enacts that "every dispute between any member or members of any society established under that act or any of the acts thereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, should be decided in manner directed by the rules of such society, and the decision so made should be binding and conclusive on all parties, without appeal: provided, that, where the rules of any society established under any of the acts thereby repealed should have directed disputes to be referred to justices, such disputes should be referred to and decided by the county-court, as thereinafter mentioned." In **[731]** addition to these general terms giving jurisdiction, the 41st section enacts, that, "in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member, or person claiming through or under a member, or under the rules of the society, shall be made to the county-court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county-court upon and in relation to such application as aforesaid shall not be subject to any appeal." I cannot conceive what language the legislature could have employed in order to give more extensive powers. It is said that the general language of that section is controlled by that of the 42nd section, which enacts, that, "in all cases where the order of such county-court shall be for the payment of money, the same may be enforced in the same manner as the ordinary judgments of such court are enforced; but, where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county-court in **[732]** his said order to order the party to do such act, or that, in default of his doing it, he shall pay a certain sum of money; and, in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by certiorari or other writ or process to any superior court of

record." It is said that this must be taken to limit the application of the former section to cases where the parties are ordered to do some act. That, however, would have the effect of nullifying the provisions of the statute in more than half the cases of disputes arising amongst these societies. Reading the two sections together, I cannot bring myself to doubt what ought to be the proper construction. It is plain to my mind that the county-court had jurisdiction here. As to the other point, however, I entertain considerable doubt whether the present judge of the county-court was right in entering as the judgment of the court the conclusion arrived at by Mr Greene, whose functions as deputy to the late Mr. Pollock were at an end. It was the duty of the judge to "hear and determine" the matter of the plaint; and the question is whether it is not the duty of this court to prohibit the judge of the county-court from determining without hearing. I think, therefore, it would be better to adopt the course suggested by Mr. Mellish, so as to allow the plaintiff an opportunity to apply to the court to have that order rescinded and to proceed to a re-hearing of the plaint.

WILLIAMS, J. I am of the same opinion. I think it was quite within the jurisdiction of the county-court to entertain the application and to make the order. It appears that a dispute arose here between the com-**[733]**-mittee of management and certain members of the society relative to the manner of convening and the place of holding a special general meeting of the society for the purpose of altering and amending certain of its rules. The question is, how and before whom that dispute is to be settled. Mr. Brett says, by the registrar of friendly societies, under the 25th, 26th, and 27th sections of the 18 & 19 Vict. c. 63. That cannot be: all the duty intrusted to that officer is, to see that the rules which are submitted to him to certify are conformable to law: he has no power, as it seems to me, to inquire into the manner in which any alterations and amendments may have been made. Then it is said that the court of Chancery is the proper tribunal. But I must say I am unable to discover any language in the statute which at all limits or controls the very general words of the 41st section. As to the other point, I must confess I see very considerable difficulty in it. I think the course which has been suggested is the course it would be advisable to adopt. I should be sorry to be supposed to lay it down as positive law, that, in all cases where the parties acquiesce in the adjournment of the decision by the deputy-judge, and allow the judgment to be entered after the powers of the deputy are at an end, they can be permitted to come to the court and ask to have that judgment set aside on the ground that it was pronounced by an incompetent tribunal, without applying in the first instance to the judge. I think it would be very inconvenient to hold that that can be allowed. The difficulty, however, in the present case may be got over by giving the parties an opportunity of applying for a re-hearing of the plaint.

WILLES, J. As to the main question, viz. whether the county-court had jurisdiction to entertain this plaint, the conclusion I have arrived at is that it had. **[734]** The 41st section of the 18 & 19 Vict. c. 63, gives the county-court jurisdiction, in very general terms, to deal with "all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or have arisen in any society the rules of which do not prescribe any other mode of settling such disputes," &c. If the first part of the 41st section had stood alone, there could have been no doubt of the power of the county-court to dispense this specific relief. But then it goes on to provide that "such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction." I doubted at first whether the court of Chancery would make such an order as this, to injoin the committee of management from acting upon the altered rules. But, upon the proper construction of the statute, it appears to me to have been intended to give jurisdiction to bring about the same result by making such an order as this. It is said that there are no means given to enforce the order when made, the 42nd section only applying to a case where the party is ordered to pay money, or to do some act. The argument is plausible, but it will not hold. The 41st section determines the principles upon which the county-court is to proceed: the 42nd relates to mere matter of detail. But it appears to me that there are ample means of enforcing the orders of the county-court. A power to enforce its orders is incident to every court: Viner's Abridgment, Court

(F.). And, assuming that the 41st section of the statute did not carry with it the powers incident to the exercise of the jurisdiction [735] which it creates, there would still be a remedy if the parties injoined should neglect to obey the order of the court. An indictment might lie, as in the case of the disobedience of an order of justices, where the statute enabling the justices to make the order omits to provide means for the carrying of it out. I arrive at the conclusion that the jurisdiction exists, and that the county-court is in this respect on the same footing as the court of Chancery. Now, it was clearly within the jurisdiction of the court of Chancery to interpose to prevent the majority from altering the constitution of the society. *Ward* v. *The Society of Attorneys*, 1 Collier, C. C. 370, is an authority for that. There, a society was incorporated by charter: the majority of its members having resolved to surrender their charter, with a view to obtain a new charter for an object different from that for which the original charter was obtained, an injunction was granted, upon the application of the minority, to restrain them from so doing. That case involves the principle upon which the county-court attempted to proceed in this case. Therefore I concur with the rest of the court in thinking that a prohibition should not be granted upon that ground. There is, however, a more formidable objection, viz. that the order was made by the deputy-judge after his deputation had ceased, after the death of the judge whose deputy he was, and after the appointment of a new judge. It is not, therefore, the judgment of a competent judge. To prove this it is only necessary to refer to the case of the Lord Chancellor retiring from office after the hearing of a cause, and before the judgment is pronounced. It was necessary to have recourse to the legislature to get rid of the difficulty arising from parties refusing to consent to judgment being pronounced at a subsequent period. Accordingly, by the 60th section of the 15 & 16 Vict. c. 80, reciting, [736] that "whereas, it has frequently happened, that, after cases have been heard fully by the Lord Chancellor in the court of Chancery, and are standing for judgment, the Lord Chancellor has delivered up the great seal without being able, by reason of other urgent public business, to deliver judgment therein, and much inconvenience and expense to the parties has been thereby occasioned," it is enacted, "that, in every such case, it shall be lawful for the person who has so delivered up the great seal, within six weeks after he shall have delivered up the same, to give in to the registrar of the said court a written judgment, signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if the judgment in pursuance whereof it is drawn up had been given in open court the day before he shall have so delivered up the great seal." It is unnecessary to refer to any other authority to shew that this order cannot stand as the act of the deputy-judge. But it is then said that it may stand as the judgment of the new judge. The objection to that is, that he had not heard the matter. It is said that the party complaining should have applied to the new judge for a re-hearing. But I am not aware of any case in which that has been held to amount to a condonation, or that "mere standing by" has been thought to preclude the party from objecting to a defect of this sort. In my opinion, it is a fatal objection to the judgment, and I think a prohibition ought to issue for the purpose of preventing its being enforced. But, if we were to issue a prohibition, there might be a difficulty in the court's proceeding to another judgment in the same suit. The proper course, therefore, will be, to suspend this rule until the first day of the next term, in order to give the complainants an opportunity to [737] apply to the judge of the county-court to strike out the judgment which has been entered per incuriam, and to proceed to a re-hearing of the plaint.

Byles, J. I am of the same opinion. What has been thrown out upon this occasion will afford a guide to the judge of the county-court directing him to a right conclusion, provided the facts are not varied. I think it was perfectly competent to the county-court to entertain and dispose of the matter of this plaint. In respect to associations of this description, the court of Chancery is the natural jurisdiction in which to settle disputes amongst the members. But its machinery is cumbrous, expensive, and not readily accessible. I think it is impossible to read the 41st section of the 18 & 19 Vict. c. 63, without being satisfied that it was intended to make it unnecessary to resort to that jurisdiction, and to transfer all its powers to the county court. It enacts that "all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or

may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the rules of the society, shall be made to the county-court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the court of Chan-[738]-cery in respect either of its ordinary or its special or statutory jurisdiction." It is impossible to conceive clearer terms giving the county-court all the remedial powers previously possessed by the court of Chancery. The 42nd section, instead of controlling that section, appears to me to be cumulative, giving the county-court a jurisdiction which the court of Chancery did not possess. The first objection, therefore, affords no ground for a prohibition. For the reasons given by the rest of the court, however, I think the rule should go for the purpose already stated.

Rule accordingly (*a*).

IN THE MATTER OF THE COMPLAINT OF CHARLES COMPANY COOPER AGAINST THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. June 1st, 1858.

[S. C. 27 L. J. C. P. 324; 4 Jur. N. S. 762; 6 W. R. 625.]

The South Western Railway Company had been in the habit of unloading goods coming by their railway from the Southampton Docks consigned to carriers in London, out of their trucks, and of placing them (by their servants) in or conveniently near to the waggons of the consignees, without any extra charge. This practice they discontinued, refusing to allow their servants to unload the trucks without an extra charge for such service,—except in the case of Messrs. Pickford, whose goods they continued to unload as before, the smallness of their quantity, and the fact of their being carried intermixed with the company's own traffic, rendering it (as the company alleged) more convenient to themselves so to do. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place,—the company alleging that the same reasons did not apply to his goods as to Messrs. Pickford's, inasmuch as the former came in large quantities, and in separate trucks. —The court refused to make absolute a rule for an injunction under the Railway Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C. by placing the same in or adjacent to his waggons,—holding the demand to be too large. But they intimated, that, if C.'s complaint had been confined to the company's giving an advantage to Messrs. Pickford in the unloading of their goods, which they withheld from him, C. might have been entitled to relief under the statute.

Pearce, in Easter Term last, on behalf of Charles Company Cooper, obtained a rule calling upon the London and South Western Railway Company to shew [739] cause why a writ of injunction should not issue against them, pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), injoining them to unload the trucks or other conveyances of the said company containing goods consigned to him at their station situate at Nine Elms, Vauxhall, in the county of Surrey, and to deliver such goods to him by placing the same in or adjacent to the waggons or other conveyances of the said Charles Company Cooper which may be placed to receive the same at their said station, with costs.

An application had previously been made to Pollock, C. B., at Chambers, founded upon an affidavit of Cooper which was in substance as follows:—1. That I am a licensed carman and contractor for the carriage of goods, and I am to a considerable extent and almost daily employed as the consignee at Nine Elms for the conveyance of goods on their transit from the Southampton Docks to the various parts of London,

(*a*) See *Hull* v. *M'Farlane*, ante, vol. ii., p. 796.

and which goods are forwarded by the said railway from Southampton Docks to Nine Elms: 2. That the company convey goods from the Southampton Docks to their station at Nine Elms at a charge of 13s. per ton for such goods as are classed under the rate No. 2 in their scale of charges: 3. That the company have until recently employed their own servants to unload the trucks or other conveyances containing goods consigned to persons at their station at Nine Elms, and delivered such goods to the consignees, by placing the same in or adjacent to the waggons or other conveyances of the consignees there to receive the same: 4. That I have recently had various lots of goods consigned to me from Southampton Docks to Nine Elms, on which the said charge of 13s. per ton has been paid for the carriage thereof, and the company refused and declined to unload the trucks and other conveyances containing the said goods as theretofore they had done as aforesaid, whereby I [740] am compelled to employ and do employ my own servants to unload such goods, and to convey the same from the trucks or other conveyances of the company to my waggons or other conveyances: 5. That, since the said company have refused and declined to unload trucks and conveyances containing goods consigned to me, I have carefully watched and inquired whether the same rule is observed respecting goods consigned to other persons; and I say that the company still continue to unload the goods of other persons than myself at the Nine Elms station: 6. That by so doing the company give an undue or unreasonable preference or advantage to or in favour of such persons, and cause an undue and unreasonable prejudice or disadvantage to me: 7. That I am advised that the course pursued by the company is illegal and in contravention of the provisions of the Railway and Canal Traffic Act, 1854.

The application was opposed upon two affidavits of the superintendent of the goods department of the company at Nine Elms. The first of these was in substance as follows:—1. That Cooper was in the service of the company for about four years down to November, 1857, when he voluntarily quitted such service, and has since pursued the avocation of licensed carman of goods on his own account from the company's station at Nine Elms to different parts of London: 2. That the only dealings between the company and Cooper had been with respect to goods consigned to him by brokers at Southampton to Nine Elms, for delivery by him as such licensed carman in London, or goods consigned from Southampton, not in any name, but to wait the orders of merchants, which last-mentioned goods have only been delivered to Cooper upon production of a written order from authorized ship-brokers: 3. That, with regard to the company's charge of 13s. per ton for goods as mentioned in the second and [741] fourth paragraphs of Cooper's affidavit, I say that such charge is applicable only to the railway transit from the Southampton Docks to the Nine Elms station, and that the labour of transfer from the railway trucks to the company's vans for delivery is not included in that rate, but is charged for in an extra rate for delivery of dock goods to bonded or other warehouses in London: 4. That, prior to the time when Cooper quitted the company's service and embarked in his present avocation of carman as aforesaid, the delivery of goods from their station at Nine Elms was performed by the company themselves in their own vans, save and except the goods of Messrs. Pickford after mentioned: 5. That Cooper adds to the company's charge for carriage of goods an amount for London cartage to bonded warehouses or other places, which should include the labour of unloading and loading from the said company's trucks into his own vehicles, as is the case with respect to the extra rate charged by the company for cartage of goods delivered by them as aforesaid: 6. That the dealings of other parties with the company have no parallel with those of Cooper, except to a certain extent the dealings of Messrs. Pickford with the company as general carriers, to whom in that character goods are consigned for transit by the company's railway from Southampton, including consignments from the Southampton Docks, which they (Pickfords) transmit as consignors and consignees; but such consignments are composed generally of different classes of goods charged by the company at differential rates including labour in the transfer from the railway to vans for delivery: 7. That, in some instances, but not frequently, such last mentioned consignments include goods arriving at Nine Elms from the Southampton Docks on which the said rate of 13s. per ton is charged by the company for their transit on the railway, and [742] which goods the company transfer into the conveyances of Messrs. Pickford; but, although in this instance this is done, it is in point of fact a convenience to the company; such goods being mixed up with the company's traffic, owing to the quantity for the Messrs.

Pickford not being sufficient to run a separate truck, and their goods are therefore placed in the same trucks which contain goods for the company's own delivery, whilst the traffic of Cooper is in almost all instances kept separate from the company's, and brought up in separate trucks: 8. That the company consider that they have a right, if they think proper, to withhold the labour of transfer with regard to such of Messrs. Pickford's goods upon which the rate of 13s. per ton only is paid for the carriage thereof: 9. That the company's waggons have always, without any intermission, so far as the general convenience of the public would permit, been placed in such an adjacent position at the station at Nine Elms as to facilitate the transfer of goods by Cooper from the railway waggons or trucks to his own vehicles: 10. That the charge of 13s. per ton for carriage of goods from Southampton Docks is about 6s. below the company's ordinary rate of charge for such class of goods; and, in cases where such ordinary or full rate is charged, the company include the labour of loading and unloading, but not otherwise: 11. That the contracts respecting the transmission of goods by the company which have been delivered to Cooper at their station at Nine Elms, and the rates and charges for the same, and the duties embraced therein, subsisted between the company and the senders of such goods; the only dealings between Cooper and the company immediately being limited to the receiving of the said goods at the station at Nine Elms by him as consignee or agent, for delivery by him in London in his own conveyances, in his character of licensed carman as aforesaid.

[743] A further affidavit of the same deponent stated (2) that between the month of November, 1857, when Cooper commenced his dealings with the company, and the present time, the entire quantity of goods consigned to Messrs. Pickford from Southampton to Nine Elms, on which the dock rate of 13s. per ton was charged, as mentioned in the seventh paragraph of the former affidavit, was less than 21 tons; and that such goods arrived at Nine Elms in various trucks at various times, and the same were always, or nearly so, mixed up with the company's own traffic: 3. That it has been the practice of the company to transfer such last-mentioned goods to the vans of Messrs. Pickford, that course being the most convenient to the company with respect to such small quantities of goods as usually arrived on any one occasion intermixed as aforesaid with goods for delivery by the company, and the amount of time and trouble on the part of the company involved in such course of business not being greater than would be required in the checking the transfer of the same goods, if such transfer were effected by Messrs. Pickford's own carmen, and the security to the company being greater: 4. That, during the period before mentioned, from November, 1857, to the present time, the quantity of goods which arrived at Nine Elms from Southampton for delivery by Cooper, on which the dock rate of 13s. per ton was charged, amounted to upwards of 327 tons, and such goods commonly, if not always, arrived in separate trucks: 5. And that about half only of the company's charges upon the said 327 tons of goods were paid by Cooper, the other moiety having been paid by the consignors.

The learned judge declined to entertain the matter, but referred the parties to the court.

In addition to the above affidavits, the motion was supported by another affidavit of the complainant, who **[744]** stated, that, whilst he was in the company's employ, the invariable practice of the company was that their servants should unload their trucks and place goods in the vans or other conveyances of the consignees, in respect of which goods the charge of 13s. per ton was charged by the company, and that no extra charge was made for so doing, and he believed that no new rule or regulation had been made on the subject: That, previously to the year 1853, Messrs. Smith & Dawes were the contractors for the delivery of goods from the Southampton Docks to London by the London and South Western Railway, and that the company always loaded and unloaded their trucks without making any extra charge for the same to Messrs. Smith & Dawes: That Messrs. Pickford are not the only parties for whom the company transfer goods into the party's own conveyances, for that they invariably unload their trucks containing goods of the description aforesaid for delivery to Messrs. Pope & Co., and place such goods in the vessels or other conveyances of the said Messrs. Pope & Co., and that such goods are of the same description as are classed under rate No. 2 in the scale of charges by the company charged at 13s. per ton: That the charge of 13s. per ton for the carriage of goods included under rate No. 2 is the highest rate of charges of the company for goods conveyed from the Southampton

Docks to Nine Elms, and that the charges of the company for manufactured silk and fine goods from the Southampton Docks to Nine Elms, are respectively 11s., 8s. 4d., and 6s. 6d. per ton, including the loading and unloading of such goods into the waggons or conveyances of the consignees: And that three fourths at least of the goods of the class aforesaid, and which have arrived at the Nine Elms station for delivery to Cooper, were consigned to him from the Southampton Docks.

Montague Smith, Q. C., and Milward, shewed cause, [745] upon a further affidavit of the superintendent of the company's goods department, stating in substance as follows,—That it had not been the rule and invariable practice for the servants of the company to place goods in respect of which the dock rate of 13s. per ton was charged in the vans or other conveyances of consignees, but that the same had always been placed in such an adjacent position as the convenience of the traffic would allow, in order to facilitate the transfer of the goods to the conveyances of the consignees, as was the case with respect to the trucks containing goods arriving for Cooper; that Messrs. Smith & Dawes previously to the year 1853 were general carriers at Southampton and in London, and in such character did consign various classes of goods from Southampton to London, which were charged by the company at differential rates, including consignments at the dock rate of 13s. per ton, which last-mentioned goods were generally brought up in separate trucks, and were placed by the company in an adjacent position to the conveyances of the said Messrs. Smith & Dawes, and were then loaded into such conveyances by the servants of Messrs. Smith & Dawes; that, with regard to goods consigned to Messrs. Pope & Co., nine tenths thereof were a different class of goods and charged at a different rate to the dock rate, and that, by contract with the company, such goods were by the joint assistance of the servants of the company and of Messrs. Pope placed in barges brought alongside the wharf, but such barges were the only conveyances brought to Nine Elms by Messrs. Pope; that the company's ordinary rate for the same class of goods as those conveyed from Southampton Docks at 13s. per ton, if conveyed from any other place would be charged at a higher rate, in which charge the labour of transfer would be included; that, with respect to the rates of 11s., 8s. 6d., and 6s. 6d. per [746] ton mentioned in Cooper's affidavit, such rates had reference to different classes of goods to those conveyed at the dock rate, and that the goods charged at 11s., 8s. 6d., and 6s. 6d., did not include silk or fine goods of any description; that, out of the 21 tons of goods which arrived at Nine Elms for Messrs. Pickford, at least seven tenths thereof arrived mixed up with the company's traffic; and that nearly the whole of the 327 tons of goods which arrived at Nine Elms for delivery to Cooper arrived in separate trucks.

The learned counsel submitted that the rule was completely answered, the defendants' affidavits clearly shewing, that, in unloading and delivering Messrs. Pickford's goods into their vans, the company were merely consulting their own convenience, the quantity of goods brought for Messrs. Pickford being small, and not brought, as the complainant's goods were, in separate trucks; and that, if this was intended to be complained of, the rule should have been differently framed, and should not have called upon the court to injoin the company to unload and deliver the complainant's goods, but should have been confined to the injoining them from doing in this respect for others that which they refused to do for the complainant.

Bovill, Q. C., and Pearce, in support of the rule. It is not denied that the company decline to unload the trucks containing Mr. Cooper's goods, though they have hitherto been in the habit of doing so for others; and they admit that they still do so for Messrs. Pickford. The fact that the quantity of goods carried for Messrs. Pickford is inconsiderable as compared with that carried for Mr. Cooper in no degree varies the rights of the latter. The company are bound to treat all alike. [Cockburn, C. J. What power has this court under the statute to interfere respecting the mode of dealing with [747] the goods by the company after they arrive at their destination?] The goods have not arrived at their destination until they are delivered to the consignee,—into the waggon or carriage of the consignee: *Richards* v. *The London, Brighton, and South Coast Railway Company*, 7 C. B. 839; *Butcher* v. *The London and South Western Railway Company*, 16 C. B. 13. [Williams, J. In those cases, the companies were held liable because they took upon themselves to deliver the goods into the passenger's carriage.] So here, the company took upon themselves to unload and deliver into the vans for Messrs. Pickford. If they do this for one, they must do it for all. At all events, Mr. Cooper has a right to complain that facilities are afforded

to others which are withheld from him. [Cockburn, C. J. That is not the complaint he makes.] Substantially, it is submitted, it is so.

Cockburn, C. J. Looking at all the circumstances of the case, I am of opinion that this rule must be discharged. I do not say that Mr. Cooper has not some ground of complaint against the company. It appears that the company, having formerly been in the habit of unloading goods brought by their railway from the Southampton Docks, out of their trucks into the waggons or other conveyances of the consignees, have recently established a new system, and have, in the case of the complainant, Mr. Cooper, declined to allow their servants to assist in unloading his goods from their trucks. It further appears that, as regards Messrs. Pickford, the well known carriers, the company have, notwithstanding this alteration in their general course of dealing, continued to allow their servants to unload their goods from the company's trucks and place them in Messrs. Pickford's vans, free of extra charge. At the same time, it appears that the quantity of goods of **[748]** the description in question which were brought up from Southampton for Messrs. Pickford is very small as compared with the quantity brought for the complainant. It further appears that the complainant, on being led to believe that this advantage which the company denied to him was continued to others, instead of remonstrating with the company, and resting his complant upon this, the only true ground, based it upon the withdrawal of an advantage which had formerly been conceded. If Mr. Cooper had communicated to the company the real ground and nature of his complaint, it being unjust that the company should extend to a rival carrier an advantage which they do not extend to Mr. Cooper, even though the amount of such advantage should be comparatively small, —the company being bound to afford equal facilities and advantages to all, whether the quantity of goods carried be large or small,—we might have felt ourselves called upon so to mould the rule as to meet the particular case. It is one thing to say that the company shall not transfer from their trucks the comparatively small quantity of goods they bring for Messrs. Pickford into the vans of that firm: but it is a very different thing to say, that, because they do that for Messrs. Pickford, they shall be compelled also to unload and deliver into the complainant's waggons the large quantity which they bring for him. The rule, therefore, cannot be made absolute in the form in which it is moved. It asks more than is necessary to redress the grievance complained of: and if we were to make it absolute in its terms we should be inflicting upon the company a grievous hardship. If the plaintiff had stood before us without exception to his conduct, we might have moulded the rule so as to meet the justice of the case. But, looking at all the circumstances, and seeing that the grievance is a comparatively small one, **[749]** and that the complainant has not taken the course which it is reasonable to suppose would have led to his complaint being redressed, I think we are not called upon to step out of the way to assist him. I therefore think the rule must be discharged, but without costs, and with an intimation that the company are not justified in giving facilities to Messrs. Pickford which they do not afford to Mr. Cooper, and that, if a renewed application be rendered necessary, it may be attended with more success.

The rest of the court concurring,

Rule discharged, without costs.

John Boyd and Another *v.* Joseph Robins and Nathan Langlands.

July 5th, 1858.

[S. C. 27 L. J. C. P. 299; 4 Jur. N. S. 1084. Reversed, 5 C. B. N. S. 597.]

In July, 1850, A. and B. gave C. a guarantee (continuing) for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200l. was due in respect thereof. In June, 1854, B. became bankrupt, and duly obtained his certificate. No notice having been given to determine the guarantee:—Held, that B.'s liability thereon was a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was a bar to a claim in respect of goods supplied to D. after the bankruptcy of B.(*a*).

This was an action brought upon a guarantee dated the 25th of July, 1850, to

(*a*) See the note at the end of the case.

recover the sum of 200l. for goods sold and delivered and money lent to and money paid for one Thomas Kerr, by the plaintiffs.

The defendant Robins suffered judgment by default. The defendant Langlands pleaded: and, by consent of the plaintiffs and Langlands, and by order of Crowder, J., the following case (of which the pleadings were [750] to form part) was stated for the opinion of the court:—

At the time when the guarantee was given, the plaintiffs were, and still are, warehousemen carrying on business at No. 5 Friday Street, London, and the defendant Robins was a miller and corn-chandler, and the defendant Langlands was a grocer and cheese-monger, at Dartford, in Kent. Thomas Kerr was a draper at Dartford.

On the 25th of July, 1850, the defendants, at the request of Kerr, gave the plaintiffs the following guarantee in writing:—

"To Messrs. John and Christopher Boyd, of No. 5 Friday Street, London, warehousemen, and the survivor of them.

"In consideration of your selling goods to Thomas Kerr, of Dartford, in the county of Kent, draper, we do hereby agree to guarantee to you and each of you the due payment of the amount of, or the balance unpaid to you for, any goods sold and delivered, and to be hereafter sold and delivered, and of any money lent and to be lent to or paid for the said Thomas Kerr by you, to the extent of 200l.: And we do further agree that you shall be at liberty at any time hereafter to call upon us for the payment of the said sum of 200l., which may be applied by you as you think proper, either in payment or part-payment of any debt which may be due to you from the said Thomas Kerr, or to make up any deficiency, or towards any loss on any debt which may be due or have been due to you, and not have been paid by him, after receiving any dividend or dividends or composition from his estate or him: And we do further agree that you shall be at liberty, without giving notice to us, or obtaining our consent, to extend the usual time or times of payment or credit for any goods sold or to be sold to the said Thomas Kerr, and to renew or take from him, as you may think proper, any bills, notes, or securities for [751] the payment of any debt due from him to you, or any part thereof, and also to receive or accept any composition from the said Thomas Kerr in full for any debt, and to execute any release to him of the debt due from him, or any part thereof, and also to execute any assignment made by him in trust for his creditors: And we do further agree that this guarantee shall be a continuing guarantee, and shall be binding upon us for the payment of the said 200l., at all events, and under all circumstances, until you receive a notice in writing to the contrary. In witness, &c." (Signed) "JOSEPH ROBINS.
"NATHAN LANGLANDS."

On the faith of this guarantee, the plaintiffs from time to time after the said 25th of July, 1850, and before the bankruptcy of the defendant Langlands, sold and delivered goods and lent money to and paid money for the said Thomas Kerr, to an amount exceeding 200l.; and in respect thereof the defendant Langlands, at the time of his bankruptcy, was liable to the plaintiffs to the amount of 200l. by virtue of the said guarantee.

The sum so due to the plaintiffs from the said Thomas Kerr was paid by him to the plaintiffs after the defendant Langlands became and was adjudicated bankrupt on the 24th of June, 1854, on the petition of a creditor to whom the defendant Langlands was indebted in an amount sufficient to support proceedings in bankruptcy.

The defendant Langlands was before and at the time of the said petition and adjudication a trader subject to the bankrupt laws, and obtained his certificate of conformity as such bankrupt, which was duly allowed on the 7th of September, 1854.

There was an estate of the said Nathan Langlands as such bankrupt applicable to the payment of dividends on the proofs under the said adjudication.

[752] The plaintiffs have not received notice in writing on behalf of the defendants, or either of them, that the said guarantee was not to remain a continuing guarantee.

The plaintiffs after, and having notice of, the said bankruptcy and the obtaining and allowance of the said certificate, sold and delivered certain other goods, and lent to and paid other money for the said Thomas Kerr, to an amount exceeding 200l.: and there is now due in respect of the same from the said Thomas Kerr a sum exceeding the said sum of 200l., which said sum the said Thomas Kerr, though requested to pay,

has not paid. The defendants have been requested to pay, but have not paid, the said money.

The question for the opinion of the court was, whether, under the circumstances of the case, the defendant Nathan Langlands had a good defence to the action. If the court should be of opinion that the plaintiffs were entitled to recover against him in this action, then judgment was to be entered for the plaintiffs for the amount of 200l. But, if the court should be of opinion that the plaintiffs were not so entitled, then judgment was to be entered for the defendant Nathan Langlands, with costs of his defence, including the costs of and occasioned by this case; or (if the court should think fit so to order) the name of the said Nathan Langlands as a defendant might be struck out of the proceedings in this action, without objection on his part, on payment by the plaintiffs of costs as aforesaid.

C. W. Wood, for the plaintiffs. This was a continuing guarantee until a notice given to determine it, and therefore it is altogether unaffected by the bankruptcy and certificate of Langlands. [Williams, J. This point arose before the Lords Justices in a case of *Ex parte Barwis, In re Strahan*, 6 De Gex, McN., & G. 672. **[753]** There, a joint and several covenant was entered into by a principal debtor and his surety that the principal would pay a sum of money by three instalments, on three specified days. The first instalment was duly paid, but before the second became due the surety became bankrupt. The creditor applied to the commissioner to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was allowed: And the Lords Justices, on appeal, affirmed his decision, holding that the claim was properly admitted as upon a contingent liability under the 178th section of the 12 & 13 Vict. c. 106.] The plaintiffs' claim here is in respect of goods for which there could be no proof. *Warburg* v. *Tucker*, 5 Ellis & B. 384, is an authority in point. There, the defendant, being indebted to the plaintiff, assigned to him, as security, an insurance on the defendant's life, and an insurance on the life of the defendant's wife, and covenanted,—first, to pay the premiums,—secondly, that, if he did not pay them, the plaintiff might pay them, and he, the defendant, would repay the plaintiff. The plaintiff sued the defendant upon this covenant, assigning for breaches,—first, that the defendant had not paid the premiums,—secondly, that the defendant had not repaid to the plaintiff premiums paid by the plaintiff on the defendant's default. The defendant, to the whole declaration, pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place. On demurrer to the plea, it was held that it gave no answer to the declaration, neither of the plaintiff's claims being a debt payable upon a contingency within s. 177, nor a liability to pay money upon a contingency within s. 178. The observations of Lord Campbell in that case apply most strongly here. [Williams, J. **[754]** That was said to be, not a contingent liability to pay money, but a contingent liability to pay damages. The court of Queen's Bench and this court (in *Young* v. *Winter*, 16 C. B. 401), are at conflict upon the other point: therefore that case can hardly be considered as an authority here; especially as the Lords Justices in *Ex parte Barwis* give the preference to *Young* v. *Winter* (*a*).] It is impossible that words could be larger than those of this guarantee. The only sections of the bankrupt act which can apply to the present case are, the 177th and the 178th. Section 177 enacts, that, "if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt: and the court is hereby required to ascertain the amount thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may after such contingency shall have happened prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not when such debt was contracted notice of any act of bankruptcy by such bankrupt committed." And s. 178 enacts, that, "if any trader who shall become bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability

(*a*) See *Warburg* v. *Tucker, in Error*, 28 Law J., Q. B. 56.

to pay money upon a contingency which shall not have happened, and the [755] demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not proveable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends: provided such person had not at the time such liability was contracted notice of any act of bankruptcy by such bankrupt committed: provided also, that, where any such claim shall not have either in whole or in part been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the court shall think fit, be expunged either wholly or in part from the proceedings." In the case of *In re Willis*, 4 Exch. 530, a claim on a guarantee for a sum certain, was held, when due, to be provable as a debt, and, before it was due, to be provable as a debt due on a contingency, under the 56th section of the 6 G. 4, c. 16. [Williams, J. That case has very little to do with the question. There was a debt: the only contingency was, whether or not the principal debtor would pay: when he failed to pay, it became an ascertained debt against the surety.] If the court feel bound by the decision in *Young* v. *Winter*, it would be idle to argue the case further here. But this distinction may be suggested. The sureties here had power to revoke the guarantee: not having done so, this may be considered as a new instrument [756] given after the bankruptcy. [Williams, J. Why is a bankrupt who has given an absolute guarantee to be better off in this respect than one who has given a guarantee which he might at any time revoke?] By abstaining from giving notice to withdraw from the obligation, the bankrupt has deluded the plaintiffs into giving further credit to the principal. [Byles, J. You say that the bankrupt act only contemplates liabilities from which the bankrupt could not by his own act have relieved himself?] Precisely so.

Aspland, contrà. This instrument, assuming it to have been a continuing guarantee when given, ceased to be so on the bankruptcy of Langlands. [Williams, J. How can the bankruptcy make any difference? It was not provable as an absolute debt. The bankrupt only became liable in the event of the principal debtor failing to pay.] The bankruptcy of Langlands put an end to his liability, just as much as if there had been a judgment against him: and no notice was necessary. The defendant's liability was exhausted quite irrespective of the bankrupt act. But the claim is clearly barred by the 178th section. The case of *Young* v. *Winter*, 16 C. B. 401, fortified as it is by the opinion of Lord Justice Turner in *Ex parte Barwis*, is conclusive of the question. [Williams, J. The difficulty that has occurred to some of us is this: Assuming, that, in an ordinary case of guarantee, the liability of the surety would, according to *Young* v. *Winter*, be the subject of a claim under s. 178, the commissioner would have to set a value upon it. But, with this clause enabling the surety to put an end to his liability by a notice, how is the value to be ascertained?] The difficulty of putting a value upon the claim affords no answer. [Williams, J. The notice being given, the thing is of no value at all.] The commissioner might then assess [757] it at a nominal sum. The intention of the legislature was that the bankrupt should be completely discharged. And there is no practical difficulty in these cases: it is not the contingency at the time of the adjudication that is to be valued; but when the parties come before the commissioner. If any difficulty arose then, notice might be given, and the proceeding adjourned, and then the claim would be limited to the goods already supplied, and so the matter would be reduced to a certainty. [Willes, J. Can you say that a man is liable to pay money upon a contingency, when by his own mere motion he may discharge himself from it? Williams, J. The difficulties of ascertaining the value of the contingency are all met by *Young* v. *Winter*: the only doubt is whether that can be said to be a contingent liability which the party may himself put an end to by giving notice.] It would be a considerable stretch of imagination to suppose that the bankrupt intended to continue his liability. *Hankin* v. *Bennett*, 8 Exch. 107, shews that a liberal interpretation is to be put upon the language of the section, in order to effectuate the general intention of the legislature.

Wood, in reply. That this is a continuing guarantee is clear. It was so held in

Boyd v. *Moule*, 2 C. B. 644, which has ever since been acted upon. [Williams, J. There is no doubt about that.] This is not a liability upon a contingency at all. A liability to pay money upon a contingency means something which a man is bound to do on the happening of an event which is beyond his control.

Williams, J. This question as to the effect of the power reserved to the sureties to put an end to the guarantee by giving notice, being quite a novel one, we [758] will take time to consider. As to the rest, we entertain no doubt.

Cur. adv. vult.

Willes, J., now delivered the judgment of the court:—

It was very properly admitted by the counsel for the plaintiffs in this case, that, if the guarantee in question had been absolute, we should have been bound by the authority of *Young* v. *Winter*, 16 C. B. 401, in this court (though conflicting with the decision of *Warburg* v. *Tucker*, 5 Ellis & B. 384, in the Queen's Bench), to hold that the plaintiffs' demand fell within the 178th section of the 12 & 13 Vict. c. 106, and that the certificate was a good bar.

But it was contended, on the part of the plaintiffs, that the guarantee, being revocable at any time, at the option of the defendant, by the giving of notice in writing to the plaintiffs, was not within the statute, for two reasons,—first, that the bankrupt could not properly be said to be "under a liability," seeing that he might, if he pleased, preclude all liability, by giving notice to determine it,—secondly, that the plaintiffs would not have been allowed by the court of bankruptcy to make any claim, inasmuch as it would be idle to allow anything in respect of a claim which the bankrupt, or, perhaps his assignees, might nullify instanter, by giving the requisite notice.

It must, however, be observed, that it might well be, that, between the time of the filing of the petition, and the time when notice could be effectually given to the plaintiffs, a liability might accrue by reason of a delivery of goods to the principal debtor, which the bankrupt might be called on to satisfy, on the contingency of the principal debtor failing to pay the price of the goods. And from any such contingent liability, [759] according to *Young* v. *Winter*, it was the intention of the statute to free the bankrupt. This can only be done by rendering his certificate a bar to all claims under the guarantee.

As to the difficulty that the right of the creditor to claim in respect of goods which might be supplied after the bankruptcy, and so to compete with the other creditors, might depend on the caprice of the bankrupt as to whether he would or would not revoke the guarantee, the answer is, that the court of bankruptcy may, on that ground, fix the amount of the claim at a nominal sum, unless it appears that there has been already a delivery of goods for which the bankrupt may be liable in the event of the principal debtor's failing to pay for them.

For these reasons, we are of opinion that the defendant Nathan Langlands has a good defence to the action,

Judgment accordingly (*a*).

[760] Jessie Dollen, Administratrix of Silas Dollen, Deceased, *v.* William Batt. June 7th, 1858.

[S. C. 27 L. J. C. P. 281; 4 Jur. N. S. 835.]

C. leased premises to the defendant, reserving rent to herself, her executors, administrators, and assigns, with covenants by the lessee to pay the rent and to yield up the premises at the expiration of the term to C. her executors, administrators, and assigns. C. afterwards by lease and release conveyed the reversion to D. and another in trust for the wife of the defendant,—the deed containing, amongst other things, a power to the trustees to receive and retain their trust expenses. The defendant underlet the premises, and received the rent, the trustees never interfering, but, on the contrary, assenting to his so receiving it on behalf of his wife, the cestui que trust. Certain expenses were incurred in relation to the trust. D., the surviving trustee, died, leaving the plaintiff, his widow and administratrix, who sued the defendant for four years' rent, three of which accrued in the lifetime of D., and

(*a*) Reversed in the Exchequer Chamber; vide post, vol. v. p. 597.

one since his death. The defendant pleaded that he before action paid the rent to his wife, with the consent of the trustee and of the plaintiff respectively:—Held, that the facts above stated afforded no evidence to sustain the plea, and that, whether the interest of C. in the premises were a freehold or a chattel interest, the plaintiff, as administratrix, was at all events entitled to recover the arrears of rent accruing in the life-time of the trustee.

This was an action for rent under a covenant. The declaration stated that one Susanna Collins, being possessed of a certain messuage, dwelling-house, garden, and premises, with the plots and parcels of land thereunto belonging, for a [chattel] term more than sufficient to enable her to make the demise and lease thereinafter mentioned, by deed, dated the 26th of March, 1845, demised the same to the defendant, to hold the same to the defendant for a time not yet expired, to wit, for the term of twenty-one years from the 25th of December then last past, yielding and paying therefore yearly and every year unto the said Susannah Collins, her executors, administrators, and assigns, during the first seven years of the said term the rent or sum of 17*l.*, and during the last fourteen years the rent or sum of 12*l.*, by even and equal payments, on the following days in the year, that is to say, the 25th of March, the 24th of June, the 29th of September, and the 25th of December; that the defendant did by the same deed covenant with the said Susanna Collins and her assigns that he the defendant would well and truly pay to the said Susanna Collins and her assigns the aforesaid rent of 17*l.* during the first seven years of the said term, and the said yearly rent of 12*l.* during the last **[761]** fourteen years of the said term, according to the reservation thereof and the true intent and meaning of the said covenant; that afterwards, by deed dated the 14th of August, 1845, the said Susanna Collins, then being possessed of the reversion expectant on the determination of the said term, assigned and transferred such reversion of the said demised premises to the said Silas Dollen and Zebulon Page, to hold unto the said Silas Dollen and Zebulon Page for the residue of the said term and interest of the said Susanna Collins therein, whereby they became possessed of such reversion; that afterwards the said Zebulon Page died, leaving the said Silas Dollen him surviving, who afterwards and before suit died, and after whose death such administration as aforesaid was in due form of law granted to the plaintiff, who thereupon, as such administratrix as aforesaid, became and was and is possessed of the reversion aforesaid, and entitled to the said rent; that, after the death of the said Zebulon Page, during the life-time of the said Silas Dollen, a large sum of money of the said rent of 12*l.*, to wit, the sum of 48*l.*, for divers, to wit, three years of the said term, became and was due and owing from the defendant to the said Silas Dollen, and was still in arrear and unpaid; and that afterwards, and after the plaintiff became possessed as aforesaid, and before suit, a further large sum of the aforesaid rent of 12*l.*, to wit, the sum of 12*l.*, for one year's rent, became and was due and payable from the defendant to the plaintiff as administratrix as aforesaid, and still was in arrear and unpaid, contrary to the said covenant: and the plaintiff, as such administratrix as aforesaid, claimed 50*l.*

The defendant pleaded,—first, that the said Susannah Collins was not possessed of the said demised premises for a term, as in the declaration alleged,—secondly, that the said Susanna Collins did not assign **[762]** and transfer the said reversion to the said Silas Dollen and Zebulon Page, as in the declaration alleged,—thirdly, for defence on equitable grounds, that, in and by the said deed in the declaration mentioned in that behalf, the said Susanna Collins assigned and transferred the said reversion unto and to the use of the said Silas Dollen and Zebulon Page, in trust, after the decease of the said Susanna Collins, for Christian Batt, the wife of the defendant, for the term of her natural life; that the rent for which this action is brought accrued after the decease of the said Susanna Collins; and that he, the defendant, before action, paid the said rent to the said Christian Batt, with the consent of the said Silas Dollen and the plaintiff respectively.

The plaintiff joined issue on each of these pleas.

The cause was tried before Willes, J., at the last Spring Assizes for the county of Somerset, when the facts which appeared in evidence were as follows:—On the 6th of March, 1845, Susanna Collins, the nature of whose interest in the premises did not very distinctly appear,—granted to William Batt (the defendant) a lease of certain premises at Ashill, in the county of Somerset, for twenty-one years from the

25th of December then last; reddendum to the lessor "her executors, administrators, and assigns," during the first seven years of the term the yearly rent of 17*l.*, and during the last fourteen years the yearly rent of 12*l.*, payable quarterly. The lease contained a covenant by the lessee, for himself, his heirs, executors, administrators, and assigns, with the lessor, "her executors, administrators, and assigns," to pay the rent to her, "her executors, administrators, and assigns," to pay taxes, to repair, &c., and also a covenant that the lessee, his executors, administrators, and assigns, should and would at the expiration of the term peaceably give and yield [763] up possession of the said hereditaments to the lessor, "her executors, administrators, and assigns, or to whom she or they should direct and appoint."

On the 14th of August in the same year, Susannah Collins, by lease and release and grant, conveyed the premises, "together with all rights, &c., thereto belonging or appertaining; and all reversions and remainders, rents, and profits thereof; and all the estate, right, title, interest, use, trust, term and terms of years, property, possibility, claim, and demand whatsoever, both at law and in equity, of her, the said Susanna Collins, of, in, or to the same; and also all deeds, evidences, and writings whatsoever relating to the said hereditaments and premises, now in the possession or power of the said Susanna Collins,"—to the use of Silas Dollen (the husband of the plaintiff) and Zebulon Page, their heirs and assigns for ever, upon trust to pay and apply the rents, issues, and profits of the said hereditaments and premises unto, or to permit and suffer the same to be received by, the said Susanna Collins and her assigns for and during the term of her natural life: and, from and after her decease, in trust for Christian Batt (the wife of the defendant) and her assigns for and during the term of her natural life, provided she so long continued a widow, in case of the death of the said William Batt, her said husband: and, from and after her decease, in trust for the said William Batt and his assigns for and during the term of his natural life; and, from and after the several deceases of the said Christian Batt and William Batt, or in case the said Christian Batt should survive her said husband and marry again, then in trust for John Collins Batt (son of the said William Batt and Christian his wife), his heirs and assigns for ever, subject nevertheless to and charged with the payment of a sum of 5*l.* a piece to each of his brothers and sisters who should be then [764] living: and, in case the said John Collins Batt should depart this life in the life-time of his said father or mother, then in trust, as to the before-mentioned hereditaments and premises, for all and every the child and children of them the said William Batt and Christian his wife, equally between and amongst them, share and share alike, as tenants in common, and not as joint-tenants: and, in default of all such issue, then in trust for the said William Batt, his heirs and assigns for ever. The deed also contained a clause impowering each of the trustees "to receive and retain his trust expenses."

Zebulon Page, one of the trustees, died in 1851; and, in December of that year, Susanna Collins also died, having in her life-time, but after the execution of the deed of gift above set out, executed an assignment (for, as was said, a valuable consideration,) of the premises in question to one Winter. Winter claiming to be entitled to the premises under this assignment, Silas Dollen, the surviving trustee under the deed of August, 1845, and the defendant, consulted Messrs. Trenchard, solicitors, of Taunton, and they, by arrangement with the solicitor acting for Winter, caused a case to be stated for the opinion of counsel. The opinion proved in favour of the claim of Winter: but the defendant declined to be bound by it, and defended an action brought by Winter, and succeeded in establishing the deed of August, 1845, Winter failing to prove that the assignment under which he claimed was made for a valuable consideration.

Messrs. Trenchard's bill of costs against Silas Dollen, as trustee, upon this occasion, amounted to 19*l.* 13*s.* 11*d.* Dollen sent Messrs. Trenchard's bill to Batt, who declined to pay it, alleging that the charges were exorbitant. Dollen, being pressed for payment, handed over to Messrs. Trenchard the title-deeds of the trust property, telling them that they should hold them as secu-[765]-rity; and he gave notice to Batt's under-tenant to pay rent to him (Dollen), and was proceeding to enforce his demand when he died.

After the death of Silas Dollen, Messrs. Trenchard demanded the amount of their bill from Mrs. Dollen, his widow and administratrix; and, as the only means of putting herself in funds to meet that demand, the present action was brought to recover four

years' rent under the lease,—three accruing in the life-time of Silas Dollen, the surviving trustee under the deed of August, 1845, and one since his death.

It appeared that Silas Dollen had never interfered with the property or received any rent, but that the rent had been always received by Batt from the under-tenant, Dollen saying that he might as well keep it; and there was evidence, that, after the death of Dollen, the plaintiff had said that she meant to do precisely as her husband had done.

On the part of the defendant it was contended that the plaintiff was not entitled to recover, inasmuch as there was no evidence to shew that the reversion in Susanna Collins was a chattel reversion, so as to pass to the plaintiff as administratrix of the surviving trustee; and also that the third plea was proved.

A verdict was found for the plaintiff, which by consent of her counsel was taken for the amount of Messrs. Trenchard's bill, subject to taxation; and leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff failed to prove the title put in issue by the first and second pleas; or to enter a verdict for the defendant on the third issue, on the ground that the evidence sustained the third plea; or to reduce the damages to 12*l.*, the amount of one year's rent under the lease, on the ground that the third plea was proved as far as regarded the rent accruing in the life-[766] time of the trustees Silas Dollen,—with power to the court to make any amendments in the declaration which they might think necessary and proper; and leave to the defendant to add a general plea of payment.

Kingdon, in Easter Term last, obtained a rule calling upon the plaintiff to shew cause why the verdict on the third plea should not be set aside, and instead thereof a verdict be entered for the defendant, pursuant to the leave reserved, on the ground that there was evidence for the jury in support of the whole of that plea; or why the damages should not be reduced to 12*l.*, on the ground that the whole of the third plea was proved, except as to the last year's rent; or why a nonsuit should not be entered, pursuant to the like leave, on the ground that the plaintiff failed to prove the title put in issue by the first and second pleas,—the plaintiff to be at liberty to contend, if necessary, upon the argument of the rule, that judgment should be entered for him on such third plea non obstante veredicto.

Prideaux now shewed cause. This action is brought to recover four years' rent under a lease granted by Mrs. Susanna Collins, to the defendant,—three of which accrued in the life-time of Silas Dollen, the fourth since his death. It was objected on the part of the defendant, that the declaration is framed as upon a chattel reversion, whereas there was no evidence that it was a chattel interest. That, however, is an illegitimate inference from the decisions that the words "during the term" in the reddendum are of such force and efficacy that the words "executors and administrators" may be rejected as surplusage, and the rent will go to the person entitled to the reversion. The lease con-[767] tains a covenant to pay the rent, and at the expiration of the term to yield up the premises, to the lessor, "her executors, administrators, and assigns." It is true, the assignment from Mrs. Collins to the trustees purports to deal with the property as if it were a freehold of inheritance. It is, however, a mere grant, which will convey a chattel interest as well as a freehold. However reserved, the rent follows the reversion. The leading case upon this subject is *Sacheverell* v. *Froggatt*, 2 Wms. Saund. 367 a., 2 Lev. 13, Sir T. Raym. 213, 1 Vent. 148, 161, 2 Keble, 798, 819, 833, 839. There, one seised in fee let for years, reserving rent during the term, to the lessor, his executors, administrators, and assigns, and the lessee covenanted to pay it accordingly, and the lessor devised the reversion, and died: it was held that the reversion was good to continue the rent during the whole term, and that the devisee should have an action of covenant for the non payment of it. In the note (7) in 2 Wms. Saund. 371, it is said: "In the report of this case in 1 Vent. 161, Lord Hale delivers the opinion of the court pretty much at length, and lays down some useful rules respecting the reservation of the rent. He said, that, where the reservation of the rent is general, the law directs according to the intent [interest?] and the nature of the thing demised. As, if tenant in tail makes a lease for years rendering rent to him and his heirs, the rent shall go to the heir in tail along with the reservation; for, the law uses all industry imaginable to conform the reservation to the estate. So, where tenant for life, the remainder over to several by limitation of uses, with power to make leases, demises, rendering rent to him, his heirs and assigns, it shall be adjudged to him in remainder: *Whitlock's case*, 8 Co. Rep. 70 b. So, if

lessee for one hundred years make a lease for fifty years, rendering rent to him and his heirs during the term, it shall go to the executor. So, where a [768] copyholder by license leases, rendering rent to him and his wife during their lives, and to his heirs, where by the custom the wife has her free-bench, the wife shall have the rent as incident to the reversion, though not party to the lease: for, the reversion, if possible, will attract the rent to it. So, if tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, his heirs and assigns, the rent shall go to the heir male of the body of his father, though he be not heir to the lessor; for, it is incident to the reversion: *Cother* v. *Merrick*, Hardr. 91, 95. But a man may reserve a rent to himself for his life, and a different rent to his heir: Co. Litt. 213 b., 214 a." [Byles, J. You are quite safe if you make the reservation to the lessor, his heirs, executors, administrators, and assigns.] Yes: and it is at least doubtful, if you do not. In *Wooton* v. *Edwin*, 12 Co. Rep. 36, one Hawes, seised in fee of a messuage, &c., demised for a term, reserving rent to himself and his assigns, and it was adjudged that by this reservation the heir should not have the rent, for that the reservation was made to the father, his executors and assigns, and not to his heirs, &c.: and the court said that, in a case of replevin, inter *Richmond and Butcher*, the case was that Butcher avowed for rent, as heir to his father, upon a demise made by his father of certain lands for twenty-one years, by these words "reddendo et solvendo proinde durante prædicto termino 21 annorum præfato (fratri), executoribus et assignatis suis, 10*l.* legalis monetæ Angliæ, &c., at festam, &c.;" and it was adjudged, that, by this reservation, the heir should not have the rent, for that the reservation was made to the father, his executors and assigns, and not to his heirs, &c. That case is perhaps not law at the present day; but it is an authority to shew that the inclination of the courts then was, that, if you reserve the rent expressly, you must [769] do it correctly. [Williams, J. The only question here is, whether, looking at the lease, we must not presume that the rent is reserved according to the real quality of the estate.] The reversion is by the language of the lease admitted to be a chattel reversion; and, if so, the plaintiff, as administratrix, is entitled to recover the whole four years' rent: but, as to the three years which accrued in the life-time of Silas Dollen, that, at all events, would be personalty. Then, as to the other branches of the rule,—there was no evidence of any payment made, nor of any assent on the part of the trustee or of the plaintiff to the defendant receiving and retaining the rent, so as to negative the right of the trustee or his personal representative to look to the rent for re-payment of the necessary disbursements on account of the trust.

Kingdon, in support of the rule. There is no evidence that this was a chattel interest; and, at all events, if the lease afforded any such, it is rebutted by the deed of the 14th of August, 1845, which treats the interest as freehold. No doubt, the use of the word "heirs" or "executors" is not conclusive: the rent follows the reversion. The rule is well laid down in 1 Williams's Executors, 5th edit. 730: "When a man seised in fee makes a gift in tail, or lease for life or for years, reserving rent, the whole rent which becomes due after his death shall go with the reversion (as an incident thereof) to his heir, and not to the executor: for, since during the continuance of the particular estate the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss: Co. Litt. 47 a.; *Cother* v. *Merrick*, Hardr. 95; 3 Bac. Abr. 62, Executors (H. 3); and, though the rent should be expressly reserved to the lessor, his executors and assigns, without naming the heir, the executors cannot have it, being strangers [770] to the reversion, which is an inheritance: Co. Litt. 47 a. Whether the heir shall have it, though not mentioned, or it shall altogether determine by the lessor's death, the cases are discordant: see notes (2) and (3) to *Sacheverell* v. *Froggatt*, 2 Saund. 367 b., where all the authorities are collected. But, if the rent be reserved during the term to the lessor, his executors, administrators, and assigns, the heir or devisee shall have it: ibid. On the other hand, if a lessee for years makes an underlease, reserving rent, the rent accruing after his death shall go to his executor or administrator, and not to his heir, even though the reservation were to him and his heirs, during the term, without mentioning the executors: 2 Wms. Saund. 371, n. (7) to *Sacheverell* v. *Froggatt*. In these cases, if the personal representative sues the underlessee for rent due since the death of the testator or intestate, it must be alleged that he had a chattel interest; otherwise it shall be intended that he was seised in fee, and then the rents belong to the heir, and not to

the executor or administrator: *Norris* v. *Elsworth*, 1 Freem. 463." The nature of the interest is not controlled by the use of the word "executors." Primâ facie, where a man grants a lease, the presumption is that he is seised in fee; though the lessee would not be estopped, even where words denoting a freehold interest are used, from shewing that it was a chattel interest only. Thus, in *Doe d. Strode* v. *Seaton*, 2 C. M. & R. 728, a lessee for years covenanted to pay the rent to the lessor, his heirs and assigns, and also to deliver up possession of the demised premises at the expiration of the term to the lessor, his heirs and assigns: in an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises, it was held that the assignee was not estopped by such covenant from shewing that the lessor was only tenant [771] for life of the premises demised. It being urged in argument there that the defendants could not be allowed to set up the defence of estoppel contrary to the words of the covenant in the lease, to give up the possession of the premises to the lessor, his heirs and assigns, and that they could not be allowed to set up an interest contrary to an express covenant,—Parke, B., asks, "Is there any case which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel, because Col. Strode, having a life-estate, had a right to grant a lease for twenty-one years, determinable upon his life, and therefore an interest passed: and, where an interest passes, there is no estoppel." In *Berry* v. *White*, Sir O. Bridgman, 82, 103, it is said: "Another reason which may be given why this reservation to Sir Robert, his heirs and assigns, may be good is, the words *heirs and assigns* do not denote any person certain, as, if he had reserved it to his wife or daughter, or the like, but properly intend only the duration of the estate in the rent, that is, so long as the estate lasts, and so reddendo to him, his heirs and assigns. Durante termino prædicto is no more than reddendo durante termino prædicto," a doctrine adopted in the judgment of this court in *Greenaway* v. *Hart*, 14 C. B. 340, 352. It is submitted, therefore, that the evidence did not sustain the issues on the first and second pleas. As to the third plea, there was abundant evidence to support it. It was proved that Silas Dollen never interfered in his life-time, nor did the plaintiff after his death. The defendant was allowed to receive the rent from the under-tenant as a sort of agent of his wife. If there be any difficulty as to the form of the plea, that may be obviated by the [772] addition of a common plea of payment, pursuant to the leave reserved to the defendant at the trial.

Cockburn, C. J. I am of opinion that this rule should be discharged. The plaintiff, as administratrix of her deceased husband, sues the defendant for four years' rent alleged to be due under a lease made by Mrs. Collins, who some time after the making of the lease conveyed the property to Silas Dollen and Zebulon Page, as trustees, for the benefit of Christian Batt, the wife of the lessee. During the first three years in respect of which the rent was claimed, the husband of the plaintiff was living: during the last year he was dead, and the plaintiff was acting as his administratrix. It is necessary to distinguish between these two periods. As regards the first three years, the defendant says that Dollen, the deceased trustee, allowed him, instead of paying the rent to him, to apply it to the purposes of the trust, and to deal with it as he thought proper, he being substantially the cestui que trust. That is a question upon the evidence; and I am of opinion that the evidence does not go the length of what is contended for by the defendant. It is true that Dollen, to save himself trouble, instead of calling upon the lessee to pay him the rent, permitted him to retain it. But I am clearly of opinion that there is nothing in the evidence which amounts to payment, even if there had been a plea of payment upon the record; nor anything amounting to a dispensation on the part of the trustee, or abandonment of his right to call for the rent to indemnify him against any expenses he might incur in carrying out the trusts. That being so, it follows that the plaintiff is entitled to recover in respect of the three years, irrespectively of the question whether this was a freehold or a chattel interest: the rent for that period being a fruit fallen in the life-time of the intestate, [773] which would pass to his administratrix. It is only upon the supposition that that is an erroneous view that the other question becomes material, because, if Dollen had dispensed with the payment of this rent by the defendant, the question would then have arisen whether Mrs. Dollen, as his adminis-

tratrix, was entitled to receive the rent for the last year: and that would depend upon whether the property was freehold or leasehold. We have before us two documents which are not consistent. The lease from Mrs. Collins to Batt shews a chattel interest: it demises the premises for a certain term, reserves rent, &c., and provides for the rendering up of the premises at the expiration of the term, not to the heirs of the lessor, but to her "executors, administrators, and assigns." It clearly, therefore, purports to be only a chattel interest. But it is true, that, in the instrument by which Mrs. Collins conveys to the trustees for Mrs. Batt, she professes to deal with the estate as a freehold estate; and she has recourse to a deed appropriate to the passing of a freehold interest. The question is, what inference are we to draw from the effect which is to be given to both those instruments. Where there are two presumptions, the stronger one must prevail. In the one case, Mrs. Collins appears to be dealing with the property as a chattel interest; in the other as a freehold: and certainly the presumption is stronger in favor of that construction which cuts down the party's interest, than of that which enlarges it. Therefore, if we are wrong upon the first point, still I think we are clearly justified in concluding that this was a chattel interest only, and that consequently the plaintiff is entitled to recover the last year's rent. It might in one event be necessary to amend the declaration: and, if it be proposed to carry the case further, we will amend accordingly. I entertain a clear opinion that the evidence does not justify us in concluding that [774] Dollen had done anything to divest himself of the right to enforce payment of the rent by Batt. And Mrs. Dollen, his administratrix, has done nothing to disentitle her to recover the first three years' rent certainly, and probably the fourth. Upon the whole, therefore, I am of opinion that the plaintiff is entitled to retain the verdict.

Williams, J. I am of the same opinion. The case is a somewhat singular one. It is in effect an action by a landlord against a tenant, the landlord being trustee for the tenant in respect of the rent for the recovery of which the action is brought. Some confusion has been unnecessarily introduced into the case by forgetting the precise position of the parties, and treating it as one where the cestui que trust has been permitted to receive the rents and profits of the trust estate. That is altogether a mistake: Dollen had no right to the rent reserved by the underlease; he was only entitled to the rent reserved by the lease granted to Batt by Mrs. Collins, as trustee for the wife of the defendant, the lessee. Then it is said that there was some equity on the part of the wife, to prevent the trustee from paying the money to the husband, which otherwise it would have been his duty to do. A lease was put in, and an assignment: and the question arises, whether the interest which the reversioner had was freehold or chattel. On that I must confess I feel very considerable difficulty. The presumption of law is, where the lease is silent, that the interest is freehold. The terms of this lease are inconsistent with a reversion in fee: the rent is reserved to the lessor, her executors, administrators, and assigns, and not to the heir: there are also covenants therein which would not exist in the case of a freehold reversion. I quite agree with the argument urged by Mr. Kingdon, that these expres-[775]-sions in the lease are not binding so as to alter the rights of the parties. But that is not the question here: the question is, whether they afford any evidence of the nature and quality of the reversion. If there had been nothing else in the case, I should have thought that the ordinary principle of law was rebutted, and that the reversion was a chattel interest. But, when the lessor comes to assign her reversionary interest, she deals with it as one of inheritance; and thus we are driven back to the original presumption. I have great difficulty in saying that there is anything on the face of this case to induce me to infer that this was a chattel reversion. But it seems to me to be altogether unnecessary to decide that point, the plaintiff having consented to take a verdict, not for what she would in strictness be entitled to recover, but for such a sum as would suffice to protect her in respect of the disbursements of the trustees. There is clearly enough to sustain the verdict so reduced. Whatever the nature of the interest which passed by the assignment, the three years' rent clearly would go to the personal representative: and that is more than enough to absorb the sum for which the verdict is taken. The only question is whether there is any answer to that. The defendant insists that there is already an answer upon the record, and that at all events the plaintiff's case is answered by the plea which he has leave to add. The third plea now on the record clearly was not proved. It alleges that in and by the deed in the declaration mentioned, Susanna Collins assigned and transferred the reversion unto

and to the use of Dollen and Page, in trust, after the decease of the said Susanna Collins, for Christian Batt, the wife of the defendant, for life; and avers that the rent for which this action is brought accrued after the decease of the said Susanna Collins, and that he, the defendant, [776] before action brought, paid the said rent to the said Christian Batt, with the consent of the said Dollen (the surviving trustee) and the plaintiff respectively. All that the evidence amounts to, taken in the most favourable point of view for the defendant, is this, that the trustee said to the cestui que trust, —or, in other words, the plaintiff to the defendant, —"You need not pay the rent to me, because I am your trustee." Good sense and justice require that it should amount, not to payment, but to dispensation of payment. I therefore think the action was properly brought, and is maintainable at all events for the amount for which the verdict is taken.

Byles, J. I also am of opinion that the verdict was right, and that there is no ground for any part of the rule. In the first place, I think there is evidence of a chattel reversion. Conceding that primâ facie every reversion is a freehold reversion, here is a covenant to yield up the premises at the expiration of the term to the executors of the lessor. If the lease had contained a recital that the executors were entitled to the reversion, that would clearly have been a recital of a chattel interest. Here, there is a covenant to yield up possession at the end of the term to the lessor, her executors, administrators, or assigns, which is the same thing; it is a statement by the lessor and lessee that the reversion is a chattel reversion. I am not sure that there is not another piece of evidence, because Mrs. Dollen, speaking of the rent which would have become payable to her, said that she should treat it as her husband had treated it. Now, if she was speaking of rent which would come to her because she was administratrix, that would be some evidence of a chattel reversion. On the other hand, the conveyance treats it as a freehold interest, being a conveyance by lease and re-[777]-lease or grant. But that is quite as consistent with its being a chattel interest as a freehold, inasmuch as it would operate a conveyance of either: and it may be that Mrs. Collins, besides this chattel interest, may have had some superior freehold reversion, which this would be an apt deed to convey. Then it is said that the rent has been paid. Now, as to the plea of payment, I am not aware of any case in which a plea of payment has been supported where it has been sought to set off an equitable demand against a legal one. But, independently of that, the averment in the third plea is, that the defendant, before action, paid the rent to Christian Batt, with the consent of the said Silas Dollen and the plaintiff respectively. I see no evidence that Dollen ever assented to any such arrangement; but, on the contrary, it seems to me that there is strong evidence to negative that. The trustees had a lien upon the reversion, whatever it was, in the position of first mortgagees. Can it be presumed that they abandoned their lien for the debt due, because they declined to trouble themselves with the receipt of the rent? I entirely agree in the view presented by my Brother Williams, and I think that upon every point the verdict was perfectly right. If there be any difficulty, that may be got rid of by an amendment.

Willes, J. I entirely concur with the rest of the court in thinking that this rule must be discharged: and, in fact, the amendment suggested would at once make an end of the thing. There ought to be a certificate for costs, because the verdict, if it had passed in the proper form, would have been for a sum exceeding 20*l.*: and Mr. Prideaux ought not, I think, to be prejudiced by the concession made by him at the trial. The rule will therefore be discharged, with liberty to the plaintiff to amend the declaration by alleging a [778] reversion in Susanna Collins in general terms, if the defendant carries the case further; and also with liberty to re-amend to a chattel interest, if the court of error should think it necessary.

Rule discharged accordingly.

Robins *v.* Power. June 5th, 1858.

[S. C. 27 L. J. C. P. 257; 4 Jur. N. S. 810.]

Where a change of ownership in a British vessel takes place, by sale in this country, whilst she is in a foreign port, the contract under which the crew shipped is (quoad the new owner) at an end: but, if one of the crew continues to serve on board the vessel at the request of an agent of the new owner, without entering into any fresh

articles, and afterwards, and before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he may in an action against such new owner recover wages pro ratâ.

This was an action for wages alleged to be due from the defendant to the plaintiff as a hired seaman and mariner of a vessel of the defendannt called the "Constance Emma," under and by virtue of a certain hiring by the defendant of the plaintiff as such seaman and mariner, and for work and services done and rendered by the plaintiff for the defendant at his request.

The defendant pleaded,—first, never indebted,—secondly, a special plea stating in substance that the plaintiff had engaged to serve as a seaman on board the "Constance Emma" for a certain voyage within the meaning of the Merchant Shipping Act, 1854, and that, during the voyage, the defendant deserted the said vessel within the meaning of the said statute. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after Hilary Term last. The facts which appeared in evidence were as follows:—On the 23rd of August, 1855, the plaintiff signed articles and shipped as a seaman on board the "Constance Emma," for a voyage from Aden to Suez, and thence to Bombay or Moulmein, at 3l. 10s. per month wages. The vessel sailed, and early in November in the same year she arrived at Suez. Whilst she was lying in the Suez Roads, viz. on the 18th of December, 1855, the then [779] owner sold her (in Liverpool) to the defendant. The defendant immediately upon becoming the purchaser of the vessel sent one Parr out to Suez to act as his agent. Parr arrived at Suez on the 10th of January, 1856, and shortly afterwards Abernethy, who was master of the vessel when she sailed from this country, gave up the command (which was assumed by the first mate), and left the vessel. The crew then for the first time learned that the vessel had been sold. The plaintiff remained on board the vessel until the 10th of March, when one Townsend, who had been sent out by the defendant to succeed Abernethy in the command, arrived at Suez. Townsend, finding the crew in a very dissatisfied state, and refusing to work unless paid the wages they had earned, took them before the vice-consul at Suez, contending that they were bound to perform their contract, and that they were entitled to nothing until the arrival of the ship at Bombay. Upon appeal to the consul-general at Alexandria, that functionary decided, upon an erroneous construction of the 205th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, that the crew were entitled to receive their wages and discharge if they did not choose to continue on board. Ultimately, however, all the crew, with the exception of the plaintiff, were induced to remain. Townsend, the new master, ineffectually tried to induce the plaintiff to remain and to sign fresh articles; and the plaintiff finally quitted the ship on the 19th of April, 1856, which sailed from Bombay without him a few days afterwards. The plaintiff had continued to do duty on board until the day he so quitted the ship.

By his particulars of demand, the plaintiff claimed wages for the whole period during which he was on board, viz. from the 23rd of August, 1855, to the 19th of April, 1856: but, at the trial, he confined his claim to [780] the time when the defendant became owner of the vessel.

On the part of the defendant, it was insisted, that the plaintiff was not entitled to recover, inasmuch as he served under a special contract (with the original owner of the vessel) which he had failed to perform; and that he had forfeited all right to wages by having deserted.

The jury, however, found that the plaintiff left the ship with the consent of Townsend, the new master; and, under the direction of the learned judge, they returned a verdict for the plaintiff for 14l. in respect of four months' service from the 18th of December, 1855, when the change of ownership took place,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that there was no evidence to sustain the verdict for the plaintiff.

Edward James, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, on the ground "that there was no evidence to justify a verdict for the plaintiff:" or for a new trial, on the ground that, "if there was any such evidence, the same should have been left to the jury;" or why the damages should not be reduced as the court should direct.

Brett now shewed cause. There was abundant evidence to warrant the verdict.

The provisions as to the discharge of seamen and payment of wages are contained in the 170th, 171st, and 172nd sections of the 17 & 18 Vict. c. 104. The 170th section enacts that, "in the case of all British foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, all seamen discharged in the united king-[781]-dom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this act, except in cases where some competent court otherwise directs; and any master or owner of any such ship who discharges any seaman belonging thereto, or, except as aforesaid, pays his wages within the united kingdom in any other manner, shall incur a penalty not exceeding 10l.; and, in the case of home-trade ships, seamen may, if the owner or master so desires, be discharged and receive their wages in like manner." The 171st section enacts, that "every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping-master, to such shipping-master, a full and true account, in a form sanctioned by the board of trade, of his wages and of all deductions to be made therefrom on any account whatever, and in default shall for each offence incur a penalty not exceeding 5l.; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered; and the master shall, during the voyage, enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions, as they occur, in a book to be kept for that purpose, and shall, if required, produce such book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payments." And the 172nd section enacts, that, "upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge, in a form sanctioned by the board of trade, specifying the period of his service and the time and place of his discharge; and, if any master fails to sign and give to any such seaman such certificate of discharge, he shall for [782] each such offence incur a penalty not exceeding 10l.; and the master shall also, upon the discharge of every certified mate whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding 20l." [Cockburn, C. J. Do not these sections pre-suppose that the same owners continue in possession of the ship?] There certainly is nothing in them which points to a change of ownership. The case of a sale of a ship abroad is provided for by s. 205, which enacts, that, "whenever any British ship is transferred or disposed of at any place out of Her Majesty's dominions, and any seaman or apprentice belonging thereto does not in the presence of some British consular officer, or, if there is no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the said ship, signify his consent in writing to complete the voyage if continued, and whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of Her Majesty's dominions, the master shall give to each such seaman or apprentice a certificate of discharge in the form sanctioned by the board of trade as aforesaid, and, in the case of any certified mate whose certificate he has retained, shall return such certificate to him, and shall also, besides paying the wages to which such seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to such other port in the united kingdom as is agreed upon by him, or furnish the means of sending him back to such port, or provide him with a passage home, or deposit with such consular officer, or such merchant or merchants as aforesaid, such a sum of money as is by such officer or merchants deemed sufficient to defray the [783] expenses of his subsistence and passage home; and such consular officer or merchants shall indorse upon the agreement of the ship which the seaman or apprentice is leaving the particulars of such payment, provision, or deposit; and, if the master refuses or neglects to comply with the requirements of this section, such expenses as last aforesaid, if defrayed by such consular officer or by any other person, shall, unless such seaman or apprentice has been guilty of barratry, be a charge upon the ship to which such seaman or apprentice belonged and upon the owner for the time being thereof, and may be recovered against such owners, with costs, at the suit of the consular officer or other person defraying such expenses, or, in case the same has been allowed to the consular officer out of the public moneys, as a debt due to

Her Majesty, either by ordinary process of law or in the manner in which seamen are hereby enabled to recover wages; and such expenses, if defrayed by the seaman or apprentice, shall be recoverable as wages due to him." It will be contended on the other side, that that section applies only to sales effected abroad. That, however, cannot have been the intention of the legislature. [Cockburn, C. J. The grammatical construction of the words undoubtedly is so. It may be that the ship is sold to foreign owners, and that a foreign captain is put in command.] The whole of the provisions of this part of the act shew that it was the intention of the legislature to transfer to the new owners all the liabilities of the ship: and this is obviously just, seeing that they will receive the whole of the freight on the completion of the voyage. Besides, independently of the act, the former owners having disabled themselves from performing the contract with the crew, the latter were discharged from the performance of the contract on their part: *Planche* v. *Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, 5 C. & P. 58; *Kent* v. **[784]** *Harwood*, 2 C. B. 905: but, having performed services on board the vessel after the defendant had become the owner, they would be entitled, in the absence of any new contract, to recover upon a quantum meruit in respect of the services actually performed by them since the transfer of the ownership: *Jesse* v. *Roy*, 1 C. M. & R. 316. Apart from the statute, the purchaser of the ship was not bound to continue the services of the crew; but, having by his accredited agent done so, he is responsible. The fact of the plaintiff's having been allowed to remain doing duty on board the vessel under one who must be assumed to have been the defendant's agent, created a contract between them which would at all events entitle the plaintiff to sue for wages pro ratâ. [Willes, J. Two questions arise,—first, whether there was any contract, express or implied, with the new owner,—secondly, whether, if there was a contract, it was upon the terms of the former contract, or upon a quantum meruit.] In *Hillyard* v. *Mount*, 3 C. & P. 93, by a clause in the ship's articles of a South Sea whaler, the seaman serving on board were to lose their wages if they did not return with the ship to the port of London: after serving thirty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship: and it was held, that, if these seamen lost their wages under the articles, they might recover a reasonable compensation for their services, on the count for work and labour. *Hartley* v. *Harman*, 11 Ad. & E. 798, 3 P. & D. 567, was also referred to.

Edward James, Q. C., and Kemplay, in support of the rule. The plaintiff shipped on board the "Constance Emma" for a voyage from Aden to Suez, and thence to Bombay or Moulmein. The circumstance of the defendant having at Liverpool become the purchaser of **[785]** the vessel whilst at Suez, did not constitute the master or the mate his agent: nor was there any evidence of any adoption by the plaintiff of their acts. The mere act of transfer clearly does not make the captain agent for the transferree: *Mitchenson* v. *Oliver*, 5 Ellis & B. 519; *Myers* v. *Willis*, 17 C. B. 77. [Cockburn, C. J. Must not the transferree be taken to adopt the master as his agent until some communication can take place? Many disastrous consequences might result from a contrary doctrine.] How can the master be said to be agent to a man with whom he has had no previous communication? The seaman is not left without remedy: the master is always liable to him for wages. *Cutter* v. *Powell*, 6 T. R. 320, is a distinct authority to shew that a seaman can claim no wages either upon the special contract or upon a quantum meruit until the voyage is completed. The 205th section of the Merchant Shipping Act has nothing to do with the question. [Willes, J. Certainly not.] To entitle him to sustain this verdict, the plaintiff must make out an engagement, express or implied, on the part of the defendant to pay him wages de die in diem. Assuming that there was here a contract between Townsend the new master and the plaintiff, it must be taken to have been upon the footing of the original articles. No contract can be implied under such circumstances: *Lamburn* v. *Cradock*, 2 M. & G. 235, 2 Scott, N. R. 533. [Willes, J. Though the law will not imply such a contract, it by no means follows that a jury may not.] Nothing that passed with Townsend could warrant the jury in implying any new contract. [Cockburn, C. J. Does not the question turn rather upon what took place before Townsend arrived out?] It is submitted not. There was no evidence to warrant the verdict.

Cockburn, C. J. I am of opinion that this rule should **[786]** be discharged, provided that the plaintiff will consent to the damages being reduced by so much of

the wages as were covered by the period intervening between the date of the transfer of the ship to the defendant and the time when the notice of the change of ownership reached Suez, that is, when Parr, arrived there and the fact of the transfer of the ship to the defendant became notorious to all parties concerned. I think there was evidence from which the jury might infer that Parr was the agent of the defendant, having gone out for the purpose of protecting the defendant's interests: and, Parr being there as agent of the defendant, the plaintiff, whose contract with the former owner was at an end, must be taken to have been adopted by Parr as a person doing a seaman's duty on board the ship; and the question is, what was the nature of the contract under which that duty was performed. I am very much disposed to think that a person who becomes the purchaser of a ship while at sea must be taken by intendment to adopt the master as his agent until his authority can be determined by the arrival of some one impowered by the new owner to supersede him; and therefore I think that Abernethy, the former master, or the mate, were authorized to engage the crew on behalf of the defendant. It is not necessary, however, to go to that extent on the present occasion, because I think there was evidence that this plaintiff was employed and performed service under a person having authority and acting as the agent of the defendant in that behalf. Conceding that a seaman engaged for a voyage must complete that voyage before he is entitled to claim any wages, here it seems to me that no such question arises, because the original contract was put an end to, and any services performed by the seamen after that event were performed under a new contract. It may well be, that, the original owner having put it out of his power [787] to perform his contract with the seamen, they might maintain actions against him: but, if the seamen chose to serve under some one else, it was perfectly competent to them to do so. Now, here, the plaintiff elected to continue on board the vessel in the service of the new owner. What was the nature of the contract under which such new services were performed? It is clear that there were no new articles; but it is suggested that the employment of the plaintiff must be assumed to have been under the terms of the old articles. If that were so, the plaintiff might be bound to complete the voyage before any claim for wages would arise: but it appears to me that there is no evidence from which we would be warranted in inferring that it was ever communicated to him that he was to continue his services on the terms of the old articles. There being, then, no special contract, and the plaintiff having performed services on board the defendant's vessel, and that under a person acting with the sanction and under the authority of the defendant, there was abundant evidence of an implied promise to pay the plaintiff a reasonable compensation for such services. I therefore think the plaintiff is entitled to retain his verdict for the amount of wages earned by him from the period when it became known at Suez that the defendant was the owner until he left the ship with the consent of the new master. With the deduction suggested, therefore, the verdict will stand.

WILLIAMS, J. I also am of opinion that the verdict ought not to be disturbed, provided it be limited to the amount of wages accruing to the plaintiff after the time when the change of ownership was notified to him. I come to this conclusion because I think there was some evidence from which the jury might if so minded have implied an agreement on the part of the defendant, [788] through his agent, to recompense the plaintiff for his services from that period. When Townsend the new master came out, he found the plaintiff doing duty on board the ship for the benefit of the owner; and he continued such service down to the 19th of April, 1856, when he finally left the ship. If it had been found as a fact that the plaintiff was engaged by Townsend for the remainder of the voyage, although he left with the consent of the master, I should have been of opinion that he was not entitled to recover. But an agreement was come to at the trial that the case should not go to the jury, but that the verdict should stand for the plaintiff if there was any evidence on which the jury might imply a contract which would entitle the plaintiff to recover on a quantum meruit. I think there was ample evidence to sustain the verdict for the amount mentioned. It is somewhat curious to observe that the conclusion we arrive at has nothing whatever to do with the controversy at the trial, but is quite independent of the construction to be put upon the provisions of the Merchant Shipping Act, of the question of desertion, and of the sea-worthiness of the ship. All that has nothing to do with the ground upon which we decide this case, viz. that there was evidence from which the jury were

warranted in implying a promise to pay the plaintiff for the services rendered by him on board the ship for the defendant, from the time he became aware of the change of ownership down to the time of his leaving her.

WILLES, J. I also am of opinion that the verdict should stand for the amount for which it was taken, less 3l. 10s. for a month's wages. It is quite clear that the defendant bought the vessel with the view of getting possession of her and using her for his own purposes. It is just, therefore, to presume that it was [789] his intention to bear the burthen of the expenses incurred by the ship from that time, and that the people who were doing duty on board the vessel should continue to do duty as his servants. Immediately the notice of the change of ownership arrived out at Suez that intention was communicated to the sailors, and it was understood that the crew should continue to work the vessel as the servants of the new owner. That state of things might, I think, reasonably be supposed to continue until some agent should arrive out, authorized by the new owner to act for him. It appears that one Parr, who was properly treated as the defendant's agent, arrived at Suez on the 10th of January, 1856, and that, upon his arrival, Abernethy, the original master, left the vessel, the mate and the rest of the crew continuing on board. I think the jury would have been well warranted in coming to the conclusion that there was a new contract between the defendant and the plaintiff that the latter should be paid for his work from the time he received notice that the defendant had become the owner of the vessel. Assuming that to be so, I think the jury would have been well warranted in implying a contract between the plaintiff and the defendant under which the former would be entitled to recover wages pro ratâ from the time when the change of ownership was communicated to the crew until the contract was put an end to by mutual consent of the parties. The counsel for the defendant not having desired that question to be left to the jury, but having agreed that the verdict should stand for the plaintiff if the court should be of opinion that there was any evidence to support it, this rule must be discharged upon the sum for which the verdict was taken being reduced to 10l. 10s., for wages from the time the change of ownership became known at Suez until the plaintiff left the ship.

[790] BYLES, J. I am entirely of the same opinion; and I do not consider it necessary to add anything to that which has fallen from the rest of the court.

Rule accordingly.

HENRY SHARNBORNE NATHANIEL MICKLETHWAIT *v.* THE REV. JOHN NATHANIEL MICKLETHWAIT. 1858.

[S. C. 28 L. J. C. P. 121; 29 L. J. C. P. 75; 5 Jur. N. S. 41, 437; 7 W. R. 117, 451. See *Dormer* v. *Ward*, [1900] P. 137; [1901] P. 20.]

John M.,—who possessed estates called the H., B., and T. estates, in Norfolk, and also other estates in Norfolk, Suffolk, Surrey, Middlesex, and London, and also in the county of Westmeath,—had three sons, John, Nathaniel, and Jonathan George. —On the marriage of his second son, Nathaniel, John M., by settlement of September, 1782, settled the H., B., and T. estates, after a prior life-estate to himself, and a provision as to pin-money for the intended wife, to the use of Nathaniel for life, remainder to such son of the marriage as Nathaniel should appoint, and, in default of appointment, to the use of the first and other sons of the marriage, in tail-male, with remainder to the settlor in fee. There was issue of this marriage two sons, Nathaniel, and Sotherton, the former of whom on the death (in 1786) of his father (no appointment having been made pursuant to the power) succeeded to the H., B., and T. estates, as first tenant in tail.—By his will, of December, 1797, John M. devised his other real estates,—to the use of his eldest son, John, for life, with remainder to his first and other sons successively in tail male; and, in default of such issue, to the use of such one of his two grandsons, Nathaniel and Sotherton, sons of his late son Nathaniel, as his son John should by deed or will appoint, for life, remainder to the first and other sons of such appointee successively in tail male, remainder, in default of issue, to the other of his two grandsons for life, remainder to the first and other sons of such grandson successively in tail male; and, in case of default of any such appointment by John, the testator devised the estates to the eldest of his two grandsons, Nathaniel, for

life, with remainder to his first and other sons successively in tail male, with remainder, on failure of such issue, to his second grandson, Sotherton, for life, and to his sons successively in tail male; and, on failure of such issue, to his (the testator's) third son, Jonathan George, for life, and to his sons successively in tail male; remainder to the testator's own right heirs.—By an unattested codicil, the testator professed to revoke the foregoing devise so far as it regarded the estates in Surrey, Middlesex, and London, and to devise these to Jonathan George, in fee.—Upon the death of John M. (in 1799), his eldest son, John, entered into possession of the estates comprised in the will of 1797, and continued in possession until his death, in 1824.—In 1804, Nathaniel (grandson of John M.), being about to marry, executed what purported to be a marriage-settlement, to which John, his uncle, was a party,—whereby, after reciting the settlement of 1782, he covenanted, with the consent of his guardians, within three months after he should have attained the age of twenty-one, to settle and assure the H., B., and T. estates to the use of himself for life, and, after his decease, to the use and intent that his intended wife should during her life receive a jointure-annuity of 1000*l.*, and, subject thereto, to the use of himself in fee. In pursuance of this covenant, Nathaniel, by an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, barred the entail in these estates. The only issue of this marriage was a son Nathaniel Waldegrave (afterwards Colonel M.).—In 1810, Nathaniel (grandson of John M.) being about to contract a second marriage, proposals for a settlement, to which John, the uncle, was a party, were drawn up and agreed to; and, on the 29th of November in that year, the latter, in exercise of the power given to him by the will of 1797, appointed the estates thereby devised to Nathaniel, to hold according to the terms of that will. By the settlement thereupon made, Nathaniel conveyed the Hickling estate to trustees, to the use of himself for life, remainder to the intent that his intended wife, in case she should survive him, should receive thereout a jointure-annuity of 1000*l.*, and, subject thereto, to the use of the trustees for the term of 1000 years for securing the annuity and for raising 15,000*l.* for the portions of the younger children, and, subject thereto, to the use of himself in fee: and he further covenanted with the trustees, as soon as he should come into possession of the other estates by virtue of the will of 1797 and his uncle's appointment, to charge those estates with a further annuity of 500*l.* in favour of his intended wife, and, so far as he was able, he thereby limited and appointed to her the said annuity, to be payable out of the said estate.—There were several children of this marriage,—of whom the defendant in this action was the eldest, and the plaintiff the second.—John, the tenant for life under the will of 1797, having through his mother's family become possessed in fee simple of certain real estates, and, amongst others, of one in Sussex called the Iridge estate, and being childless, in the year 1822 made his will, whereby,—after reciting his father's will, and his desire that the attempted codicil thereto should be confirmed, and the devise therein of the lands in Surrey, Middlesex, and London, to his brother Jonathan George, in fee, should be established,—proceeded to devise the Iridge estate to trustees, first, to the use of his nephew Sotherton for life, remainder to the first and other sons of the body of Sotherton successively in tail male; secondly, in default of such issue, to his (the testator's) brother Jonathan George for life, remainder to his nephew, John, eldest son of Jonathan George, for life, and to the first and other sons of John successively in tail male. Then followed two shifting clauses, the first of which provided, that, if the testator's nephew Nathaniel and his first or other son or sons, or his or their heirs, should, in the life time of Jonathan George, effectually confirm and establish the codicil to the will of 1797, by effectually conveying the lands in Surrey, Middlesex, and London to Jonathan George in fee, then the foregoing devise in favour of Jonathan George and of his son John and his first and other sons in tail male, was to become void, and, immediately on such event, or otherwise in default of issue of the testator's nephew John, the estate was to pass to the testator's great-nephew John Nathaniel (second son of his nephew Nathaniel) for life, remainder to the first and other sons of John Nathaniel, in tail male, remainder to the third, fourth, fifth, and every other son of his (the testator's) nephew Nathaniel (excepting always the eldest son), successively, in tail male, with remainder, in default of issue, to Jonathan George in fee. Then followed the second shifting clause, upon which the contest mainly arose,—"And as by possibility

it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel, or the heirs male of the body of such second or other younger son, may become entitled to the property settled on the marriage of the said Nathaniel, in the character of the then heir male of his body,—now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of the body of a younger son, of my said nephew Nathaniel, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct." John (the testator of 1822) died in 1824, and his nephew Sotherton thereupon entered into possession of the Iridge estates under the last-mentioned will; and his nephew Nathaniel entered into possession of the estates devised by the will of 1797.—In April, 1826, Nathaniel (nephew of the testator of 1822) and his eldest son Colonel M. conveyed the lands in Surrey, Middlesex, and London to Jonathan George, in fee, conformably to the terms of the first shifting clause of the will of 1822; whereupon, by virtue of the provisions of the will, the devise of the Iridge estate in remainder to Jonathan George and his sons in tail male became void, and the devise of that estate in remainder to Nathaniel (the testator's nephew) and his sons took effect.—Nathaniel (nephew of the testator of 1822) died in 1856, having previously devised his Hickling and other estates, subject to a term of years for raising a sum of money, to his eldest son, Colonel M., for life, with remainder to his sons successively in tail male, with remainder, on failure of such issue, to his second son (the defendant), for life, with remainder to his sons successively in tail male, with a like remainder to his third son (the plaintiff), with remainders over.—Colonel M. (eldest son of Nathaniel, nephew of the testator of 1822) died in July, 1856, whereupon the defendant entered into possession of the H. and B. estates (the T. estate having long before been sold), and of the property devised by the will of 1797, with the exception of the estates in Surrey, Middlesex, and London, which had been conveyed to Jonathan George in 1826:—Held, that the estates referred to in the (second) shifting clause were the estates which passed by the will of 1797, and which came to the defendant as first tenant in tail in remainder after the determination of the prior estate of his elder brother; that the character in which the defendant actually took the estates was intended to be described by the term "heir male of the body" of his father; and that, consequently, the contingency provided for by the shifting clause had happened, and so the plaintiff was entitled, as the next younger son of the testator's nephew Nathaniel, to the Iridge estate.

This was an action of ejectment for the recovery of certain property in Sussex, being part of the Iridge estate comprised in and devised by the will of John **[791]** Micklethwait, the testator of 1822, hereinafter mentioned. The defendant appeared and defended for the whole of the property mentioned in the writ; and by a judge's order made by consent under the provisions **[792]** of the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court:—

In the year 1782, a marriage was solemnized between Nathaniel Micklethwait, second son of John Micklethwait of Beeston St. Andrew, in the county of Norfolk (which said John Micklethwait is hereinafter described as "the testator of 1797," and which said Nathaniel Micklethwait is hereinafter described as "Nathaniel Micklethwait No. 1"), and Sarah Branthwayt: and, upon the occasion of such marriage, a marriage-settlement, bearing date the 11th of September, 1782, was executed between

the said John Micklethwait (the testator of 1797) and the said Nathaniel Micklethwait No. 1, of the first part, Mary Branthwayt and the said Sarah Branthwayt, of the second part, John Blofield and John Micklethwait the younger (hereinafter described as "the testator of 1822"), of the third part and Francis Long and Miles Sotherton Branthwayt, of **[793]** the fourth part,—whereby certain estates in the county of Norfolk, known and hereinafter described as the "Hickling estate" (of about the value of 2220*l.* per annum), the "Beeston estate" (of about the value of 470*l.* per annum), and the "Tunstall estate" (of about the value of 820*l.* per annum), being the property comprised in the marriage settlement of the 18th of January, 1804, hereinafter mentioned, were settled by the said John Micklethwait the father, the testator of 1797, To the use, as to the Tunstall and Beeston estates, of himself for life, and, as to the Hickling estate, and, after the decease of the said John Micklethwait (the father, and testator of 1797), as to the Tunstall and Beeston estates, to the use of the said Francis Long and Miles Sotherton Branthwayt for a term of ninety-nine years, if the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt should so long live, for raising pin-money for the said Sarah Branthwayt during the joint lives of the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt, and, subject to the said term, To the use of the said Nathaniel Micklethwait No. 1, for his life, with a limitation to the use of the said John Blofield and John Micklethwait (the testator of 1822) and their heirs, during his life, to support contingent remainders; remainder to the use and intent that the said Sarah Branthwayt might receive during her life a jointure annuity of 600*l.*, with the usual powers of entry and distress for recovering the same; remainder to the use of the said Francis Long and Miles Sotherton Branthwayt for the term of 1000 years, upon trusts therein contained for raising 10,000*l.* for the portions of younger children (and which has been since raised and paid, and the said term surrendered); with remainder to the use of such one of the sons of said Nathaniel Micklethwait No. 1 on the body of the said Sarah Branthwayt to be begotten, and **[794]** the heirs of his body, as the said Nathaniel Micklethwait No. 1 should by deed or will appoint, and, in default of such appointment, to the use of the first son of the body of the said Nathaniel Micklethwait No. 1 on the body of the said Sarah Branthwayt to be begotten, and the heirs of the body of such first son, with remainder to the second son of the body of the said Nathaniel Micklethwait No. 1 on the body of the said Sarah Branthwayt to be begotten, and the heirs of the body of such second son, with remainders over to the third, fourth, fifth, and every other son and sons of the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt successively, and the heirs of their bodies respectively; with remainder to the said John Micklethwait (the testator of 1797), in fee.

The said John Micklethwait (the testator of 1797), being at the time of making his will hereinafter mentioned, and at the time of his death, seised in fee-simple of certain other estates in the counties of Norfolk, Suffolk, Essex, Middlesex, and Surrey, and in the cities of London and Norwich, and in the county of Westmeath, in Ireland (being the property devised by the will next hereinafter mentioned), made his will, bearing date the 4th of December, 1797, duly executed and attested in manner then by law required to pass real estate, and thereby devised the said estates as follows, that is to say, To the use of his eldest son, the said John Micklethwait, the testator of 1822, for life with a limitation to trustees and their heirs during his life to support contingent remainders; remainder to the use of his first and other sons successively in tail male; and, in default of such issue, then (in case such limitation, direction, or appointment of the said hereditaments and premises should be made by his said son John Micklethwait as was thereinafter mentioned) to the use and behoof of such one of them his **[795]** two grandsons Nathaniel Micklethwait No. 2 and Sotherton Branthwayt Micklethwait (the sons of his said late second son Nathaniel Micklethwait No. 1 deceased,) as his the testator's said son John Micklethwait should during his life time, by any deed or deeds, writing or writings, with or without power of revocation, under his hand and seal, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or in or by his last will and testament in writing, or any codicil thereto, to be by him signed, sealed, and published in the presence of and to be attested by three or more credible witnesses, limit, direct, or appoint the same manors, hereditaments, and premises unto, To hold the same unto such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, for and during the term

of his natural life, without impeachment of or for any manner of waste (other than voluntary or negligent waste in pulling or letting down houses or buildings without re-building or repairing the same); and, from and after the determination of the said estate for life of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, by forfeiture or otherwise in the life-time of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, to the use of the said trustees and their heirs during the natural life of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed, as aforesaid, upon trust to support contingent remainders, but nevertheless to permit and suffer such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, [796] during his natural life, to receive and take the rents, issues, and profits of the said premises to and for his and their own use and benefit: and, from and after the decease of such one of them his said two grandsons to whom the said premises should be limited, directed, or appointed as aforesaid, then to the use and behoof of the first son of the body of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use and behoof of the second, third, fourth, fifth, and all and every other the son and sons of the body of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, lawfully begotten, severally, successively, and in remainder one after another, in order and course as they and every of them should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such last-mentioned son and sons lawfully issuing, the elder of such sons and the heirs male of his body lawfully issuing being always preferred and to take before the other and younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: and, for default of all such issue, to the use of the other of them his said two grandsons to whom the said premises should not be so limited as aforesaid for his life, with a limitation to the said trustees and their heirs during his life to support contingent remainders, and remainder to the use of his first and other sons successively in tail male: But, in case no such limitation, direction, or appointment of the said hereditaments should be made by his the said testator's son as aforesaid in favour of one or either of his said two grandsons, then [797] and after the decease and failure of issue male of his said son John, the said testator devised all the said premises to the use of his said grandson, the said Nathaniel Micklethwait No. 2, during his life, with a limitation to the said trustees and their heirs during his life, to support contingent remainders, and with remainder to the use of his first son and the heirs male of his body: and, in default of such issue, to the use of the second, third, fourth, fifth, and every other the son and sons of the body of the said Nathaniel Micklethwait No. 2, severally and successively, one after another, as they should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of such son and sons, the elder of such sons and the heirs male of his body being always preferred and to take before the younger of them and the heirs male of his body; with remainders, on failure of all such issue, to the said Sotherton Branthwayt Micklethwait for life, and his sons successively in tail male: and, on failure of such issue, to the testator's son Jonathan George Micklethwait for life, and his sons successively in tail male; and, on failure of such issue, to the testator's own right heirs: And the said testator by his said will declared, that, notwithstanding any of the aforesaid uses, it should be lawful for his said sons and grandsons when and as they respectively should respectively be in the actual possession of his said manors and estates by virtue of the limitations thereinbefore contained, by deed, with or without power of revocation, to be by them, so respectively in possession, signed, sealed, &c., and attested as therein mentioned, to limit or appoint unto or in trust for any such woman as they his said sons and grandsons respectively in possession as aforesaid might thereafter happen to marry, for her life respectively, in full or in part of her jointure, any annual sum not exceeding 500*l.*, to be [798] issuing out of the same hereditaments, or a competent part thereof, with such powers for the recovery thereof, and such terms of years as usual.

By a codicil to his said will, bearing date the 26th of February, 1799,—but which was not executed in manner required by law to pass real estate, the said John

Micklethwait professed to revoke the above devise so far as regarded the estates in Surrey, Middlesex, and London, and to devise his last-mentioned estates to his son Jonathan George Micklethwait, in fee.

The said John Micklethwait (the testator of 1797) died on the 27th of February, 1799, without having revoked or altered his said will, leaving John Micklethwait (hereinafter described as the testator of 1822), his eldest son and heir at law, and the said Jonathan George Micklethwait, his third son, him surviving. The second son of the said John Micklethwait (the testator of 1797), being the said Nathaniel Micklethwait (No. 1), party to the said marriage-settlement of the 11th of September, 1782, died in the life time of his father, some time in the year 1786, without having made any appointment of the estates comprised in the said settlement of 1782. Upon the death of the said John Micklethwait (the testator of 1797), the said John Micklethwait (the testator of 1822) entered into possession of the estates devised by the said will of the 4th of December, 1797, and continued in such possession until his death, as hereinafter mentioned. The said Nathaniel Micklethwait (No. 1) had two sons only, viz. Nathaniel Micklethwait (his eldest son), hereinafter described as Nathaniel Micklethwait No. 2, and who upon the death of his father entered as tenant in tail into possession of the estates comprised in the settlement of 1782, and Sotherton Branthwayt Micklethwait, afterwards known as Sir Peckham Micklethwait, Baronet.

[799] The said Nathaniel Micklethwait (No. 2), on the 26th of January, 1804, intermarried with the Lady Maria Wilhelmina Waldegrave; and a settlement was executed upon such marriage, bearing date the 18th of January, 1804.

By this settlement, which was made between the said Nathaniel Micklethwait (No. 2) of the first part, the said John Micklethwait the son, and Miles Sotherton Branthwayt, Esq. (who in the said settlement are stated to be the guardians of the said Nathaniel Micklethwait (No. 2) of the second part, Charles Marquis Cornwallis, Elizabeth Laura Countess Dowager of Waldegrave, Heneage Earl of Aylesford, William Lord Radstock, and Thomas Berney Brampston, Esq. (therein described as the guardians of Lady Maria), and the said Lady Maria, of the third part,—after reciting the settlement of the 10th and 11th of September, 1782,—the said Nathaniel Micklethwait (No. 2), with the consent of his said guardians, covenanted and agreed, within three months after he attained twenty-one, to settle and assure the said Hickling, Tunstall, and Beeston estates (and to which he is therein stated to be then entitled in fee-tail general in possession under his said parents' marriage settlement), subject to the said term of 1000 years created by such settlement), To the use of himself for life, and, after his decease, To the use and intent that Lady Maria should during her life receive a jointure annuity of 1000l., with the usual powers of entry and distress, and a term of years for securing the same, and, subject thereto, To the use of himself, the said Nathaniel Micklethwait (No. 2), in fee. The John Micklethwait party thereto of the second part, described as guardian of the said Nathaniel Micklethwait (No. 2) is the said testator of 1822. There was issue of this marriage one child only, Nathaniel Waldegrave John Branthwayt (hereinafter [800] described as Colonel Micklethwait), born on the 14th of February, 1805; and the said Lady Maria Wilhelmina Waldegrave died on the same day.

By an indenture on the 28th of January, 1805, and a recovery suffered in pursuance thereof, the said Nathaniel Micklethwait (No. 2), having previously attained the age of twenty one years, in manner then required by law, barred the entail in the estates comprised in the said indentures of 1782, and 18th of January, 1804, and limited the uses thereof to himself, in fee-simple.

The Tunstall estate was sold by the said Nathaniel Micklethwait (No. 2), and conveyed on the 8th of December, 1809.

In the month of October, 1810, a marriage was contemplated between the said Nathaniel Micklethwait (No. 2) and the Honourable Charlotte Marianne Harriett Rous; eldest daughter of John, Lord Rous; and, upon the treaty for such marriage, the following proposals were made by the said Nathaniel Micklethwait (No. 2) and John Lord Rous, and were (subject to the alterations which appear in the same) approved of and signed by the said John Micklethwait, the testator of 1822:

"Proposals for a settlement upon the intended marriage between Nathaniel Micklethwait, Esq., of Beeston, in the county of Norfolk, and the Honorable Charlotte

Marianne Harriett Rous, the eldest daughter of the Right Honorable John Lord Rous, by Charlotte Maria Lady Rous, his present wife, late Charlotte Maria Whittaker.

"Lord Rous proposes on the day of marriage to pay to Mr. N. Micklethwait 5000l. as Miss Rous's portion, which is to be in lieu and satisfaction of all claims which she might have as one of his lordship's younger children under or by virtue of the settlement made [801] upon his marriage with Lady Rous, and also in lieu of all legacies or bequests contained in any will made by his lordship previous to the intended marriage.

"In consideration whereof, and for making a provision for Miss Rous and for the issue of the marriage, Mr. N. Micklethwait proposes to charge his Hickling estate with a clear annuity of 1000l. to Miss Rous, in case she shall survive him, during her life, to be payable quarterly, and the first payment to be made on the first quarter-day which shall happen after his death; and with a further clear annuity of 500l. as an augmentation to the said provision in case John Micklethwait, Esq., of Newmarket (the uncle of Mr. N. Micklethwait) shall, by virtue of the power given to him by the will of John Micklethwait, Esq., his late father, deceased, by deed or will settle, appoint, or devise the estates therein mentioned to the use of Mr. N. Micklethwait or his issue; the first payment of such additional annuity of 500l. to be made on the quarter-day which shall first happen after the death of Mr. N. Micklethwait, in case he shall have come into possession of the said estates in his life-time, but, if not, then on the first quarter-day next after such estates shall by virtue of such settlement, appointment, or will, come into the possession of his issue or representatives; and such additional annuity to be payable to Miss Rous during her life at the same times and together with the said original annuity of 1000l.

"Mr. N. Micklethwait also proposes to charge the said estates at Hickling with the sum of 25,000l. for the fortunes of the children of the intended marriage, to be equally divided amongst such children, if more than one, share and share alike, and, if only one, the whole to such only child, such fortunes to be raised and paid to, such children within months after Mr. N. Micklethwait's decease, or when and as they shall [802] respectively attain the age of twenty one years, which shall last happen, with such yearly sums for their maintenance from the time of his decease until such fortunes shall respectively become payable as the trustees to be named in the settlement shall deem necessary, not exceeding the sums following, viz. if only one child, l., if two children, l. each, and, if three or more, l. each per annum.

"The said provision for Miss Rous to be in bar of dower.

"The settlement to contain all usual powers and provisions for raising and securing the payment of the said annuities and children's fortunes, and all other powers necessary for carrying the trusts of the settlement into effect.

"Memorandum.—The following alterations in the above arrangements have been since proposed:—

"Mr. Micklethwait proposes, in pursuance of the power given to him by his father's will, immediately to appoint all the estates thereby devised to him to Mr. Nathaniel Micklethwait.

"Mr. Nathaniel Micklethwait to enter into articles whereby he will covenant as soon as he comes into possession, to settle 500l. per annum upon Miss Rous, pursuant to the power given by Mr. Micklethwait's will.

"Instead of 25,000l. to be secured upon the Hickling estate, only 10,000l. to be charged thereon.

"Miss Rous's portion of 5000l. to be vested in the funds; 3000l. on mortgage of Mr. Symond's estates at Felmingham; 500l. on mortgage of an estate at Necton, belonging to Mr. Collyer.

"To be vested in the names of trustees, in trust for raising the remainder of the children's portions.

"We approve of and agree to the above arrangement.

"JOHN MICKLETHWAIT."

[803] "Names of trustees proposed by Lord Rous and Mr. Micklethwait:—

"For Miss Rous's annuity.—T. S. Gooch, Esq., of Bramfield Hall, Suffolk: Abraham Whittaker, Esq., of Lyston House, in the county of Hereford.

"For provision for younger children.—Sotherton Branthwayt Micklethwait, of Lamberhurst, in the county of Sussex, Esq., William Hanbury, of Lamberhurst, in the county of Northampton, Esq."

In pursuance of such arrangement, the said John Micklethwait (the testator of 1822), on the 29th of November, 1810, executed the deed of appointment of that date under his hand and seal hereinafter set forth; and the same was duly sealed and delivered by him in the presence of and attested by two credible witnesses, in manner required by the said will of the 4th of December, 1797.

The following is a copy of the deed of appointment of the 29th of November, 1810:—

"To all to whom these presents shall come, I, John Micklethwait, of Newmarket, in the county of Cambridge, Esq., send greeting: Whereas John Micklethwait, late of Beeston St. Andrew, in the county of Norfolk, Esq. (my late father), did, in and by his last will and testament, bearing date the 4th of December, 1797, and duly executed and attested in such form and manner as the law requires for the passing freehold estates (amongst other things), give and devise (charged as in the said will is mentioned) all and every his manors, advowsons, tithes, impropriations of tithes, capital and other messuages, farms, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several counties of Norfolk, Suffolk, Essex, Middlesex, and Surrey, and in the cities of London and Norwich, and also in the county of Westmeath, in Ireland, whether the same were freehold or copyhold [804] or of any other nature or tenure whatsoever; And also all other his manors, messuages, lands, tenements, hereditaments, and real estate whatsoever in the kingdoms of Great Britain and Ireland whereof and whereunto he was seised or entitled in possession, reversion, remainder, expectancy, or otherwise; And all his estate, right, title, and interest of, in, and to the same and every part and parcel thereof, from and immediately after his decease, unto and to the use of his eldest son, me, the said John Micklethwait, and my assigns, for and during the term of my natural life, without impeachment of waste (other than such waste as in the said will is mentioned), with remainder to trustees during my life to preserve contingent remainders, with remainders from and after my decease To the use of the first and all other son and sons of my body lawfully begotten, or to be begotten, in tail male, with remainder, for default of such issue (in case such limitation, direction, or appointment of the said hereditaments and premises should be made by me as was therein and as is hereinafter mentioned), to the use and behoof of such one of them his the said testator's two grandsons, Nathaniel Micklethwait and Sotherton Branthwayt Micklethwait (the sons of the said testator's then late second son Nathaniel Micklethwait), as I the said John Micklethwait should during my life-time by any deed or deeds, writing or writings, with or without power of revocation, under my hand and seal, to be by me sealed and delivered in the presence of and to be attested by two or more credible witnesses, or in or by my last will and testament in writing, or any codicil thereto, to be signed, sealed, and published in the presence of and to be attested by three or more credible witnesses, limit, direct, or appoint the same manors, hereditaments, and premises unto, To hold the same unto such one of them his the said testator's two grandsons to [805] whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste (other than such waste as in the said will is mentioned; with remainder to trustees during the life of such one of them his the said testator's two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, to preserve contingent remainders; with remainder from and after the decease of such one of them his the said testator's two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, To the use of the first and all other son and sons of the body of such one of them his the said testator's two grandsons to whom the said premises should be so limited directed, or appointed as aforesaid, lawfully to be begotten, in tail male, with divers remainders over, for default of such issue, as in and by the said last will and testament, on reference being thereto had, may more fully and at large appear: And whereas the said John Micklethwait, the testator, departed this life on or about the 27th of February, 1799, without altering or revoking his said last will and testament: Now know ye that I the said John Mickle-

thwait, the son of the said testator John Micklethwait, deceased, in pursuance and exercise and execution of the power and authority to me given and reserved in and by the said recited or in part recited last will and testament of the said John Micklethwait, deceased, and by force and virtue of the same and of all and every other power and powers, authority and authorities, in me being or vested, or in any wise enabling me thereunto or in this behalf, have limited, directed, or appointed, and by this my deed or writing under my hand and seal by me sealed and delivered in the presence of and attested by the two credible per-[806]-sons whose names are hereupon indorsed as the witnesses to the sealing and delivery of these presents by me, do limit, direct, and appoint unto the said Nathaniel Micklethwait, the eldest of the two grandsons of the said testator, all and every the aforesaid manors, advowsons, tithes, impropriations of tithes, capital and other messuages, farms, lands, tenements, hereditaments, and real estate whatsoever, late of the said John Micklethwait, the said testator, deceased, and by him in and by his said recited or in part recited last will and testament given and devised (from and after my decease, and in default of issue male of me the said John Micklethwait, as in the said will is mentioned), and in such case as in the said will is mentioned, to the use and behoof of such one of them his the said testator's two grandsons as I should in manner as therein and hereinbefore mentioned limit or appoint the same manors, hereditaments, and premises unto, To hold the same according to the form and effect of the said recited or in part recited will of the said John Micklethwait, my late father, deceased. In witness, &c.

"John Micklethwait.
"Nathaniel Micklethwait."

The said intended marriage between the said Nathaniel Micklethwait (No. 2) and the said Charlotte Marianne Harriet Rous took place on the 27th of December, 1810; and, on the 26th of December, 1810, a marriage settlement of that date was executed, to the effect following:—

The settlement is made between the said Nathaniel Micklethwait (No. 2), therein described as of Beeston St. Andrew aforesaid, Esq. of the first part, John Lord Rous, of the second part, the Honorable Charlotte Marianne Harriett Rous, of the third part, Thomas Sherlock Gooch and Abraham Whittaker, Esqs., of the fourth part, and Sotherton Branthwayt Micklethwait and [807] William Hanbury, Esqs., of the fifth part. It recites the then intended marriage and the seisin of the said Nathaniel Micklethwait (No. 2) of the Hickling estates, the will of 1797, and the deed-poll of 1810. It then recites, that, upon the treaty for the said then intended marriage, it was proposed and agreed that the said John Lord Rous should at or before the solemnization thereof pay to the said Nathaniel Micklethwait (No. 2) the sum of 5000l. as and for the fortune or portion of the said Charlotte Marianne Rous, his daughter, which it was agreed should be taken and considered in lieu and full satisfaction of all claims which the said Charlotte Marianne Harriett Rous might have as one of the younger children of the said John Lord Rous under or by virtue of the settlement made upon his marriage with the said Charlotte Maria Lady Rous, his then wife, and also in lieu of all legacies or bequests mentioned and bequeathed to her in any will made by the said John Lord Rous previous to the said then intended marriage: and the said Nathaniel Micklethwait, in consideration thereof and of the said marriage, and for making a provision for the said Charlotte Marianne Harriett Rous, his then intended wife, in case she should happen to survive him, and for the issue of the said then intended marriage, did agree to settle and convey his said estates in Hickling and adjoining parishes in Norfolk thereinafter released, To the uses and upon and for the trusts, intents, and purposes thereinafter mentioned concerning the same; and also to enter into a covenant to charge the said hereditaments and premises so devised by the said will of the said John Micklethwait, deceased, in case and when and so soon as he should come into possession thereof by virtue of the said will and deed of appointment, with the payment of an annual sum or yearly rent-charge of 500l. to the said Charlotte Marianne Harriett [808] Rous, his then intended wife, during her life, in case she should happen to survive him the said Nathaniel Micklethwait (No. 2), as an augmentation of her jointure: And the said Nathaniel Micklethwait (No. 2) did also agree to pay to the said Thomas Sherlock Gooch and Abraham Whittaker, previous to the solemnization of the said marriage, the sum of 10,000l. upon the trusts thereinafter declared.

The settlement then contains a conveyance by the said Nathaniel Micklethwait (No. 2) of the said Hickling estate to trustees, to the use of himself for life, remainder to the intent that Lady Charlotte, in case she should survive him, might receive thereout a jointure annuity of 1000l. for her life, with the usual powers of entry and distress for securing and enforcing the payment of the same; and, subject thereto, to the use of the said Thomas Sherlock Gooch and Abraham Whittaker for one thousand years, to be computed from the decease of the said Nathaniel Micklethwait (No. 2) for securing the payment of the said annuity and for raising 15,000l., for the portions of the younger children of the said then intended marriage; and, subject thereto, To the use of the said Nathaniel Micklethwait (No. 2), in fee. The said Nathaniel Micklethwait (No. 2) then by the said indenture of settlement covenanted with the said trustees that he would in case and when and as soon as he should by virtue of the said therein recited will of the said John Micklethwait, his grandfather (the testator of 1797), and of the said deed of appointment of the 29th of November, 1810, be in the actual possession of the manors, messuages, lands, tenements, hereditaments, and premises thereby devised to the said John Micklethwait the son (the testator of 1822) as aforesaid, well and effectually limit and appoint, and so far as he could he did thereby limit and appoint, unto the said Lady Charlotte, for her life, in [809] augmentation of the jointure thereinbefore provided for her, one annual sum or yearly rent-charge of 500l., to be payable out of the said devised premises, and to commence immediately after the decease of the said Nathaniel Micklethwait (No. 2); and the said Nathaniel Micklethwait (No. 2) also by the said settlement covenanted that he would limit and appoint such powers and remedies for recovery of the said annuity when in arrear, and such term or terms of years for the better securing the payment thereof, to take effect immediately after his decease, as were usual and necessary and expedient in that behalf, and warranted by the said power.

On the 23rd of May, 1812, the said Nathaniel Micklethwait (No. 2) executed indentures of lease and release and settlement dated the 22nd and 23rd of May, 1812, to the following effect:—

The said Nathaniel Micklethwait (No. 2) thereby settled certain estates in Faversham and other parishes in Norfolk, of about the value of 2520l. per annum; and Elizabeth Branthwayt, widow, who was entitled for her life in part of the same, concurred with him in so doing: and the said Nathaniel Micklethwait (No. 2) thereby also settled the said Beeston estates comprised as aforesaid in the said settlements of 1782 and 1804, to which he was then entitled in fee simple under the recovery deed of 1805, to the uses following, viz. as to the parts of the said Faversham and other estates to which the said Elizabeth Branthwayt was as aforesaid entitled for her life, to the use of her and her assigns for her life, by way of restoration and in confirmation of her said estate for life; and, as to the other estates, and, after the decease of the said Elizabeth Branthwayt, as to the parts of the said estate limited to her for her life, to the use of the said Nathaniel Micklethwait (No. 2) and his assigns for his life, with a limita-[810] tion to trustees during his life to support contingent remainders; remainder to the use of the said Colonel Micklethwait and his assigns for his life, with a limitation to trustees during his life to support contingent remainders; remainder to the use of the first and other sons successively of the said Colonel Micklethwait in tail male; and, on failure of such issue, as to the parts of the said estates in Faversham in which the said Elizabeth Branthwayt had a life interest as aforesaid, to the use of the said Nathaniel Micklethwait (No. 2), his heirs and assigns, but, if he died without issue male in her life time (which did not happen), then to the uses subsisting therein before the execution of the said indenture of settlement: And, as to all other the said estates thereby settled, comprising the said Beeston estates, to the use of the said Nathaniel Micklethwait (No. 2), his heirs and assigns.

On the 24th of October, 1822, the said John Micklethwait (the testator of 1822) made his will, bearing date that day, duly executed and attested in manner then by law required to pass real estate, of which the following is a copy:—

"This is the last will and testament of me, John Micklethwait, of Iridge Place, in the parish of Salehurst, in the county of Sussex, Esq., touching the disposition of such temporal estate which by the blessing of Divine Providence I have been endowed with, and whereof I have an absolute right of disposal. In the first place, it is my particular wish and desire that all my just debts, whether on mortgage, bond, simple

contract, or otherwise, shall be paid off and discharged: and, for the greater facility thereto, and in order the better to secure the payment of the several pecuniary legacies by me hereinafter given and bequeathed, I give and devise unto my friends William Alexander Moreland, of, &c., and John Law Hodges, of, &c., and their [811] heirs, all that my messuage or tenement, buildings, farm, lands, hereditaments, and premises, with their rights, members, and appurtenances, situate, lying, and being in the parish of Sandhurst, in the said county of Kent, and now in the tenure or occupation of James Collens, his assigns or under-tenants; and also all that my messuage or tenement, buildings, farm, lands, hereditaments, and premises, with their rights, members, and appurtenances, situate, lying, and being in the parish of Hawkhurst, in the said county of Kent, and now in the tenure or occupation of Edmund Springett, his assigns or under-tenants; and all other my messuages, lands, tenements, hereditaments, and premises situate, lying, and being in the said parishes of Sandhurst and Hawkhurst, or either of them, To hold the same to them the said W. A. Moreland and J. L. Hodges, and their heirs, upon this special trust and confidence nevertheless in them reposed,—that they the said W. A. Moreland and J. L. Hodges, or the survivor of them, or the heirs or assigns of such survivor, do and shall as soon as conveniently may be after my decease sell and dispose of my said messuages or tenements, buildings, farms, lands, hereditaments, and premises, situate in the several parishes of Sandhurst and Hawkhurst aforesaid, either together or in lots or parcels, and by public auction or private contract, as they or he in their or his discretion shall judge most prudent, for the best price or prices that can reasonably be had or gotten for the same: and upon further trust to pay and apply the net moneys to arise by such sale, and the rents and profits to be received in the mean time and until such sale, in aid of my personal estate, in, for, and towards the discharge and satisfaction of all my just debts, whether on mortgage, bond, simple contract, or otherwise, and also in, for, and towards the payment and satisfaction of the several pecuniary legacies [812] by me hereinafter given and bequeathed; and, in case of any surplus of the said trust moneys from and after such payment, discharge, and satisfaction as aforesaid, then I give and bequeath such surplus money unto my nephew Sotherton Branthwayt Micklethwait, his executors, and administrators, to and for his and their own sole and absolute use and benefit: And, the more effectually to enable my said trustees, or the survivor of them, or the heirs or assigns of such survivor, to sell and dispose of my said messuages or tenements, buildings, farms, lands, hereditaments, and premises situate in Sandhurst and Hawkhurst aforesaid, I do hereby declare that no purchaser or purchasers thereof, or of any part thereof, shall be obliged to look to or concern himself, herself, or themselves, after payment of his, her, or their purchase-money or purchase-moneys, with the application thereof or of any part thereof, but that the receipt or receipts of my said trustees, or the survivor of them, or the heirs of such survivor, shall at all times be an effectual discharge or discharges to such purchaser or purchasers for such and so much of his, her, or their purchase-money or purchase-moneys as in such receipt or receipts shall be expressed or acknowledged to be received: And I do hereby order and direct that my said nephew Sotherton Branthwayt Micklethwait shall have an election of becoming the purchaser of my said estates so given and devised in trust to be sold as aforesaid at a price to be affixed by the fair valuation of two persons, one to be chosen by my said trustees or the survivor of them, or the heirs of such survivor, and the other by the said Sotherton Branthwayt Micklethwait, or, in case of a difference between them, then by the valuation of a third person to be chosen by the said two referees, upon condition that he the said Sotherton Branthwayt Micklethwait shall signify his wish to become such purchaser within six [813] months from the time of my decease, and provided he the said Sotherton Branthwayt Micklethwait shall complete such purchase within twelve months from the time of my decease: And whereas my much respected father, John Micklethwait, deceased, did by his will, bearing date the 4th of December, 1797, give and devise (among and together with several other estates) certain messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, therein particularly described, to the use of me for life, with remainder to the use of my heirs in tail male, and, in default of such issue, to the use of my nephew Nathaniel Micklethwait, for life, with remainder to his heirs in tail male, or of my nephew Sotherton Branthwayt Micklethwait, for life, with remainder to his heirs in tail male, authorising or giving to me the power of making the election as to which

of my said nephews and his heirs in tail such limitations in remainder should first pass in the event of my decease without leaving any male issue: And whereas, by a codicil to the said will, dated the 26th of February, 1799, my said father did attempt and intend to revoke and make void the devise contained in his said will so far as regarded the said messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London; and he did thereby attempt and intend to give and devise the same unto my brother Jonathan George Micklethwait, his heirs and assigns, for ever; but, such codicil having been published in the presence of and attested by two witnesses only, the same was inoperative as to the above-mentioned revocation and devise therein: And whereas, under and by virtue and in exercise of the power and authority to me given in and by my said father's will, I have heretofore made an election by limiting and directing from and immediately after my decease without issue male, **[814]** all and every the messuages, lands, tenements, hereditaments, and premises devised by the said will as aforesaid, unto my said nephew Nathaniel Micklethwait, for the term of his natural life, with remainder to his first and other sons and their heirs in tail male: nevertheless, it is my wish and desire that the said codicil to my father's will should be confirmed, and the devise therein of the said messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, to my brother Jonathan George Micklethwait and his heirs and assigns for ever should be fully and legally established: And whereas it is my expectation that my nephew Edward Micklethwait will be provided for by his maternal relations: Now, I do hereby give, devise, and bequeath unto my nephew John Micklethwait (eldest son of my said brother Jonathan George Micklethwait) and his assigns, for and during the term of his natural life, one annuity or clear yearly rent-charge of 100l. sterling: Also, I give, devise, and bequeath unto my said nephew Edward Micklethwait (the other son of my said brother Jonathan George Micklethwait) and his assigns, for and during the term of his natural life, one annuity or clear yearly rent-charge of 50l. sterling: Also I give, devise, and bequeath unto my sister in law Mary Corthine, spinster, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent-charge of 100l. sterling: Also, I give, devise, and bequeath unto Mary Pooke, of Salehurst, aforesaid, spinster, and her assigns, for and during the term of her natural life, one annuity or yearly rent-charge of 40l. sterling: All which said several annuities or yearly rent-charges I do direct shall be paid from and out of, and be charged on, the hereditaments and real estate hereinafter given and devised, by two equal half-yearly payments, on Lady Day and Michaelmas Day in every year, and the first payment **[815]** thereof to begin and be made on such of the said days as shall next happen after my decease: And I do hereby order and direct, that, in case the said annuities or yearly rent-charges, or any or either of them, or any part thereof, shall be in arrear and unpaid over and above the space of thirty days from and after the several days above mentioned and appointed for payment thereof, it shall and may be lawful to and for the said John Micklethwait, Edward Micklethwait, Mary Corthine, and Mary Pooke, respectively, or their respective assigns, from time to time to recover and raise the same by distress and sale of the effects on all or any part of the said hereditaments and real estate so charged therewith, in like manner as rent may be recovered in case of non-payment; And, subject to and chargeable with the payment of the several annuities or yearly rent-charges aforesaid, and to the power and remedy for recovery thereof in manner as aforesaid, I give and devise all and every of my manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate whatsoever, whether in possession, reversion, remainder, or expectancy, and whether situate in the county of Sussex or elsewhere (except Sandhurst and Hawkhurst aforesaid), unto my aforesaid friends William Alexander Moreland and John Law Hodges, and their heirs, To hold the same unto the said William Alexander Moreland and John Law Hodges and their heirs for ever, To the several uses, upon the trusts, and under and subject to the powers, provisos, and limitations hereinafter expressed and declared of and concerning the same, that is to say, To the use of my said nephew Sotherton Branthwayt Micklethwait, and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, To the use of the said William Alexander Moreland and John Law Hodges and **[816]** their heirs during the natural life of my said Nephew Sotherton Branthwayt Micklethwait, in trust to support the contingent uses and

estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as the case may require, yet nevertheless to permit and suffer my said nephew Sotherton Branthwayt Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after his decease, to the use of the first son of the body of the said Sotherton Branthwayt Micklethwait lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of my said nephew Sotherton Branthwayt Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, in order and course as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his and their body and bodies, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: And, in default of such issue, To the use of my aforesaid brother Jonathan George Micklethwait, and his assigns, for and during the term of his natural life; and, from and after the decease of my said brother Jonathan George Micklethwait, then to the use of my said nephew John Micklethwait (the eldest son of my said brother Jonathan George Micklethwait), and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, to the use of the said William Alexander Moreland and John **[817]** Law Hodges and their heirs, during the natural life of my said nephew John Micklethwait, in trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, yet nevertheless to permit and suffer my said nephew John Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after his decease, to the use of the first son of the body of my said nephew John Micklethwait lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of the said John Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, in order and course as they shall respectively be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his and their body and bodies lawfully issuing, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: Provided, nevertheless, that, if my said nephew Nathaniel Micklethwait and his first or other son or sons, or his or their heirs, do and shall in the life-time of my said brother Jonathan George Micklethwait, fully and effectually confirm and establish the aforesaid codicil to my father's will, by legally and effectually conveying and assuring the said messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, unto and to the use of my said brother Jonathan George Micklethwait, his heirs and assigns for ever, that then and in such case the **[818]** devise and limitation hereinbefore made in favour of my said brother Jonathan George Micklethwait for life, and of my said nephew John Micklethwait, his son, and the first and other sons of his body, in tail male as aforesaid, shall from thenceforth cease and become void, and immediately on such event, or otherwise in default of such issue as aforesaid of my said nephew John Micklethwait, then all and every of my aforesaid manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate in Sussex or elsewhere (except in Sandhurst and Hawkhurst aforesaid), are to go and pass to the use of my great-nephew John Nathaniel Micklethwait, second son of my said nephew Nathaniel Micklethwait, and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, to the use of the said William Alexander Moreland and John Law Hodges, and their heirs, during the natural life of the said John Nathaniel Micklethwait, in trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require, yet nevertheless to permit and suffer the said John Nathaniel Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during

the term of his natural life; and, from and after his decease, to the use of the first son of the body of the said John Nathaniel Micklethwait lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of the said John Nathaniel Micklethwait, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall respectively be in seniority of age and priority of birth, and the [819] several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his and their body and bodies lawfully issuing, being always to be preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies lawfully issuing: and, in default of such issue, to the use of the third, fourth, fifth, and all and every other son and sons (except the eldest son) of my said nephew Nathaniel Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall respectively be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons (except such eldest son) lawfully issuing, the elder of such son and sons (except as aforesaid), and the heirs male of his and their body and bodies, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing; and, in default of such issue, to the use of the right heirs of my said brother Jonathan George Micklethwait for ever; And, as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son, may become entitled to the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the [820] then heir male of his body; Now, in order to prevent the union of the two estates in the same person, whilst there is in existence a younger son, or an heir male of the body of a younger son, of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel Micklethwait, as the heir male of his body, Then the limitations in this my will in favour of such second or other younger son so becoming entitled, shall, from and immediately after such event, cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct: And my will is, and I do hereby order and direct, that it shall and may be lawful to and for my said nephew Sotherton Branthwayt Micklethwait, my said nephew John Micklethwait, and the said John Nathaniel Micklethwait, and each and every of them, as and when they shall or may happen respectively to come into possession of my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate so limited in use to them respectively as aforesaid, by any writing or writings signed and sealed by them respectively in the presence of and to be attested by two or more credible witnesses, to demise and lease all or any part of the same manors, messuages, farms, lands, tithes, tenements, and real estate, to any person or persons whomsoever, for any term or terms not exceeding fourteen years, in possession, [821] and not in reversion, so as upon every such lease and leases the best and most improved yearly rent or rents be reserved and made payable half yearly or quarterly that can reasonably be obtained, without taking any fine, foregift, or other thing by way of premium for the same, and so as such lease or leases do contain the usual covenants and conditions on the part or parts of the lessee or lessees, and be not made dispunishable for waste by any express words therein contained, and so as the respective lessees do execute the original leases, or duplicates or counterparts thereof: And, in consideration of the great regard and respect which I have and bear for the family of my much honoured

mother, Elizabeth Micklethwait, deceased, before Elizabeth Peckham, spinster, through the benevolence of which family I am possessed of the greater part of my real estates in Sussex and Kent, I do by this my will order and direct that my said nephew Sotherton Branthwayt Micklethwait, and the several other person and persons (except my said brother Jonathan George Micklethwait) who shall in succession become entitled to my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estates aforesaid, by virtue of the aforesaid limitations in this my will contained, shall severally and successively as they shall come into the possession thereof, take the surname and bear the arms of Peckham jointly with those of Micklethwait, and shall for that purpose solicit for and obtain due license by His Majesty's sign-manual, and procure the same to be duly recorded in the Herald's Office of this kingdom: And, as touching my personal estate, I give and dispose thereof in manner following, &c., &c.: And I make, nominate, constitute, and appoint my said nephew Sotherton Branthwait Micklethwait sole executor of this my last will and testament," &c.

The said John Micklethwait (the testator of 1822) **[822]** was at the time of making his will, and at the time of his death, seised in fee-simple of certain estates in the county of Sussex, known as "The Iridge estates," being of the value of 2800*l.* per annum or thereabouts, and being a portion of the property devised by his said will.

The said John Micklethwait (the testator of 1822) died in the month of April, 1824, without having revoked or altered his said will, and without having had any children.

Up to about this period, Nathaniel Micklethwait No. 2, resided at Beeston House, which was the family mansion of the Micklethwaits, and part of the property comprised in the settlements of 1782 and 1804 and 1812. There was no family residence on any of the estates devised by the will of 1797.

The property sought to be recovered in this action forms part of the said Iridge estates devised by the said testator of 1822.

At the time when the said John Micklethwait (the testator of 1822) made his said will, Messrs. Richard Owen Stone and William Owen Stone carried on business in partnership as solicitors at Mayfield, in Sussex, and were at that time the solicitors of the said John Micklethwait (the testator of 1822), and were employed by him to prepare his said will; and the said Richard O. Stone was one of the attesting witnesses to the execution thereof. Richard Owen Stone died in 1824; and William Owen Stone, his son and partner, continued the business, and took into partnership Mr. Donald Barclay, and they carried on business in partnership at the same office in Mayfield until William Owen Stone's death in 1839. After the death of William Owen Stone, Mr. Barclay continued the business, and subsequently took Mr. Henry King into partnership. They carried on their business at a different office from that in which **[823]** the business had been carried on during the life-time of the Stones; and quantities of papers, including several papers which belonged to the Micklethwaits, were removed from the one office to the other. Among the papers which were so removed, two papers have been found. The first is in the hand-writing partly of the said Richard Owen Stone, and partly of Benjamin Buss, who at that time was the clerk of the said Richard Owen Stone and William Owen Stone, and contains an exact copy of the said will of the said John Micklethwait (the testator of 1822), and is in fact the original draft from which the said will was engrossed for the purpose of being executed. The second paper was found folded up inside the first paper, and is entirely in the hand-writing of the said Richard Owen Stone; but Benjamin Buss believes that certain pencil "ticks," one of which is placed against each clause in the paper, were put there by him. He does not recollect making the "ticks" or recognize them as being in his hand writing; but he thinks they are his, because it would have been part of his duty to put them there. The following is a copy of the said second paper:—

"Disposal by testament.

"Devise estates in Sandhurst and Hawkhurst to W. A. Moreland and J. L. Hodges, in trust to sell and to apply proceeds in discharge of debts, and towards payment of pecuniary legacies, and to pay residue to S. B. Micklethwait, Esq., who is to have the election of becoming purchaser at a valuation [six instead of three months for election].

"Recite property settled on Mr. N. Micklethwait, and the expectation of nephew Edward Micklethwait's being provided for.

"Devise to nephew John, eldest son of Mr. J. G. Micklethwait, annuity of 100l.: to nephew, Edward Micklethwait, annuity of 50l.: to Mrs. Corthine, an annuity of 100l.

[824] "Subject to the above annuities, give the residue of real estates to trustees and their heirs.

"To the use of nephew S. B. M. for life;

"Remainder to his first and other sons in tail male: in default of such issue, to brother J. G. Micklethwait, for life;

"Remainder to nephew John Micklethwait, for life;

"Remainder to first and other sons of nephew John Micklethwait.

"Clause, if father's will confirmed as to the property in London and Croydon, the limitation to brother J. G. and to nephew and his first and other sons to immediately cease.

"In default of such issue of nephew John, or in the event of confirmation, which shall first happen, then to John Nathaniel Micklethwait (second son of nephew Nathaniel Micklethwait), for life;

"Remainder to his first and other sons in tail male. In default of such issue, remainder to the third, fourth, fifth, and all other (except the eldest son) of Nathaniel Micklethwait, in tail male.

"Proviso, as in codicil, to prevent the two estates, i.e. the one already settled on Nephew Nathaniel and Mr. Micklethwait's estate getting into the possession of the same person.

"In default of all the issue of nephew Nathaniel (except his eldest son, or the issue of such eldest son),

"Then to brother J. G. Micklethwait, his heirs and assigns, for ever.

"Clause for letting leases as restricted.

"Clause also as to the taking the surname and bearing the arms of Peckham jointly with Micklethwait."

[Then followed the heads of the provisions as to the disposal of the personal estate of the testator.]

These two papers were to be treated as part of the case.

[825] Upon the death of the said John Micklethwait (the testator of 1822), the said Sotherton Branthwayt Michlethwait, who was created a baronet, and was also known as Sir Peckham Micklethwait, entered into possession of the said Iridge estates under the said will of the 24th of October, 1822, and continued in possession thereof until his death without issue in September, 1853; and, upon such death of the said John Micklethwait (the testator of 1822), the said Nathaniel Micklethwait (No. 2) entered into possession of the estates devised by the said will of the 4th of December, 1797.

On the 6th of April, 1826, the said Nathaniel Micklethwait (No. 2) and the said Colonel Micklethwait did, in the life-time of the said Jonathan George Micklethwait, fully and effectually confirm and establish the said attempted codicil to the will of the said John Micklethwait (the testator of 1797), by legally and effectually conveying and assuring the said property situate in the counties of Surrey and Middlesex, and in the city of London, unto and to the use of the said Jonathan George Micklethwait in fee; and thereupon the devise and limitation contained in the said will of the said John Micklethwait (the testator of 1822) in favour of the said Jonathan George Micklethwait and of John Micklethwait his son, and the first and other sons of his body in tail male, ceased and became void.

The value of the estates devised by the will of 1797, exclusive of the portion conveyed to Jonathan George Micklethwait as before mentioned, is 4370l. per annum.

There was issue of the said marriage of the said Nathaniel Micklethwait (No. 2) and the said Charlotte Marianne Harriet Rous six sons, of whom John Nathaniel Micklethwait, the defendant in this action, was the eldest, and Henry Sharnborne Nathaniel Micklethwait, the plaintiff in this action, was the second. [826] Upon the death of the said Sir Peckham Micklethwait, the defendant entered into possession of the said Iridge estates under the said will of the 24th of October, 1822, and from thence hitherto hath been and still is in occupation and possession of the same.

The said Nathaniel Micklethwait (No. 2) died on the 6th of January, 1856; and, upon his death, the said Colonel Micklethwait entered into possession of the estates in the counties of Norfolk, Suffolk, and Essex, and in the city of Norwich, and in the county of Westmeath, devised by the said will of the 4th of December, 1797, and also the estates comprised in the settlements of 1804, and 1810, and 1812, severally mentioned in the will of the 29th of May, 1852, hereinafter referred to, and died on the 18th of July, 1856, without having been married, and without having barred the estate-tail in any of the property devised by the said will of the said John Micklethwait, the testator of 1797.

The said Nathaniel Micklethwait (No. 2) duly made and published his will, dated the 29th of May, 1852, executed so as to pass real estates; and thereby he devised his said manors and estates hereinbefore called the Hickling estates, and all other his estates belonging to him in fee-simple in possession, to trustees, for a term of years, for raising a sum of money therein mentioned; and subject thereto, to his eldest son, the said Nathaniel Waldegrave John Branthwayt Micklethwait (called in this case Colonel Micklethwait), for life; with remainder to his first and other sons successively in tail male; and, on failure of his issue, the testator devised, not only the said several estates, but also the said manor and site of Faversham Hall, and estates in Faversham, Costessey, Drayton, Attlebridge, Ringland, Morton, Beeston, and Sprowston, comprised in and settled by the said indentures of the 22nd and 23rd of May, 1812, to his second son, the said John Nathaniel [827] Micklethwait, the defendant, for life; with remainder to his first and other sons successively in tail male; and, on failure of such issue, to his third son, the said Henry Sharnborne Nathaniel Micklethwait, the plaintiff for life, with remainder to his first and other sons successively in tail male, with remainders over in like manner to the testator's other sons, daughters, and grandchildren successively for life, and to their children in tail: And, after reciting that he was seised or entitled for his life of and to, not only the said manors, hereditaments, and real estates comprised in the said indentures of the 22nd and 23rd of May, 1812, but, also of and to divers other considerable real estates in England and Ireland, with remainders respectively to his said sons successively in tail male,—the said testator declared that the several gifts and devises thereinbefore contained of his said manors and estates thereinbefore devised to or in favour of his said sons respectively for life, were so made, and should be accepted by them respectively, upon condition that each and every of his said sons respectively who should after his decease become seised or entitled of and to the said manors and real estates of or to which he the said testator was so seised or entitled for his life as aforesaid for any estate in tail, should within twelve calendar months next after he should be in possession of the same, make and execute all such legal and proper deeds as should be requisite or proper, not only legally and effectually to bar and destroy such estate-tail, but also to settle and assure the said manors and real estates to the uses, estates, &c., thereinbefore limited, created, and expressed of the said testator's said manors and estates in Hickling, Stalham, Ingham, and Sutton, after and subsequent to the said term, with a limitation over to the next person in remainder, in case of refusal or neglect of any son to make such deeds within the aforesaid time.

[828] The above-mentioned condition was performed by the defendant on the 16th of June, 1857, executing disentailing deeds of all the property then vested in him in tail, including the estates devised in 1797, and appointed in November, 1810, and settling such property as directed by the last mentioned will of 1852.

Upon the death of the said Colonel Micklethwait, the defendant entered into possession of the said estates in the counties of Norfolk, Suffolk, and Essex, and in the city of Norwich, and in the county of Westmeath, in Ireland, devised by the testator of 1797, and the Hickling and other estates comprised in the settlements of 1804 and 1810, and in the deed of 1812, severally mentioned in the will of 1852, except the estates conveyed to Jonathan George Micklethwait as hereinbefore mentioned, and from thence hitherto has been and still is in possession of the same.

Neither the plaintiff nor the defendant has at any time taken or borne the surname or arms of Peckham jointly with those of Micklethwait; nor has either of them for that purpose solicited for or obtained any license by Royal sign-manual.

On the 27th of February, 1856, the defendant addressed the following letter to the plaintiff:—

"Hollingdon Court, Uxbridge,
"27th February, 1856.

"My dear Henry,—I am much surprised and annoyed at the letter I have received from you in answer to my note of Sunday night.

"All that I have desired to do is, to place the real facts of the case before you, and to make you aware that I shall certainly take all that I am entitled to; and I shall never find fault with any one that may dispute my claim or establish any right for himself. Had I merely consulted my own peace and com-[829]-fort, I should have taken the opinion of an eminent lawyer upon the subject, and then have kept my own counsel until the time came for establishing my claims: but this appeared to me a selfish and ungenerous course of proceeding between brothers; and therefore, as soon as I became fully aware of the contents of my father's will, I hastened to inform you of its probable bearings upon the old Iridge estate.

"Fred. has long been aware of the difficulties of the case; and so were Sir Peckham and my father. In fact, there was a correspondence about the possibility of re-settling of the estates: and I have seen the opinion given by Mr. Christie in the year 1850 (I think) on the subject.

"You speak in your letter as if my claim to hold the old Iridge estate as tenant for life merely rested on "an omission or inaccuracy" in the shifting clause of my great-uncle's will. Such, however, is not the case: and I will now give you an outline of the facts, more particularly, as I think you also labour under another error, viz. that the shifting-clause was to prevent the union of my father's landed estates (held under his grandfather's and Mr. Branthwayt's wills) with the Iridge estate.

"On my father's marriage in 1804, John Micklethwait settled certain properties in Ireland, Suffolk, and Essex, on my father and his heir male. In the year 1822 he made his will, leaving the Iridge estate to Sir Peckham and his heirs, then to me and my heirs, &c. He then introduced a shifting-clause, to the effect, that, if any of the sons of my father, after they came into possession of the Iridge estate, should become entitled to the property he had settled on my father's marriage, as his heir male, then the Iridge estate should pass to the next in the entail. The colonel, as my father's heir male, has come into possession of these [830] aforesaid settled estates, and, in compliance with my father's directions, has used his right to disentail these estates, and to re-settle them according to my father's wishes; and by that settlement I shall doubtless become entitled to them as tenant for life, but as tenant for life only, without the option of disposing of them according to my own wishes; for, by the present will, any daughters I might have are excluded, and the preference given to my sisters. But, understand me, I am not complaining of this arrangement: I only allude to it, in order to shew the true facts of the case.

"Since seeing Fred., I have had a very positive legal opinion, that, the Colonel having barred his entail, and re-settled the estates, the shifting-clause falls to the ground, from the fact, that, when an estate is re-settled, it becomes another estate in the eye of the law: and though I might, through these means, become possessed of it, I could never hold it under the terms contemplated by my great-uncle's will. You see, therefore, first, that the disputed point involves a very small part of my father's estate, and, secondly, that my claim is founded upon no technical objections.

"If John Micklethwait had been in earnest in preventing the two estates from coming together, why did he limit the entail to you, and not continue it to Fred., who was born when he made his will.

"You have been most unlucky as to present means; and I wish it had been otherwise: but eventually you may be in the best position of any of the family; for, you may be entitled to the old Iridge estate in fee, and to the whole of my father's estates as tenant for life.

"As to your concluding remark, that my father died in the 'full confidence' that the two estates would be kept separate by his 'successors,' I do not hesitate to say that there is not the slightest foundation for such a belief: and, when I discussed the subject with Fred., [831] he never even attempted to bring forward such an argument. I firmly believe that my father was perfectly well acquainted with all the circumstances of the case; and, had he wished that the estates should have been kept separate, he had ample means of enforcing compliance.

"What Fred.'s motives could have been for giving you the assurance you told me he had often done, that the two estates could not go together, I cannot imagine, as I

can produce a letter written by him six years ago, in which he states, that, under certain circumstances, I must become entitled to the two properties, or words to that effect. I shall be in London to-morrow, &c.

"Do not let yourself be drawn into making these unguarded assertions. You may some day be placed in the same situation in which I now am; and be sure that they will then be remembered and brought forward against you.—Believe me your affectionate brother, "JOHN MICKLETHWAIT."

The plaintiff, on the 19th of September, 1856, demanded of the defendant possession of the property mentioned in the writ in this action; to which demand the defendant refused to accede.

The accompanying pedigree is a correct pedigree of the Micklethwait family, and is to be taken as part of the case. [See next page.]

Each of the deeds and wills above mentioned is to be taken as set out in full, and copies are to be referred to if necessary.

The court are to be at liberty to draw any inferences of fact from the facts hereinbefore stated which a jury might draw.

The defendant objects to the admissibility in evidence of the before-mentioned alleged draft and instructions for the will of 1822; and the plaintiff objects to the admissibility of the will of 1852.

[833] The question for the opinion of the court,—subject to the above objections, is,—whether, under the circumstances hereinbefore stated, the plaintiff is entitled to the property mentioned in the said writ of ejectment. If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff, with costs of suit. If the court shall be of opinion in the negative, then judgment of nol-pros., with costs of defence, shall be entered up for the defendant.

Atherton, Q. C. (with whom was R. Clarke and Honyman), for the plaintiff. The defendant, the second son of Nathaniel Micklethwait, the nephew of John Micklethwait the testator of 1822, having by reason of the death of Colonel Micklethwait, his elder brother, without issue, in 1856, succeeded as heir male of the body of his father, within the meaning of the language of the second shifting-clause in the will of 1822, to the property settled on the marriage of Nathaniel Micklethwait his father (viz. the Hickling estates), ceased to be entitled to retain the Iridge estate, which had come to him upon the death of his uncle Sotherton Branthwayt Micklethwait (or, as he was afterwards called, Sir Peckham Micklethwait) in 1853,—the property thereby meant to be designated being the estates which passed by the will of 1797 and the appointment of John Micklethwait of 1810 made with a view to and as a settlement upon the second marriage of his nephew Nathaniel Micklethwait. The object of the testator evidently was, to prevent the union of the two estates,—the Iridge estate, and the estates which passed by the will of 1797 and the appointment of 1810,—in the same person. Over the former, he had an absolute power of disposition; as to the latter, he had a mere power of appointing in favor of one or other of his two nephews, the grandsons of the testator of 1797. Conditionally [834] upon the confirmation of the imperfect codicil in the will of 1797, and upon failure of issue of Sir Peckham Micklethwait, the Iridge estate is devised to John Nathaniel Micklethwait, the defendant, for life, and to his sons successively in tail male. Upon the death, therefore, of Sir Peckham Micklethwait without issue in 1853, the defendant acquired an indisputable title to the Iridge estate: and, upon the death of Colonel Micklethwait without issue in 1856, he succeeded under the limitations in the will of 1797 and the appointment of 1810 to the estates comprised in the settlement of the latter date. The question then is, whether the effect of the shifting-clause in the will of 1822 was not to dispossess the defendant of his title to the Iridge estate. That clause is as follows: "And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son may become entitled to the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the then heir male

[832] 1754.

JOHN MICKLETHWAIT = Elizabeth Peckham.
The testator of 1797.
Settlor of 1782.
Died 27 Feb. 1799.

1. John Micklethwait = Jane Corthine.
The testator of 1822.
Died, S. P., 20 April, 1824.
Tenant for life under will of 1797.

2. Nathaniel Micklethwait (No. 1) = Sarah Branthwayt.
Died 1786. Died 1793.
First tenant for life of settlement of 1782.

3. Johnathan George Micklethwait.

1. Jan. 26, 1804.
Lady Maria Waldegrave = Nathaniel Micklethwait (No. 2)
Died 14 Feb. 1805.
Tenant for life under the will of 1797.
Testator of 1852.
Settlor of 1804, 1810, and 1812.
Died 17 Jan. 1856.

Lady Charlotte Harriet Rous.
Died 1830.

2. Sotherton Branthwayt Micklethwait = Anne Hanbury.
Afterwards Sotherton Branthwayt Peckham Micklethwait.
Died, S. P., 3rd September, 1853.
Tenant for life under the will of 1822.

1. Nathaniel Waldegrave J. B. Micklethwait.
Tenant in tail under the will of 1797.
Born Feb. 14, 1805.
Died, S. P., 17 July, 1856.
(Called in the case Colonel Micklethwait.)

2. The Rev. J. N. MICKLETHWAIT.
The Defendant.
Born 17 March, 1812.

Sarah Charlotte.
28 June, 1813.

3. H. S. N. MICKLETHWAIT.
The Plaintiff.
Born 13 Aug., 1814.

Charlotte
1815.

4 5 6 7 8 9 10 11 12 13
Sons and daughters.
Frederick, 18 April, 1817.
Sotherton Nathaniel, 22 Aug., 1823.
Other sons born after 1822.

of his body: now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son or an heir male of the body of a younger son of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall by the death or failure **[835]** of issue male of the eldest or other eldest son become entitled to the said settled property of my said nephew Nathaniel Micklethwait, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son so becoming entitled shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait and the heirs male of his body shall under the limitations of this my will become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct." The manifest intention of the testator by that clause was, to prevent the Iridge estate, over which he had an absolute right of disposal, from being possessed by the same person who should become, in the way pointed out (not perhaps with strict accuracy), entitled to the property comprised in the will of 1797 and the settlement of 1810; and this the defendant clearly took in the character of the then heir male of the body of his father, —an expression which is evidently (as appears from similar inaccuracies of expression in other parts of the will) used by the testator in the popular rather than in the strict legal sense of those words. The statement of facts at pp. 822-824, in the view above presented, clearly would not be admissible; there being no ambiguity which needs the aid of extrinsic evidence to explain it.

Lush, Q. C. (with whom was R. E. Turner) for the defendant. Three propositions will be submitted for the consideration of the court,—first, that the property referred to in the second shifting-clause as "settled on the marriage of Nathaniel Micklethwait," is not the property comprised in the will of 1797, and dealt with on the marriage of Nathaniel Micklethwait in 1810, but the **[836]** Hickling, Beeston, and Tunstall estates dealt with in the settlement made on the marriage of 1804; and that, consequently, the contingency provided for in the shifting clause, of the second nephew succeeding in place of the first, as "heir male of the body" of his father, has not happened, inasmuch as the defendant has succeeded to these estates, not as "heir of the body," but as devisee under the will of his father,—secondly, that, even assuming that the estates referred to in the shifting-clause are the estates devised by the will of 1797, still the contingency provided against has not happened, inasmuch as the defendant has not succeeded to these estates as "heir male of the body" of his father Nathaniel: because, taking as first tenant-in-tail after the determination of the estate for life, according to the limitations of the will of 1797, he would take, not an estate by inheritance, but an estate-tail as purchaser,—thirdly, that, even if this should be held otherwise, still the contingency provided for by the will has not been fulfilled in regard to the estates succeeded to, seeing that the estates settled (according to the plaintiff's own construction) on the marriage of 1810, comprised the whole of the estates devised by the will of 1797, while the defendant has succeeded only to a part of those estates, other part having been conveyed to Jonathan George Micklethwait conformably to the will of 1822, as the price of the defendant's acquisition of the Iridge estate. It is admitted, on the part of the plaintiff, that the defendant's title to the property in question under the will of 1822 is primâ facie indisputable. Now, it is a well-established rule of law that a right clearly vested is not to be divested except by language equally plain and unambiguous. Thus, in *Fazakerley* v. *Ford*, 4 Simons, 390, W. G., by his will, dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail **[837]** male. T. G., the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life, remainder, subject to a term for securing a jointure and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will, dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G., in tail male: provided, that, if the lands devised by W. G. to T. G. in tail male should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his (S. F.'s) will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof, then his estates should be in trust for the person who would

be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his life-time: then T. G. died: and it was held by Vice-Chancellor Shadwell, that, as W. G.'s estates came to T. G.'s second son incumbered with the term, S. F.'s estates did not go over under the shifting-clause. In giving judgment the Vice-Chancellor says: "I am extremely unwilling at any time to make the decision of an important question depend upon the nice and accurate construction of any particular word: but I would rather construe the will by a fair and general interpretation of the words, having regard to what is shewn, upon the face of the will, to be the obvious intention of the testator." Upon appeal to the Lord Chancellor, a case was sent for the opinion of the court of Queen's Bench, and after argument the majority of that court,—Lord Denman, C. J., Parke, J., and Patteson, J. (dissentiente Taunton, J.),—certified in conformity with the opinion of the Vice-Chancellor: see 1 Ad. & E. 897, **[838]** 2 N. & M. 1. In *Thornhill* v. *Hall*, 2 Clark & F. 22, it is laid down as a rule of the courts in construing written instruments, that, when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. In that case, the testator recited seriatim in his will the interests he had in several leaseholds for lives, and after each recital he devised the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters nominatim different parts of the rents of Whitacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and, further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them:" and it was held, that the devise to R. in Blackacre was for the whole term of the lives of the cestuis que vies, and was not, on R.'s dying unmarried, cut down to an estate for life only, by the clause of survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. In giving his judgment, the Lord Chancellor (Lord Brougham) says: "I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument, by terms **[839]** clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt,—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should shew a possibility; it is not even sufficient that you should deal in probabilities; but you must shew something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by tacitum or by dubium, or by possibile, or even by probabile, but that it must be taken away, and can only be taken away, by expressum et certum." Here, then, is a clear and unambiguous limitation of the Iridge estate in favour of the defendant. Before they can give effect to the argument on the other side, the court must be satisfied that there is an equally clear intimation of intention on the part of the testator, that, in the event which has happened, the estate was to go over. It is submitted that the language of the shifting-clause is not more applicable to the estates which passed by the will of 1797, than to the estates which formed the subject of the settlement in 1804. In truth, it is not applicable to either; but to the Hickling, Beeston, and Tunstall estates, as limited by the original settlement of the testator's father, in 1782. [Cockburn, C. J. The Tunstall estate was gone at this time: it has been sold in 1809.] It does not appear from the case that that fact was known to the testator of 1822. [Cockburn, C. J. It can hardly, I think, be presumed that he did not know the condition of the property in 1810, when he took so active a part in the proposals for the settlement of that date.] It is **[840]** clear, that, if the recovery contemplated by the first settlement had never been suffered, the defendant would have been taken in the precise character of "heir male

of the body of his father" indicated by the shifting-clause. The deed executed upon Nathaniel's marriage in 1804, though not strictly speaking a settlement, was one which a court of equity would have so treated: and therefore the testator might well speak of the property therein mentioned as settled property. But, whether the estates referred to in the shifting-clause are the estates devised by the will of 1797, or those dealt with in the so-called settlement of 1804, the event contemplated has not happened. [Cockburn, C. J. Now arises the question as to the admissibility of the parol evidence.] The argument on the part of the plaintiff is, that, looking at the whole of the will together, the shifting-clause refers to the property devised by the will of 1797: on the other hand, the defendant submits that it is more strictly applicable to the settlement of 1804. [Cockburn, C. J. I think it is impossible to adopt either view, without looking at the surrounding circumstances.] The case, it is submitted, is not within the rule which warrants the reception of parol evidence to explain the intention of the testator. Assuming parol evidence to be admissible, the papers in question are not legitimate evidence: there was nothing to identify the first document as the testator's instructions for his will; it may have been a mere abstract compiled from the draft. [Cockburn, C. J. The language used is rather indicative of its being instructions, than of its being an abstract.] The fact that the document accords with the provisions in the will does not make it admissible, or justify its reception for the purpose of explaining the will. The only ground upon which it could be received is, that it is proved to be a document which contains the testator's instruc-**[841]**-tions for drawing his will. What proof is there of that, except the bare fact that the document is found in the office of the deceased solicitor? [Cockburn, C. J. Tied up with that which indisputably is the genuine draft of the will.] That carries the case no further. Neither does the statement of the clerk: for, his belief that the pencil marks were made by him is founded upon the assumption that the document was what it purports to be, in which case only would it have been his duty to have made them. [Byles, J. Part of the draft will is in the hand-writing of that clerk.] But it is submitted that this is not a case in which such evidence is admissible at all. In *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363, a testator devised lands to his son John H. for life, and, from and after his decease, to his (the testator's) grandson John H., eldest son of the said John H., for life, and, on his decease, to the first son of the body of his said grandson John H. in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married: by his first wife he had one son, Simon, by his second wife and eldest son, John, and other younger children, sons and daughters: and it was held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to shew which of these two grandsons was intended. Lord Abinger, in giving the judgment of the court, after referring to a great number of authorities, concludes thus,— "Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is, to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were res integra, we should be much disposed to hold the devise void for uncertainty: but **[842]** the cases of *Doe d. Le Chevalier* v. *Huthwaite*, 3 B. & Ald. 632, *Bradshaw* v. *Bradshaw*, 2 Y. & Coll. 72, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly: but we think, that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will." Applying the principle of that case here, it is clear that parol evidence ought not to be received for the purpose of shewing which estates the testator indicated by the expressions used in the shifting-clause. [Cockburn, C. J. The testator's declarations would be admissible to explain that which upon the face of the will appears to be ambiguous.] No doubt. [Cockburn, C. J. But for the settlement of 1804, the language of the shifting-clause would have been satisfied by the settlement of 1810. If so, there is an ambiguity, which justifies the admission of parol evidence.] It is submitted that the language cannot refer to the estates settled by the will of 1797. [Williams, J. Your objection is, that neither property precisely answers the description in the shifting-clause. Is not that the case which is alluded to in *Doe d. Hiscocks* v. *Hiscocks*? I find it further

alluded to in a case of *Douglas* v. *Fellows*, Kay, 114. There, a will contained a legacy to Commodore P. D., of S., and a like legacy to the children of P. H. D. This last legacy was claimed by the three children of H. O. D., and also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. and H. O. D. were both in the same degree of relationship to the testatrix, and she had given like legacies to their brothers and sisters. H. O. D. was dead at the date of the will. It was held, **[843]** that the previous gift to Commodore P. D., and the fact that the gift was not to the children of "the said" P. H. D., together with the intention manifested in the will to provide for all the members of the D. family, was sufficient to enable the court to decide, upon the face of the will, that the children of H. O. D. were intended, although there was no reference to him as "the late" H. O. D.; and that extrinsic evidence of the intention of the testatrix was not admissible; although it might have been if there had been only one class of claimants. Vice-Chancellor Page Wood there says: "I think, that, without admitting the evidence of intention in this case, I must decide against Mr. Wigram's clients (*a*): but I should be most reluctant to have it supposed that I should be inclined to admit this evidence. I think that the only case in which it would be admissible might, perhaps, be that imaginable case which was hinted at in *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 373, where the description used being incorrect and equally inapplicable to two persons, an equivocation arises. If that be law in any sense, it must mean, that, where all the legitimate evidence has been admitted, and two classes of persons, improperly designated, seem to be equally pointed at by the words of the will, an equivocation then arises; just as in the case where there are two manors of the name of Dale, either of which might have been designated by the words of the will" (*b*). Suppose a man were to leave a legacy to his nephew James, and it turned out that he had no nephew James, but that he had two great-nephews called James,—would parol evidence of the testator's declarations be admissible to shew which **[844]** of his two great-nephews he meant?] It is submitted that it would not. Suppose the testator had also a first cousin James? [Cockburn, C. J. He would not be very likely to mistake his first cousin for his nephew; but he might very well mistake his nephew for his great-nephew. Williams, J. The case of *Doe d. Allen* v. *Allen*, 12 Ad. & E. 451, 4 P. & D. 220, seems nearer to this than *Doe d. Hiscocks* v. *Hiscocks*. There, the testator devised estates to John A., the grandson of T. A., charged with the payment of 100*l*. "to each and every the brothers and sisters of the aforesaid John." At the time of making the will there were two persons named John A., grandsons of T. A., one of whom had several brothers and several sisters; the other had only one brother and one sister: and it was held that parol evidence of declarations of the devisor that she had left her property to the grandson who had only one brother and one sister, were admissible to shew which grandson should take under the devise; and that it was no objection to such evidence that the declarations were subsequent to the making of the will. The court do not seem to approve of *Doe d. Hiscocks* v. *Hiscocks*: but they say that the case in hand "is directly within the authority of *Cheyney's case*, 5 Co. Rep. 68 a., and of the recent case of *Doe d. Gord* v. *Needs*, 2 M. & W. 129;" and that "it is also within the very terms of the only case in which, according to the opinion of the court of Exchequer thrown out in their judgment in *Doe d. Hiscocks* v. *Hiscocks*, declarations of the testator can be received as evidence of his intention."] Unless the description is equally applicable to both subjects, parol evidence is clearly inadmissible to explain which property the testator referred to. But, whether the shifting-clause in question refers to the estates settled in 1782, or to those limited by the will of 1797, in neither case has the event happened upon which the **[845]** shifting-clause was to take effect. The testator clearly contemplated that the estate, which ever it was, should be an estate of inheritance. Now, the Hickling, Beeston, and Tunstall estates have not come to the defendant either as an estate in fee or in tail; therefore the testator could not have meant to refer to them. Then, assuming the estates limited by the will of 1797 to have been contemplated, the event which was to deprive the defendant of the Iridge estate has not happened, viz. that of the whole of those estates, not a part of them, coming to the defendant or his issue under the

(*a*) The children of Commodore D.

(*b*) See *Blundell* v. *Gladstone*, 11 Simons, 467, 1 Phill. 279; *Doe d. Gains* v. *Rouse*, 5 C. B. 422.

limitations of the will. [Cockburn, C. J. The object of that was, to provide for the case of Nathaniel Micklethwait not conveying the Sussex estates to the Sotherton branch.] That can hardly be so; for, the estate is given, first, to the nephew Sotherton and his issue, secondly, to the testator's brother Jonathan George and his issue, thirdly, to Nathaniel and his issue. [Cockburn, C. J. If it is capable of another meaning, then surely you are not at liberty to insert the word "all," unless the whole scheme of the will must otherwise fail.] The construction contended for is the natural construction of the language used by the testator. The "property settled" could only have reference to the property proposed to be settled by the deed of 1804, which recites the settlement of 1782, and which was the only deed in the nature of a settlement to which the testator was a party. [Cockburn, C. J. As at present advised, I entertain no doubt that the testator, when he speaks of property settled upon the marriage of Nathaniel, looking at what took place in 1804 and 1810, and seeing that he must have had present to his mind the "proposals for a settlement," which he signed, and which he carried out by giving effect to the provision of the will of 1797 by means of the appointment which he afterwards executed, he must have been **[846]** speaking of the property which popularly speaking was "settled" in 1810. That being so, my learned Brothers agree with me that there is no ambiguity, and therefore recourse need not be had to the parol evidence.]

Atherton, Q. C., in reply. The event has happened upon which the Iridge estate was to be divested, under the shifting-clause, in favour of the third son of the testator's nephew, the plaintiff in this action,—the defendant, the second son, having become entitled to the property settled on the marriage of Nathaniel Micklethwait, though not strictly and technically by inheritance. [Cockburn, C. J. I think you need not labour that. It comes at last to the point which was last urged by Mr. Lush, viz. whether, in order to satisfy the terms of the shifting-clause, it was not necessary that the defendant should have succeeded to the whole of the property comprised in the will of 1797.] The argument on the part of the defendant would wholly frustrate the obvious intention of the testator.

Cockburn, C. J. The latter part of the argument presented on the part of the defendant alone creates any serious difficulty. Upon that we desire to take time to deliberate.

Cur. adv. vult.

Cockburn, C. J., now delivered the judgment of the court:—

The question in this case turns on the construction and effect of a clause in the will of John Micklethwait, on the 24th of October, 1822. To the due appreciation of the question, it is expedient to set forth the state of the family and the antecedent disposition of the family estates.

John Micklethwait, the testator's father, had three **[847]** sons,—John, the eldest, upon whose will the present suit arises, Nathaniel, and Jonathan George.

John Micklethwait, the father, was possessed of estates held in fee-simple in various counties. He possessed estates called the Hickling, Beeston, and Tunstall estates, in the county of Norfolk, and also other estates in the counties of Norfolk, Suffolk, Surrey, and Middlesex, and in the city of London, and in the county of Westmeath, in Ireland. On the marriage of his second son, Nathaniel, with Susan Branthwayt, the said John Micklethwait, by indenture of settlement, bearing date the 11th of September, 1782, settled the Hickling, Beeston, and Tunstall estates, after a prior estate for life to himself and a provision as to pin-money for the intended wife, to the use of his son Nathaniel, for life, remainder to such son of the marriage as Nathaniel should appoint, and, in default of appointment, to the use of the first and other sons of the marriage, in tail male, with remainder to the settlor, in fee.

There was issue of this marriage, Nathaniel, called in the case Nathaniel Micklethwait (No. 2), and Sotherton Branthwayt afterwards known as Sir Peckham Micklethwait. The father, the first Nathaniel, died in 1796, in the life-time of his father.

The Hickling, Beeston, and Tunstall estates having been thus settled on the marriage of the first Nathaniel, John Micklethwait, the father, proceeded, by his will of the 4th of December, 1797, to devise his other real estates as follows,—first, to the use of his eldest son, John Micklethwait (the testator of 1822), for life, with remainder to the use of his first and other sons successively in tail male; and, in default of such issue, to the use of such one of his two grandsons, Nathaniel and Sotherton Branthwayt,

sons of his late son Nathaniel, as his son John should by deed or will appoint, for life; re-[848]-mainder to the first and other sons of such appointee, successively, in tail male; remainder, in default of issue, to the other of his two grandsons, for life; remainder to the first and other sons of such grandson, successively, in tail male. In case of default of any such appointment by John, the testator devised the estates to the eldest of his two grandsons, Nathaniel, for life, with remainder to his first and other sons successively in tail male; with remainder, on failure of such issue, to his second grandson, Sotherton Branthwayt, for life, and to his sons successively in tail male; and, on failure of such issue, to his (the testator's) third son, Jonathan George, for life, and to his sons successively in tail male; remainder to the testator's own right heirs.

By a codicil, of the 26th of February, 1799, the testator professed to revoke the foregoing devise, so far as regarded the estates in Surrey, Middlesex, and London, and to devise these to his son Jonathan George, in fee; but this codicil, not having been duly attested so as to pass real estate, did not take effect.

On the death of John Micklethwait, the testator of 1797, John Micklethwait, the testator of 1822, entered into possession of the estates comprised in the will of 1797, and continued in possession till his death, in 1824.

Nathaniel (No. 2), the eldest son of the first Nathaniel, and the eldest grandson referred to by the testator of 1797, succeeded to the Hickling, Beeston, and Tunstall properties, as first tenant in tail, his father having made no appointment of the estate conformably to the power contained in the settlement of 1782. In 1804, this Nathaniel (No. 2), being about to marry Lady Maria Wilhelmina Waldegrave, executed an instrument, which is called a settlement, and which bears date the 18th of January, 1804.

By this settlement, made between Nathaniel Mickle-[849]-thwait, of the first part, John Micklethwait (the testator of 1822) and Miles Sotherton Branthwayt, described as the guardians of the said Nathaniel Micklethwait, of the second part, and various persons therein named as the guardians of Lady Maria, of the third part,—after reciting the settlement of 1782, Nathaniel Micklethwait covenants, with the consent of his guardians, within three months after he shall have attained the age of twenty-one, to settle and assure the Hickling, Beeston, and Tunstall estates to the use of himself for life, and, after his decease, to the use and intent that Lady Maria should during her life receive a jointure-annuity of 1000l., with the usual powers of entry and distress, and a term of years for securing the same; and, subject thereto, to the use of himself in fee. In fulfilment of this agreement, Nathaniel Micklethwait, by an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, barred the entail in these estates. It does not appear that any deed was ever executed charging these estates with the jointure-annuity to Lady Maria. The arrangement became abortive and fell to the ground, in consequence of the death of Lady Maria, who died on the 14th of February, 1805, immediately after giving birth to a son (the only child of the marriage), who was named Nathaniel Waldegrave John Branthwayt, and who in the case is more generally designated as Colonel Micklethwait. The estates referred to in the so-called settlement of 1804, having been thus disentailed, one of them, the Tunstall estate, was afterwards, in 1809, sold by Nathaniel Micklethwait.

In October, 1810, a marriage being contemplated between Nathaniel Micklethwait, now a widower, and Charlotte the daughter of Lord Rous, proposals for a settlement, to which John Micklethwait, the testator of 1822, was a party, were drawn up and agreed to. [850] In these it was proposed by Nathaniel Micklethwait to charge the Hickling estate with an annuity of 1000l. per annum in favour of his intended wife, in the event of her surviving him, and with a further annuity of 500l. a year, if his uncle John Micklethwait should exercise the power of appointment given him by the will of 1797, in his, Nathaniel Micklethwait's, favour. Nathaniel Micklethwait further proposed to charge the Hickling estate with 25,000l. for the fortunes of the children of the intended marriage; and the settlement was to contain all usual powers and provisions for raising and securing the payment of the annuities and the children's fortunes, and all other powers necessary for carrying the trusts of the settlement into effect.

Then follows a proposal by John Micklethwait, the testator of 1822, in the following terms, - "Mr. Micklethwait proposes, in pursuance of the power given to

him by his father's will, immediately to appoint all the estates thereby devised to him, to Mr. Nathaniel Micklethwait." By a subsequent clause, the sum to be charged on the Hickling estate for the children's fortunes, was to be 10,000l., instead of 25,000l.; another 10,000l. and 5000l., the intended wife's portion, being to be invested in a certain specified manner.

These proposals having been adopted as the basis of the settlement, Mr. John Micklethwait executed a deed of appointment of the 29th of November, 1810, whereby he appointed the estates devised by the will of 1797, to Nathaniel, the eldest of the two grandsons, to hold according to the terms of the will of 1797. A marriage-settlement was thereupon executed by Nathaniel Micklethwait of the first part, Lord Rous of the second part, the intended wife of the third part, and trustees of the fourth part. By this settlement, Nathaniel Micklethwait conveyed the Hickling estate to the trustees of the settlement, to the use of **[851]** himself for life, remainder to the intent that his intended wife, in case she should survive him, should receive thereout a jointure-annuity of 1000l.; and, subject thereto, to the use of the trustees for a term of one thousand years for securing the annuity, and for raising 15,000l. for the portions of the younger children; and, subject thereto, to the use of himself in fee. He further covenanted with the trustees, as soon as he should come into possession of the other estates by virtue of the will of 1797 and his uncle's appointment, to charge those estates with a further annuity of 500l. in favour of his intended wife, and, so far as he was able, he thereby limited and appointed to her the said annuity, to be payable out of the said estate.

There were several children of this marriage. The eldest son, John Nathaniel, is the defendant in this action: the second son, Henry Sharnborne Nathaniel, is the plaintiff.

Such being the state of the family and of the family estates, in the year 1822 John Micklethwait, the tenant for life under the will of 1797, being at that time, as he continued to be till his death, childless, proceeded to make his will. He had become possessed, through the family of his mother, a Miss Peckham, of real estates in fee-simple in the counties of Kent and Sussex. It is with reference to the estate in Sussex, known by the name of the Iridge estate, that the present question arises; and it will only be necessary to advert to so much of the will as relates to it.

After reciting his father's will and attempted codicil, and that the latter became ineffective by reason of the attestation thereto being defective, and that it was his (the testator's) wish that his father's codicil should be confirmed, and that the devise therein of the lands in Surrey, Middlesex, and London, to his brother Jonathan George in fee should be fully and legally established, **[852]** he proceeds to devise the Iridge estate to trustees,—first, to the use of his nephew Sotherton Branthwayt Micklethwait for life, remainder to the first and other sons of the body of Sotherton Branthwayt Micklethwait successively in tail male,—secondly, in default of such issue, to his brother Jonathan George, for life, remainder to his nephew John, eldest son of his brother Jonathan George, for life, and to the first and other sons of the said John Micklethwait, successively, in tail male. Then follow two shifting-clauses. The first provides, that, if the testator's nephew Nathaniel and his first or other son or sons, or his or their heirs, should, in the life-time of Jonathan George Micklethwait, effectually confirm and establish the codicil of 1797, by effectually conveying the lands, &c., in Surrey, Middlesex, and London, to Jonathan George, in fee, then the foregoing devise in favour of Jonathan George, and of his son John and his first and other sons in tail male, was to become void; and, immediately on such event, or otherwise in default of issue of the testator's nephew John Micklethwait, the estate was to pass to the testator's great-nephew John Nathaniel Micklethwait (second son of his nephew Nathaniel), for life, remainder to the first and other sons of the body of John Nathaniel, in tail male, remainder to the third, fourth, fifth, and every other son of the testator's nephew Nathaniel (excepting always the eldest son), successively, in tail male, with remainder, in default of issue, to Jonathan George, in fee. Then follows the shifting-clause upon which the present contest arises, and which is in these words:—"And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my **[853]** said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and

become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son, may become entitled to the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the then heir male of his body: Now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of the body of a younger son, of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel Micklethwait, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct."

John Micklethwait, the testator, died in 1824. On his death, his nephew Sotherton Branthwayt Micklethwait, who was created a baronet, and known as Sir Peckham Micklethwait, entered into possession of the Iridge estate under the foregoing will. Nathaniel Micklethwait entered into possession of the estates devised by the will of 1797.

In April, 1826, Nathaniel Micklethwait and his **[854]** eldest son, Colonel Micklethwait, conveyed the property in Surrey, Middlesex, and London, to Jonathan George Micklethwait, in fee, conformably to the terms of the first shifting-clause of the will of 1822; whereupon, by virtue of the provisions of the will, the devise of the Iridge estate in remainder to Jonathan George and his sons in tail male became void, and the devise of that estate in remainder to Nathaniel Micklethwait and his sons took effect.

On the death of Sir Peckham Micklethwait without issue, in September, 1853, the defendant, John Nathaniel Micklethwait, entered into possession of the Iridge estate, under the will of 1822, and has since continued in possession. Nathaniel Micklethwait, his father, died on the 6th of January, 1856.

By his will, made in 1852,—after devising his Hickling and other estates, held in fee-simple, to trustees for a term of years for raising a sum of money,—he devised the same, subject to such term, to his eldest son, Colonel Micklethwait, for life, with remainder to his sons successively in tail male; with remainder, on failure of such issue, to his second son (the defendant), for life; with remainder to his sons successively in tail male; with a like remainder to his third son, Henry (the plaintiff in this action); with remainders over. And, after reciting that he was seised for life, not only of real estates comprised in the indentures of the 22nd and 23rd of May, 1812 (which are set forth in the case, but have nothing to do with the present question, and therefore need not be further referred to), but also of other considerable real estates in England and Ireland, with remainder to his sons successively in tail male,—he declared that the devises in his will in favour of his sons were made on the condition that each and every of them who should become seised of the estates of which he (the testator) was seised for life, should **[855]** within twelve calendar months disentail the same and settle them to the uses to which his estates of Hickling, Beeston, and Tunstall stood limited by his will, with a limitation over to the person next in remainder, in case of refusal or neglect.

This condition the defendant fulfilled, by executing in June, 1857, disentailing deeds of all the property vested in him in tail, including the estates devised by the will of 1797 and appointed in 1810, and by settling such property as directed by the will of 1852.

In the mean time, Colonel Micklethwait, the eldest son of Nathaniel Micklethwait (No. 2), the testator of 1852, had died, namely, in July, 1856. The defendant thereupon entered into possession of the Hickling and Beeston estates, and of the property devised by the will of 1797, with the exception of the property in Surrey, Middlesex, and London, which, as we have seen, had been conveyed to Jonathan George Micklethwait in 1826.

Upon this state of facts, the plaintiff contends that the second shifting-clause in

the will of 1822 has taken effect, inasmuch as, by the death of the eldest son of Nathaniel Micklethwait (No. 2) without issue, the defendant, the second son, has succeeded, as heir male of the body of his father (within the meaning of the language of the clause), to "the property settled on the marriage of Nathaniel Micklethwait" (No. 2), such property being, as the plaintiff maintains, the estates which passed by the will of 1797, and the appointment of John Micklethwait of 1810, made with a view to, and as a settlement upon, the second marriage of Nathaniel Micklethwait (No. 2).

The defendant, on the other hand, makes three points,—first, that the property referred to in the second shifting-clause as "settled on the marriage of Nathaniel Micklethwait" is not the estates comprised in **[856]** the will of 1797, and dealt with on the marriage in 1810, but the Hickling, Beeston, and Tunstall estates, dealt with in the settlement made on the marriage of 1804; and that, consequently, the contingency provided for in the shifting-clause, of the second nephew succeeding in place of the first, as "heir male of the body" of his father, has not happened, inasmuch as the defendant has succeeded to these estates, not as "heir of the body," but as devisee under the will of his father,—secondly, that, even assuming that the estates referred to in the shifting-clause are the estates devised by the will of 1797, still the contingency provided against has not happened, inasmuch as the defendant has not succeeded to these estates as "heir male of the body" of his father Nathaniel; because, taking as first tenant in tail after the determination of the estate for life, according to the limitations of the will of 1797, he would take, not an estate by inheritance, but an estate-tail as purchaser,—and, thirdly, that, even if this should be held otherwise, still the contingency provided for by the will has not been fulfilled in regard to the estates succeeded to, seeing that the estates settled (according to the plaintiff's own construction) on the marriage of 1810, comprised the whole of the estates devised by the will of 1797, while the defendant has succeeded only to a part of those estates, another part having been conveyed to Jonathan George Micklethwait conformably to the will of 1822, as the price of the Iridge estate.

We think it expedient to deal with the second of these points in the first instance, as the solution of the meaning of the words "heir-male of the body," as used in the shifting-clause, may be of material importance in ascertaining to which of the estates the testator has referred as the "property settled on the marriage of Nathaniel Micklethwait."

In the course of the argument, it was pointed out by **[857]** the court, as the fact is, that, in reciting, in the will of 1822, the provisions of the will of 1797, with reference to this very property, the estate taken by the son of the tenant-for-life as tenant-in-tail after the determination of the life-estate, was throughout described as taken by such son as heir of the tenant-for-life,—clearly shewing that the legal distinction between an estate-tail created by a limitation to a man for life, with remainder to the heirs of his body, and an estate-for-life to a man, with remainder in strict settlement to his son, and the son's heirs, in tail, was not present to the mind of the testator, and that the latter estate was considered by him as an estate of inheritance in the first taker; and that it must therefore be taken that such an estate ought fairly to be considered as having been intended to be described in the form of words used in the clause under consideration.

It was admitted by the counsel for the defendant, that it appeared from the rest of the will that the words had been used by the testator in the sense suggested; and the second point originally contended for was virtually abandoned. We shall see presently the importance of this in determining the question which we next proceed to consider, viz. which of the estates is meant to be referred to in the shifting-clause.

We are of opinion that the property referred to as "settled on the marriage of Nathaniel Micklethwait" was, the estates dealt with on the second marriage in 1810. It is true that there were two marriages, and that settlements were made on each, and that different estates were dealt with in making these settlements, from which some ambiguity might appear to arise: but, on closer examination, it appears to us plain that the estates devised by the will of 1797 are those referred to. It must be conceded, that, in neither instance, were any estates "settled," in the strict legal sense of **[858]** the term, and that, to make the will sensible, recourse must be had to a more enlarged and popular meaning of the term "settled." But, admitting this, it seems to us that in no sense of the word can it be said that any estates were "settled" on

the marriage of 1804; while, on the other hand, we think that that term may have been intended to be applied, and was in fact applied, by the testator, to the estates appointed by him on the marriage of 1810. It is true there was a settlement in 1804; but it is not true that any "property" was "settled." The estates then dealt with were already in strict settlement: the purpose of the new settlement was simply to charge them with a jointure-annuity in favour of the intended wife; and, to effect this purpose, the estates were disentailed and restored to the condition of estates in fee-simple, so as to enable the owner to charge them as agreed. Now, the meaning of a "settled" estate, whether in legal or in popular language, as contradistinguished from an estate in fee-simple, is understood to be one in which the powers of alienation, of devising, and of transmission according to the ordinary rules of descent, are restrained by the limitations of the settlement: it would be a perversion of language to apply the term "settled" to an estate taken out of settlement, and brought back to the condition of an estate in fee-simple.

The same observations will apply to the same property, when dealt with on the settlement made on the second marriage of Nathaniel Micklethwait, in 1810. Here, again, the Hickling estates were merely charged with a jointure-annuity for the wife, and a term of years created for raising portions for the younger children: subject to these, the estates remained in Nathaniel Micklethwait in fee-simple, and cannot, therefore, for the reasons already pointed out, be said to have been estates "settled on the marriage."

[859] We have next to consider whether the clause was intended to refer to the estates devised by the will of 1797. It is true that, strictly speaking, these estates were not settled on the marriage of 1810; they passed to Nathaniel Micklethwait for life, and his sons after him in tail, by virtue of the will of 1797 and the appointment of 1810: nevertheless, we are satisfied that it was to these estates that the testator intended to refer. It was his own proposal, as part of the settlement to be made on the marriage, to exercise his power of appointment in favour of his nephew; and, as soon as that appointment was made, the practical effect was, to pass these estates to Nathaniel for life, and his sons in tail male after him, in strict settlement. This having been done on the marriage, and as part of the settlement effected on the marriage, the testator might well refer to these estates as having been "settled on the marriage." It appears to us far more probable that he did so, than that he intended to refer to estates which had been taken out of settlement by cutting off the entail. But, if any doubt could remain on this head, it appears to us to be solved by reference to the term used, of "heir male of the body," which term is admitted to have been used by the testator to designate a first son taking as tenant in tail by purchase on the determination of the life-estate of his father. It is plain that such a description would not apply to the case of a son taking as heir-at-law to his father, tenant in fee-simple. But, as we have seen, the Hickling estates were estates in fee-simple. Moreover, as the union of the two estates, the contingency against which the testator was seeking to provide, would equally have arisen on a devise of the estate as on its descending by inheritance, it is reasonable to suppose, that, had the testator been dealing with an estate in fee, which was not unlikely to be **[860]** devised by will, he would have guarded against the case of the estate coming to the possessor of the Iridge estate by will, as well as against its coming to him by inheritance. On the other hand, the term "heir male of the body," taken in the sense in which it is admitted that the testator has used it in the will, is applicable to the estates devised by the will of 1797, and to them alone, seeing that these are the only entailed estates, and that to such the term, as used, is alone applicable.

On these grounds, we hold with the plaintiff, that the shifting-clause was intended to apply to the union of the estates devised by the will of 1797 with the Iridge estate devised by the will of 1822.

We proceed to consider the third point made on behalf of the defendant, viz. that, if "the property settled on the marriage of Nathaniel Micklethwait" is to be held to be the estates devised by the will of 1797, the contingency guarded against by the shifting clause has not arisen, inasmuch as the defendant has not come into possession of the estates devised by the will of 1797, but only of a part of such estates, the Middlesex, Surrey, and London property having been made over to Jonathan George Micklethwait. In addition to which, from the alleged inapplicability of the general

expression used in the clause to the succession to a part of the estates only, the defendant's counsel strongly contended that the shifting-clause was intended to apply to the union of the Iridge estate with the estates devised by the will of 1797, in the event of the provisions of the first shifting-clause not being adopted by Nathaniel Micklethwait and his son, and the Iridge estate devolving on the latter on failure of issue of John, the son of Jonathan George, according to the limitations of the will of 1822.

To this argument it appears to us that two satisfac-**[861]**-tory answers may be given. In the first place, such a construction would require a double contingency in order to give effect to the shifting-clause,—not only the devolution of the estates devised in 1797 on the second nephew, by failure of issue of the first, but also the devolution of the Iridge estate on Nathaniel and his issue by failure of the issue of John, the son of Jonathan George Micklethwait; whereas, the former contingency alone is referred to in the preamble of the shifting-clause. In the second place, such a construction appears to us to be inconsistent with the scheme of the will. Practically, the effect of the provisions of the will of 1822, as to the Iridge estate, was, to carry the estate to John Nathaniel Micklethwait for life and his sons in tail male, upon the condition of his joining with his father in conveying the Surrey, Middlesex, and London property to Jonathan George in fee; immediately after which follows the shifting-clause in question. There can be little doubt that the testator expected that the arrangement which he desired in order to carry into effect his father's codicil, would be completed. We have no evidence as to the value of the Surrey, Middlesex, and London property: but it cannot be doubted that it was exceeded by that of the Iridge estate, seeing that Nathaniel Micklethwait and his son lost no time in making over the Surrey, Middlesex, and London estates, in order to secure the succession in remainder to the Iridge estate. Now, the shifting-clause occurs immediately after the provisions for securing the disposition of the property in the manner just pointed out; and it contains no reference to the non-completion of the desired arrangement. It appears to us that the reasonable construction to be put on the whole of the provisions of the will taken together is, that the shifting-clause in question was intended to take effect on the completion of the **[862]** arrangement contemplated by the testator as to the transfer of the Surrey, Middlesex, and London property, in the event of the rest of the estates becoming united with the Iridge estate by failure of the issue of the elder nephew, then in possession of the former; and that, consequently, the term "property settled on the marriage of Nathaniel Micklethwait," although general and unqualified, must be taken to mean that property short of that portion of it which it was part of the scheme of the will to have separated from it.

We are therefore of opinion that the estates referred to in the shifting-clause are the estates which passed by the will of 1797, and which came to the defendant as first tenant in tail in remainder after the determination of the prior estate of his elder brother; that the character in which the defendant actually took the estates, was intended to be described by the term "heir male of the body" of his father; and that, consequently, the contingency provided for by the shifting-clause has happened.

It follows that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Upon this judgment the defendant brought a writ of error, which came on for argument on the 5th of February, 1859, in the Exchequer Chamber, before Pollock, C. B., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Hill, J.

Rolt, Q. C. (with whom were Lush, Q. C., and R. E. Turner), for the plaintiff in error (defendant below), submitted,—that the second shifting-clause in the will of 1822 was inoperative, on the ground of ambiguity, **[863]**—that the estates devised by the will of 1797 were not "property settled" on the marriage of Nathaniel Micklethwait No. 2,—that the deed-poll of the 29th of November, 1810, was not a settlement of the estates devised by the will of 1797,—that the clause did not apply to the estates settled on either of the marriages of Nathaniel Micklethwait No. 2, as the plaintiff in error had not succeeded to those estates as "the heir male of his father,"—that the clause was inoperative, as the plaintiff in error had not succeeded to the whole of the estates devised by the will of 1797, or to the whole of the estates settled on the first or second marriage of his father,—that the alleged draft and instructions for the will of 1852 were inadmissible in evidence,

and that the will of 1852 was admissible. The following cases were cited:—*Doe d. Hearle* v. *Hicks*, 8 Bingh. 475, 2 M. & Scott, 759, 1 Clark & F. 20, *Thornhill* v. *Hall*, 2 Clark & F. 22, *Doe d. Luscombe* v. *Yates*, 5 B. & Ald. 544, 1 D. & R. 187, *Clavering* v. *Ellison*, 3 Drewry, 451, *Kiallmark* v. *Kiallmark*, 26 Law J., Ch. 1, *Scarisbrick* v. *Eccleston*, 5 Clark & F. 398, *Burrell* v. *Crutchley*, 15 Ves. 544, *Fazakerley* v. *Ford*, 4 Simons, 390, 1 Ad. & E. 897, 2 N. & M. 1, *Taylor* v. *The Earl of Harewood*, 3 Hare, 372, and *Harrison* v. *Round*, 2 De Gex, M'N., & G. 190.

Atherton, Q. C. (with whom were R. Clarke and Honyman), for the defendant in error (plaintiff below) submitted,—first, that, on the death of Colonel Micklethwait, and on the defendant coming into possession of the 1797 estates, the shifting-clause in the will of the 24th of October, 1822, took effect, and the Iridge estate became the property of the plaintiff below,—secondly, that it appeared by the case that the property known as the 1797 estates, was the property referred to by the testator of 1822 as the property settled on the **[864]** marriage of Nathaniel Micklethwait No. 2,—thirdly, that the language of the will of the 24th of October, 1822, and the other facts, shew that the defendant (below) did succeed to the 1797 estates, in the character of the heir male of the body of Nathaniel Micklethwait No. 2, within the meaning of the testator of 1822,—fourthly, that, assuming that there was any ambiguity as to the property referred to, the instructions for the will of the 24th of October, 1822, and the draft of such will, were admissible in evidence to remove the same,—fifthly, that the said instructions clearly shewed what was the property intended by the testator of 1822 as the settled property of Nathaniel Micklethwait No. 2,—sixthly, that the will of the 29th of May, 1852, was not admissible in evidence against the plaintiff below,—seventhly, that the fact of Nathaniel Micklethwait No. 2 and Colonel Micklethwait having complied with the wishes of the testator of 1822, by confirming the codicil of 1799, did not nullify the shifting-clause.

Cur. adv. vult.

MARTIN, B., now delivered the judgment of the court:—

This is error from the judgment of the court of Common Pleas upon a special case. The action is ejectment to recover possession of an estate called Iridge, in the county of Sussex.

The material facts are these:—One John Micklethwait, being seised in fee-simple of estates in Norfolk, Suffolk, Essex, Middlesex, Surrey, London, and Norwich, and in the county of Westmeath, in Ireland, by his will, dated the 4th of December, 1797, devised them to the use of his eldest son, John Micklethwait, for life; with remainder to his first and other sons in tail male; and, in default of such issue, and in case an appointment should be made by his said son John **[865]** Micklethwait, to the use of such one of his grandsons Nathaniel or Sotherton (the sons of a deceased son Nathaniel,) as his son John should during his life-time appoint,—to hold the same to such one of them during the term of his life, and, after the decease of such grand son to whom the estate should be appointed, to the use of the first son of the body of such grandson and the heirs male of his body, and, in default of such issue, to his second, third, and other sons in tail male. There were other limitations, which do not seem material.

The testator afterwards made an unattested codicil, whereby he proposed to revoke his will as regarded his estates in Surrey, Middlesex, and London, and to devise them to his son Jonathan George Micklethwait, in fee.

After his death, John Micklethwait entered into possession of all the estates, and during his life-time acquired other real estates, principally from the family of his mother, whose name was Peckham, and part of which was the Iridge estate, the subject of the present question.

In the year 1804, Nathaniel, the grandson, being a minor, and entitled under a marriage-settlement made in 1782 to an estate-tail in certain estates in Norfolk, called the Hickling and other estates, and being about to be married, on the 18th of January, 1804, executed a deed of covenant, whereby he professed to bind himself within three months after he attained twenty-one, to settle these estates to the use of himself for life, and, after his death, to the use that his wife should receive an annuity of 1000*l.* a year, and, subject thereto, to the use of himself in fee.

In January, 1805, having come of age, he suffered a recovery, and, by an indenture dated the 28th of that month, limited the use of these estates to himself in fee. **[866]** On the 14th of February, 1805, there was born an only child of this marriage, a son,

afterwards Colonel Micklethwait. In October, 1810, Nathaniel Micklethwait was about to marry a second time, his first wife being dead, and proposals were made for a settlement. John Micklethwait was a party to these proposals; and ultimately it was arranged, that, in pursuance of the power given him by his father's will, he should immediately appoint all the estates thereby devised to Nathaniel and his male descendants, and that Nathaniel should charge his Hickling estate with a jointure of 1000*l.* a year for his intended wife, and make provision for her and the children of the marriage. In pursuance of this arrangement, John Micklethwait, on the 29th of November, 1810, executed a deed of appointment, and thereby,—after reciting his father's will, appointed to Nathaniel Micklethwait all the estates therein mentioned, from and after his own death without issue, to hold the same according to the form and effect of his father's will.

On the 26th of December, a marriage-settlement was executed by Nathaniel Micklethwait, whereby the Hickling estate was conveyed to trustees to secure a jointure to his intended wife of 1000*l.* a year, and to raise 15,000*l.* for younger children, and, subject thereto, to the use of Nathaniel Micklethwait, in fee. This marriage took place in the same month; and the defendant in this suit is the eldest son of this marriage, and the plaintiff the second.

In the year 1822, John Micklethwait made his will, bearing date the 22nd of October in that year: and the present question arises upon the construction of a shifting-clause contained in it.

The will recites the will of his father, and the power of election and appointment thereby given to him, and that his father had by a codicil attempted to revoke [867] his will as to the Surrey, Middlesex, and London estates, and to devise them in fee to Jonathan George Micklethwait, but that the codicil, not having been duly executed, became inoperative; that he himself had exercised his power of election by appointing that after his decease without issue male, all the lands devised by his father's will should go to Nathaniel Micklethwait for his life, with remainder to his first and other sons in tail male; and that it was his wish that the codicil in his father's will should be confirmed, and the devise of the estates in Surrey, Middlesex, and London to Jonathan George Micklethwait in fee legally established. He then devised some annuities, and, subject thereto, he devised all his real estate in Sussex or elsewhere to trustees and their heirs, To the use of Sotherton Micklethwait for life, with remainder to his first and other sons in tail male, and, in default of such issue, to his brother Jonathan George for life, with remainder to a nephew, John, for life, and to his sons in tail male,—provided that, if his nephew Nathaniel and a son of his should in the life-time of his brother Jonathan George effectually confirm the codicil of his father's will by conveying the estates in Surrey, Middlesex, and London, to him in fee-simple, that then the limitation to Jonathan George and to John and to the first and other sons of John should cease, and immediately on such event, or otherwise in default of such issue as aforesaid, the testator's lands in Sussex and elsewhere should go and pass to the use of the defendant (the second son of Nathaniel), for life, with remainder to his first and other sons in tail male, and, in default of such issue, to the third and other sons of Nathaniel and their heirs, in tail male respectively, with the ultimate remainder in fee to his brother Jonathan George. Then there follows the clause upon which the present question arises. It is in substance [868] as follows:—"And as by possibility it may happen, that, after the second, third or other younger son of Nathaniel, or the heirs male of his body, shall, under the limitations aforesaid, have come into possession of my estates, the eldest son of Nathaniel, or his heirs male, may die and become extinct, so that such second or other younger son of Nathaniel, or his heirs male, may become entitled to the property settled on the marriage of Nathaniel, in the character of the then heir male of his body: Now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of a younger son of Nathaniel, I direct, that, in case the second or other younger son, or the heirs male of his body, shall by the death or failuure of the issue male of the eldest son become entitled to the said settled property of Nathaniel, as the heir male of his body, then the limitation in the will in favour of such second and other younger son shall immediately after such event cease, and the next younger son of Nathaniel, and the heir male of his body, shall become entitled to all my real estates in such manner and in every respect as if his eldest brother, or the issue male of his body, had been dead or become extinct." By a subsequent clause in the will, he

directs that Sotherton Micklethwait and all others except Jonathan George who should become entitled to his estates, should take the name and arms of Peckham (his mother's family), jointly with those of Micklethwait.

The testator died in 1824. In 1826, Nathaniel and his eldest son, then Colonel Micklethwait, conveyed the estates in Surrey, Middlesex, and London to Jonathan George, in fee-simple. In September, 1853, Sotherton Micklethwait died without issue, and the defendant entered into possession of the Iridge estate, by virtue of the limitation in the above will.

[869] Nathaniel died in January, 1856, and Colonel Micklethwait, his eldest son, died in July of the same year; and thereupon all the property devised by the will of 1797, except the Surrey, Middlesex, and London estates, came to and was taken possession of by the defendant under and by virtue of the appointment executed by John Micklethwait on the marriage of Nathaniel in 1810; and the question now to be decided is, whether the plaintiff, being his next brother, has thereupon become entitled to the Iridge estate by virtue of the shifting-clause in the will of October, 1822.

It was contended, in the argument below, that, as the defendant became entitled to the estates mentioned in the will of 1797, excepting the London, Surrey, and Middlesex estates, on the death of Colonel Micklethwait, the Iridge estate passed to the plaintiff, the third son of Nathaniel, by virtue of the shifting-clause.

The contention on the part of the defendant was, that these estates did not answer the description of "property settled," and therefore that the shifting-clause did not take effect; and, secondly, it was contended, that, if the testator meant the estates mentioned in the will of 1797, and dealt with in the settlement on the second marriage of Nathaniel in 1810, he meant all the estates there comprised; and, inasmuch as the London, Surrey, and Middlesex estates were taken out of that settlement, the shifting-clause did not take effect.

The court of Common Pleas gave judgment for the plaintiff; and this writ of error has been brought.

The case was argued at the sittings after Hilary Term, 1859; and we are of opinion that the decision of the court of Common Pleas is right, and their judgment should be affirmed.

Upon the first point, looking at all the facts of the **[870]** case, we are clearly of opinion that the construction put upon the will by the court of Common Pleas was right, and that the term "property settled," mentioned and referred to in the shifting-clause are the estates above referred to as devised by the will of the testator's father, of 1797, and mentioned in the settlement of 1810.

As the reasons of the Common Pleas on this point are so clear and conclusive to our minds, we refrain from repeating the arguments. It is necessary, however, to go into our reasons for affirming the judgment of the Common Pleas, that the shifting-clause took effect on the defendant becoming entitled to these estates, excepting the London, Surrey, and Middlesex estates, which were taken out of the settlement by the confirmation of the codicil, in pursuance of the wish expressed in the will of the testator John Micklethwait. This depends on the true intent and meaning of the will, —or, in other words, on the intention of the testator, to be collected from the will itself.

It was contended, that, to divest an estate already given, the clause must be clear, and be construed strictly. No doubt the intention must be manifest from the terms of the will. We adopt the expression on a similar question, of Sir L. Shadwell, V. C., in *Fazakerly* v. *Ford*, 4 Simons, 415, "not to make the decision of such an important question depend upon the nice and accurate construction of any particular word; but we would rather construe the will by a fair and general interpretation of words, having regard to what is shewn upon the face of the will to be the obvious intention of the testator."

It appears to us, in construing these clauses, that this was the meaning of the testator:—Looking at the clause of the will limiting the Iridge estate to the second son of Nathaniel, he studiously excludes the **[871]** eldest son of Nathaniel and his posterity from any interest in the Iridge estate; for, on failing the second and younger sons of Nathaniel, the reversion is devised to Jonathan George and his heirs for ever. The limitation to the second son of Nathaniel takes effect on the happening of either of two events,—first, if the codicil be confirmed, —secondly, if not confirmed, on failure of the issue of John, son of Jonathan George. In the first case, he takes the settled

estates without the London, Surrey, and Middlesex estates: in the second, the whole of the settled estates would remain to him by force of the will of 1797. In thus far separating the Iridge estate from the settled estates, he directs, in either case, whilst the second and younger sons take the Iridge estate, Colonel Micklethwait, as first son, would take the settled estates with or without the estates mentioned in the codicil: and, if there had been male issue of Colonel Micklethwait, the testator clearly manifested an intention that these estates should go in separate and distinct lines. That seems his intention: so that he treats the remaining part of the estates in the will after the confirmation of the codicil, as settled estates. That being the testator's intention, what is the intention to be collected from the shifting-clause, which is to operate upon and control the limitations to the second and younger sons? The testator expresses what his intention is, viz. "In order to prevent the union of the two estates in the same person, whilst there is in existence a younger son or an heir male of the younger son, I direct, &c." Now, what two estates does the testator mean? One estate is, the Iridge estate. The other is, the property settled on the marriage of Nathaniel. This may mean the whole property settled, or the property settled after the codicil is confirmed. We think it means both, according to the event. One great object of the testator manifestly **[872]** was, the confirmation of the codicil in favour of his brother Jonathan George; and certainly, when confirmed, the two estates were to go in different lines, to the exclusion of the eldest son from the Iridge estate. The words bear out that construction,—"And as, by possibility,"—which may mean that then the estates might not be disentailed,—"that, from and after the second and other sons or their issue, &c., shall, under the limitations aforesaid," have come into possession of my said hereditaments. The limitations aforesaid to them is in one of two events, either on the confirmation of the codicil, or on failure of issue of John, the son of Jonathan George. If it means limitation in either event, then the words "property settled" would mean either the whole or a part. And it is, if by the death of the eldest or otherwise the heirs of his body may become extinct, the second or younger son or his heir may become entitled to property settled. Neither the limitation nor the shifting-clause shews that the testator meant "property settled" otherwise than such settled property as would come to the second or younger son by death or failure of issue of the eldest son. And we think the intention of the testator expressed in the will is, that, when such property comes to the second son, the Iridge estate shall go to the third son. We are, therefore, of opinion that the words "settled property" are to be taken distributively, and that such was the meaning and intention of the testator to be collected from the will: and that, after the defendant came into possession of the settled estates, the plaintiff became entitled under the shifting-clause to the Iridge estate.

It is therefore our opinion that the judgment of the court of Common Pleas ought to be affirmed.

Judgment affirmed (*a*)

(*a*) This judgment was acquiesced in.

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